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OF GEORGIA

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(124 Va. 333)

RICHMOND COLLEGE v. SCOTT-NUCKOLS CO., Inc.

(Supreme Court of Appeals of Virginia. Jan. 13, 1919.)

1. CONTRACTS ⇨289—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE.

Actual fraud is not the only excuse which may be shown by a contractor for failure to produce architect's certificates, and such a certificate, though called for by contract as a condition precedent to payment, is not necessary if it is capriciously or arbitrarily withheld.

2. PLEADING ⇨205(2)—GENERAL DEMURRER—DECLARATION—SUFFICIENCY.

In view of Code 1904, §§ 3271, 3272, requiring demurrers to set out the grounds, *held* that a declaration on the common counts in assumpsit by a contractor for materials and labor under a written contract was sufficient, as against general demurrer, though showing that the architect's certificate was not procured; the averments as against general demurrer sufficiently excusing nonproduction.

3. PLEADING ⇨235 — AMENDMENTS—ALLOWANCE.

While under Act March 27, 1914 (Laws 1914, c. 331), the trial court should permit amendments in furtherance of justice, and a refusal may be reviewed, such amendments are not a matter of right, and should not be permitted to delay, impeach, or embarrass the administration of justice.

4. PLEADING ⇨236(3)—AMENDMENT—ALLOWANCE.

Where defendant had already filed a special plea of set-off, which alleged defects in work done under contracts, *held* that the denial of leave to file trial amendments, setting up breach of a contract unconnected therewith, as well as plaintiff's insolvency and negligent performance of the contracts sued on, was a proper exercise of the trial court's discretion.

5. SET-OFF AND COUNTERCLAIM ⇨34(1) — SUBJECT-MATTER OF SET-OFF.

In action on two written contracts, *held* that under Code 1904, § 3299, defendant could not counterclaim for damages suffered because of plaintiff's breach of a third separate written contract, not connected with the ones sued on.

6. CONTRACTS ⇨288—BUILDING CONTRACTS—CONSTRUCTION.

A contract for the construction of water and sewer lines *held* not to require the engineers named to personally inspect all of the work, but to allow them to appoint expert agents for that purpose, and to issue certificates on the agent's report.

7. CONTRACTS ⇨290—BUILDING CONTRACTS—WAIVER.

Where a contract under which plaintiff was to lay sewer and pipe lines for defendant provided for inspection of the work by defendant's engineers, and defendant acquiesced in inspection by an agent of the engineers specified, such acquiescence was a waiver of defendant's right to require the inspection to be personally made by the engineers themselves.

Error to Hustings Court of Richmond.

Action by the Scott-Nuckols Company, Incorporated, against Richmond College. There was a judgment for plaintiff, and defendant brings error. **Affirmed.**

A. W. Patterson, of Richmond, for plaintiff in error.

O'Flaherty, Fulton & Byrd, of Richmond, for defendant in error.

PRENTIS, J. Richmond College, hereinafter called the defendant, complains of a verdict and judgment in favor of Scott-Nuckols Company, Incorporated, hereinafter called the contractor, for the balance claimed to be due for material and labor done in the construction of water and sewer lines laid under certain written contracts.

There were three separate contracts. Contract No. 1 was dated March 6, 1914, and contract No. 3, September 15, 1914. There was another contract, generally referred to in the record as contract No. 2, which was dated July 13, 1914. One point of controversy arises out of the fact that, although the action was based upon balances claimed to be due on contracts Nos. 1 and 3, the defendant filed a special plea of set-off and recoupment, and claimed that the three contracts were dependent each upon the other, and that it had the right to set off and recover damages arising out of alleged defects in the construc-

tion done under contract No. 2, as well as for such alleged defective work done under the other two contracts. The construction under contract No. 2 had been completed, inspected, approved, and the whole of the work done thereunder paid for in full by the defendant before this suit was instituted, and the action, as above stated, is based upon balances claimed to be due under the other two contracts.

While all of the work was done in the construction of a sewer and water system upon the property of the defendant at Westhampton, the contracts were let at separate times, under different specifications, and upon competitive bidding. They might just as well have been entered into with three separate contractors as with one, and no reference is made in either one of the contracts to either of the others. They were therefore clearly independent and not interdependent agreements. All that is hereafter said must be read in view of this conclusion, which was contested by the defendant in several different methods before the trial court as well as here.

The specifications which constitute a part of contract No. 1 provide, among other things, that:

"The premises shall at all times be under charge and jurisdiction of the engineer, and he or his properly accredited agents or representatives shall have free and unobstructed access to the premises at all times, and the contractor shall provide adequate and safe means for the inspection of his work at any and all times."

They further provide that:

"The term 'engineers' shall mean a properly appointed member of the firm of Carneal & Johnston, or his successor duly appointed by the owners, or the assistants and duly authorized agents of the engineer."

As to payments, this is said:

"Payments will be made as the work progresses, upon the certificate of the engineer that the work has been satisfactorily performed. Basis of payments to be eighty-five per cent. of the work satisfactorily performed, the remaining fifteen per cent. to be included in the final payment for the entire work which shall be due and made within thirty days after the acceptance and approval of the work as a whole by the engineer and superintendent and the owners."

There was, as is usual in such controversies, a sharp conflict in the evidence, which we shall not review, because by the mandate of the statute, under the demurrer to the evidence rule, the defendant is here admitting the truth of all of the contractor's evidence and all proper inferences therefrom which conflict with its own evidence.

[1, 2] 1. The first assignment of error is that the court erred in overruling the demurrer to the declaration. The original declaration contains the common counts in

assumpsit. The particulars of the claim and the amended declaration show that the contractor was claiming a balance of \$238.20 for work done under contract No. 1 (\$8,050.61 having been paid thereon), \$1,139.46 under contract No. 3 (\$1,000 having been paid thereon), and \$10 for sand and stone furnished. The demurrer was a general demurrer to the declaration and to each count thereof, and for specification states:

"That the several matters and things set out in the contracts made a part of said amended declaration and shown to be conditions precedent to a right of action and recovery are not alleged or averred in such manner as to give plaintiff the right to sue, nor are such other matters alleged as legally excuse the failure to allege and aver such conditions precedent."

It is only necessary to say as to this specification what was said as to the sixth and seventh grounds of demurrer in the case of *Newton v. White*, 115 Va. 849, 80 S. E. 561, and that is that it is no more than an assertion that the declaration is insufficient in law. The rule which would apply under section 3271 in cases where the plaintiff moves the court to require the defendant to state the grounds of demurrer requires that they shall be stated specifically, and that no ground shall be considered other than those so stated. *Va. & S. W. Ry. Co. v. Hollingsworth*, 107 Va. 364, 58 S. E. 572. The demurrer was submitted without argument, and the defendant did not present to the lower court, either in its demurrer or in argument, the specific ground here relied upon. It was properly overruled, because under section 3272 of the Code no "defect or imperfection in the declaration, * * * whether it has been heretofore deemed misleading or insufficient pleading or not," shall be regarded, "unless there shall be omitted something so essential to the action or defense, that judgment, according to law and the very right of the cause cannot be given."

This declaration and the statement of the particulars of the claim clearly and sufficiently advised the defendant of the nature of the contractor's claim; and, although it does not in specific terms charge fraud or bad faith on the part of the architects who were required by the contracts and specifications to approve the work, it does so in substance, for in both of the special counts it is alleged that "the plaintiff repeatedly called upon the said architects to issue to it a certificate for said work, which they had approved, but the said architects, without any just cause or right or excuse for so doing, wrongfully refused and failed to issue a certificate for said work" in accordance with the contracts; and, further, although the defendant took and accepted said work and has had the use and benefit thereof, "that the said architects have wrongfully and in gross disregard of the rights of the plaintiff re-

refused to issue a certificate therefor." Actual fraud is not the only excuse which may be shown for failure to produce the architect's certificate, and it is well recognized that such a certificate is not necessary if it is capriciously or arbitrarily withheld. 6 R. C. L. 980; *Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, note, 6 L. R. A. (N. S.) 774; *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608, note; *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520, note, 1 L. R. A. (N. S.) 1051. If the refusal of the certificate is based upon false or fraudulent information, failure to produce it does not bar a recovery. *Richmond v. Burton*, 115 Va. 211, 78 S. E. 560. A general demurrer to such a declaration, under these conditions, should be overruled, and there is no merit in this assignment. *B. & O. R. Co. v. Lafferty*, 14 Grat. (55 Va.) 478; *N. & W. Ry. Co. v. Mills & Fairfax*, 91 Va. 641, 22 S. E. 556; *Cornell v. Steele*, 109 Va. 591, 64 S. E. 1033, 132 Am. St. Rep. 931; *Johnson v. Bunn*, 114 Va. 222, 76 S. E. 310; *Kistler v. Ind. & St. L. R. Co.*, 88 Ind. 460; *Maddux v. Buchanan*, 121 Va. 111, 92 S. E. 830.

[3, 4] 2. The second assignment of error arises thus: After all the evidence in chief had been introduced on both sides, and during the examination of the witnesses put on by the plaintiff in rebuttal, the defendant moved for leave to amend its special plea of set-off by inserting an averment of the plaintiff's insolvency, and stated to the court that such amendment was desired for the purpose of introducing testimony to that effect, and recovering unliquidated damages as claimed in the plea; and then again, after all of the testimony had been concluded, the defendant moved for leave to amend its special plea of set-off by alleging that in the execution of contracts 1, 2, and 3, the plaintiff violated the contracts by doing its work under them in an unworkmanlike manner, and in disregard of the specifications accompanying such contracts and made a part thereof, which defective and faulty work the plaintiff covered up and concealed from view, whereby the defendant and its agents were misled, deceived, and defrauded in making payments to the plaintiff company under said contracts, which payments the said company had not earned and should not have received. The court refused to allow either of these amendments, and this is alleged as error.

It is claimed that the act of March 27, 1914 (Acts 1914, p. 641), providing that:

"In any suit or action hereafter instituted, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding

which does not affect the substantial rights of the parties"

—is clearly not permissive, but mandatory, as to such amendments, and that the word "may", as first used in that statute, should be construed as an imperative.

We cannot agree with this suggestion. It is true that the trial courts must always permit amendments in furtherance of justice, and upon refusal to do so such action may be reviewed by this court; but such amendments are not matters of right, and should not be permitted to delay, impede, or embarrass the administration of justice. So far as the amendment to the special plea of set-off refers to contract No. 2 it was clearly improper to admit it, because contract No. 2 was an independent contract, which had been fully and completely performed. It is also observed in this connection that the special plea of set-off which had been filed in this case already alleged the defective and negligent construction of the work, as well as damages which could have been prevented by proper care, and claimed recoupment on account of the losses thereby caused. These allegations were sufficient to permit the plaintiff to prove all the damages alleged arising under the two contracts sued on. No evidence was excluded, and the defendant was permitted fully to present the evidence to support its entire claim for damage and recoupment. No reason is suggested or excuse given for not offering these amendments at an earlier stage of the trial, and there was no danger of loss under contract No. 2 (not here involved) because of the alleged insolvency of the contractor, for it appears that it had given bond in the penalty of \$4,500 for the faithful performance of that contract. The court correctly exercised its discretion in refusing to allow the pleas to be amended at that time. The refusal to do so did not prejudice any substantial right of the defendant.

[5] 3. The third and fourth assignments of error may be considered together. They are that the court erred in refusing to give the instructions offered by the petitioner, and in giving the instructions that were given.

These assignments raise substantially the same questions which were presented in various forms during the trial. The defendant claimed that it had the right to set off and recover unliquidated damages under Code, § 3290, growing out of contract No. 2. This contract had been fully performed and paid for before contract No. 3 had been let or commenced, and after the work done under contract No. 1 had been substantially performed. This contract No. 2 (as has been previously stated) was in no way dependent upon either of the other contracts, and had not been sued upon by the contractor, and this action was brought to recover balances alleged to be due under contracts No. 1 and

No. 3. It is well settled in this state that the defendant cannot avail himself of set-off and counterclaim under that section (3299), unless such claim grows out of the contract sued on. *Bunting v. Cochran*, 99 Va. 558, 39 S. E. 229; *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 281, 21 S. E. 466; *Newport News & Old Point Ry. & Elec. Co. v. Bickford*, 105 Va. 185, 52 S. E. 1011; *Leterman v. Charlottesville Lumber Co.*, 110 Va. 773, 67 S. E. 281; *Burks' Pl. & Pr.*, 457. So that the trial court rightly directed the jury to disregard all evidence referring to contract No. 2, and instructed them to consider only the evidence relating to contracts No. 1 and No. 3.

[6, 7] Then the defendant, all through the trial, claimed that, because the contracts provided that Carneal & Johnston, engineers, were to be the sole arbitrators to decide all questions and disputes touching the proper construction and completion of the work, and contemplated and agreed that the decision of said engineers on all such points was to be final and conclusive, they must abide by the decision of these engineers, etc., unless their decision was fraudulently made, or such a gross mistake had been made as necessarily to imply bad faith on their part, or plain failure to exercise an honest judgment; that therefore the contractor could not rely upon the evidence that Carneal & Johnston appointed an engineer, one Moore, as their assistant to superintend the work under the contracts; and that they did the work of construction under his direction and control. The specifications under contract No. 1 expressly provided that Carneal & Johnston, in the performance of their duties under the contract, were to employ assistants, though this provision does not appear in the specifications forming a part of contract No. 3. They had a very large amount of work on hand, and the language should be construed in a reasonable and practical way for the accomplishment of the manifest ends in view. Sewer pipes are laid from day to day; and, if such work is to be properly inspected, it must be done daily, or certainly before the ditches in which they are laid are covered. The contracts provide for partial payments to be made during the progress of the work for that already completed and tested. The specifications with contract No. 1 provided that such payments should be made for work "satisfactorily performed," and those with contract No. 3, when the piping had been "laid and tested." After such pipes are laid and covered, there is no practical way to inspect the work; so that there is the practical necessity that the architects or chief engineers employ assistants to inspect such work as it progresses, and, as stated, such partial payments could not be properly made except for construction properly executed. Such payments on these contracts

were made, and the witness Moore, the assistant engineer employed by the architects for the purpose, testifies that he did his duty as he understood it. The defendant sought to have the court instruct the jury, in effect, that every part and parcel of the work of supervision committed to Carneal & Johnston should have been done by them personally. While it is true that upon the final arbitration they could only act in person, it cannot be true that under such contracts as these the architects or engineers cannot employ expert assistants to superintend and direct the construction in accordance with the contracts. Such work requires constant supervision and inspection during its progress, for it is soon concealed so as to make proper inspection thereafter impossible. There is no other practical method. This method was pursued under these contracts, and the payments here made were upon certificates issued by Carneal & Johnston, based upon the reports of satisfactory work made to them by their assistant and superintendent, Moore, and the contractor and the defendant both acquiesced in this method of execution and settlement, and this practical construction of the contracts by the engineers. If it be true that this was not authorized by the contracts, rightly construed, and that no such certificates should have been issued or payments made unless based upon the personal knowledge and inspection of Carneal & Johnston from day to day, or during construction, then this requirement has been waived, for it must have been known during the many months in which these pipes were being laid that these inspections and this supervision were not the personal work of the engineers, but of their assistant and representative, Moore.

We do not, of course, mean that any improper inspection, either by Carneal & Johnston or by their assistant, could relieve the contractor of the obligation of the contract, but only that, Moore having acted as the representative of the architects, by their direction, and with the knowledge and acquiescence of the defendant, the contractor was justified in accepting Moore as the duly authorized representative of the architects during construction. Moore, it must be remembered, never issued any certificates upon which the payments were based, nor did he ever undertake to approve the completed work.

The vital questions involved are questions of fact. The defendant claimed that the contractor had failed to perform its contract, and that the engineers refused, and were justified in refusing, to approve and accept the work; and the evidence in the record to sustain these views is most impressive. These claims of the defendant were fairly and sufficiently presented to the jury in the instructions, and they were told that if the work had not been done according to

the required specifications and had not been accepted, they should allow the defendant (by way of damage and recoupment) such sum as had been expended by it in repairing and relaying the sewer lines. If the jury had found in favor of the defendant, we would not have disturbed their verdict. The verdict, however, shows that they believed that the weight of the testimony was against these contentions of the defendant. While the grammatical construction of some of the instructions which were given is worthy of criticism, and there is some confusion, still as a whole they fairly presented the law of the case to the jury, and there is no reason to doubt that they were fully understood.

What we have said is sufficient to indicate our view as to the motion to set aside the verdict and grant a new trial upon the ground that it is contrary to the law and the evidence. It may be that this court has grave and reasonable doubts as to whether the jury have correctly interpreted conflicting parol evidence, but in a civil case this is insufficient; for, in order to justify a reversal on that ground, the verdict must be plainly against the evidence, or without evidence to support it. This vexed controversy has been tried in the method provided by our system for the determination of such disputes, and we find no reversible error in the proceedings.

Affirmed.

SIMS, J., absent.

(124 Va. 445)

TAYLOR v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
Jan. 16, 1919.)

1. TAXATION §98—INTANGIBLE PERSONALTY OF MINORS—NONRESIDENT GUARDIAN.

Intangible personal property owned by minors domiciled in Virginia is subject to taxation therein under its Constitution, § 168, and Code 1904, § 491, and Acts 1897-98, c. 707, as amended by Acts 1916, c. 492, unless no situs is fixed by the statute law for the taxation of such property, where minor has guardian who is nonresident.

2. TAXATION §98 — INTANGIBLE PERSONALTY OF WARD—SITUS FOR TAXATION.

Code 1904, § 492, providing by whom property is to be listed and to whom taxed, does not make domicile of guardian situs of intangible personal property of his ward for taxation, though it requires property to be listed by and taxed to guardian instead of ward.

3. TAXATION §254—INTANGIBLE PERSONALTY—SITUS.

General rule is that in absence of some statute fixing different rule, situs for taxation of intangible property of one domiciled in state is at residence of owner.

4. TAXATION §98 — INTANGIBLE PERSONALTY OF WARD—SITUS.

Where ward is domiciled in Virginia, his domicile fixes situs of his intangible personal property for taxation, though he has a nonresident guardian.

Error to Corporation Court of Norfolk.

Application by Robertson Taylor, guardian, etc., against the Commonwealth, for relief from an alleged erroneous assessment. To review judgment dismissing the application, applicant brings error. Affirmed.

This is an application by the plaintiff in error for relief from an alleged erroneous assessment made by a commissioner of revenue of the city of Norfolk in October, 1916, per a report to him of the examiner of records of that city, of certain promissory notes owned by a minor, the ward of the plaintiff in error, for taxation for the year 1914, as omitted property for the latter year, which notes were on February 1, 1914, under the control of said guardian, being in the hands of his attorney in the said city, but were not listed for taxation nor taxed for the year 1914.

As of February 1, 1914, the said guardian was a nonresident of Virginia, but the said ward was then a resident of and domiciled in the said city.

The court below declined to grant the relief sought, dismissed the application, and the guardian brings error.

Loyall, Taylor & White, of Norfolk, for plaintiff in error.

The Attorney General, for the Commonwealth.

SIMS, J. (after stating the facts as above). [1] It is undisputed that intangible personal property, owned by minors who are domiciled in Virginia, is subject to taxation therein under section 168 of the state Constitution and the statutes contained in section 491 of the Code, as amended (4 Pollard's Code 1916, § 491), and Acts 1897-98, p. 756, as amended by Acts 1916, p. 828, enacted in pursuance of the Constitution; just as such property of other persons domiciled in the state is subject to taxation, unless it be true that the statute law of the state is such that no situs therein is fixed by law for the taxation of such property of a minor in a case where the minor has a guardian who is a nonresident of the state.

As stated in the petition:

"The sole question presented for decision is whether intangible personal estate of a ward residing in Norfolk in the hands or control of his guardian, residing outside of Norfolk, is taxable in Norfolk under the provisions of the statute."

The positions of the appellants are as follows:

(a) That the effect of section 492 of the Code when correctly construed, is to make the domicile of the guardian the situs for taxation of the intangible personal property of the ward which is in the possession or under the control of the guardian. But if this be not so,

(b) That there is no statute in Virginia which fixes a situs for taxation of such property where the guardian is a nonresident of the state—that this is a *casus omissus* of the statute which is fatal to the taxing power of the state in the instant case.

We will consider these positions in their order as stated.

[2] 1. Section 492 of the Code, so far as material, contains the following provisions:

"Sec. 492. By whom property is to be listed; to whom taxed. If property be owned by a person *sui juris*, it shall be listed by and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has neither guardian, or trustee, father nor mother, it shall be listed by and taxed to the person in possession. * * * If the property be owned by an idiot or lunatic, it shall be listed by and taxed to his committee, if any; if none has been appointed, then such property shall be listed by and taxed to the person in possession. * * *

It is obvious from the reading of the statute that it is silent on the subject of the situs of property of minors, idiots, and lunatics for the purpose of taxation. Whatever effect, on that subject, is to be given to the statute must arise from deductive reasoning. And such reasoning must be based upon the effect given to domicile by the rule which is embodied in the maxim, "*Mobilia sequuntur personam*." Accordingly, the contention of the appellant is that this statute makes the domicile of the guardian the situs of the intangible personal property of the ward for taxation, in that it requires property to be listed by and taxed to the guardian instead of the ward.

The provisions of the statute above quoted, both in the caption and body of it, concern merely by whom the property is to be listed and to whom taxed. That this statute does not fix the domicile of the person by whom it requires property to be listed, and to whom it requires it to be taxed, as the situs of such property for taxation, is apparent, we think, from a reading of it, in the light of the following considerations: The statute embraces both tangible and intangible personal property. The situs of tangible personal property for taxation is the locus of the property itself and not the domicile of the person by whom the statute aforesaid requires it to be listed and to whom it requires the property to be taxed. This single consideration refutes the reasoning on which the position of appellant under consideration is based. Further: Where the owner is a minor, idiot, or lunatic he is, of course incompetent to

list for taxation property owned by him, and alike incompetent to act as a payer of taxes. Hence the statute in all such cases provides for some one else than the owner of the property to list it for taxation and to whom it shall be taxed. To provide a competent person to list the property for taxation and also to act as payer of the taxes thereon, who will be likewise a person competent to give a correct list and one who, if not the owner, will be charged with responsibility to the property owner in the premises, were, we think, the objects and purposes of the statute in designating by whom property of such persons is to be listed and to whom taxed, and not the making of the domicile of the former person the situs of the property for taxation. What taxing jurisdiction should be such situs is wholly apart from such objects and purposes.

Further: As stated in the opinion of this court delivered by Judge Burks in the case of *Wise v. Commonwealth*, 122 Va. 693, 95 S. E. 632, " * * * It is the policy of this commonwealth to impose taxes on all intangible property of its citizens in the county or corporation of their residence. * * * " The construction which appellant seeks to have placed upon the statute under consideration would make it change such settled policy of the state in such cases as that under consideration. Such a purpose would need to be plainly apparent from the language of the statute before such a construction could be given to it. There being an entire lack of such a purpose apparent from the provisions of the statute, as we construe them as aforesaid, we cannot give it the construction sought by appellant.

There are provisions of the statute under consideration, which are not quoted above, which concern certain property, namely, certain separate property, property held in trust, and other property in certain cases therein mentioned, for taxation, of which such statute does plainly fix the situs; but these provisions do not concern such property as is involved in the case before us.

We conclude, therefore, that the statute relied on does not have the effect contended for by appellant, in his position (a) above noted.

[3,4] We come now to consider the alternate position of appellant, (b) noted above.

In the outset of this consideration it should be stated that if there were no situs fixed by law for the taxation in this state of the property in question, it is well established that it could not be assessed for taxation or taxed in this state. But from this the conclusion does not follow that the statute law of the state can be alone looked to upon the inquiry whether such situs is fixed by law.

The general rule of law is well settled that, in the absence of some statute fixing a different rule, the situs for taxation of intangible personal property of one domiciled in this state is at the residence of the owner of it. *State Bank of Virginia v. City of Richmond*, 79 Va. 115; *Cooley on Taxation*, 63.

On principle, this rule applies to such property owned by minors no less than to that owned by persons sui juris; and no authority to the contrary has been cited or called to our attention.

As we have seen above, the statute law of Virginia, relied on by appellant to have that effect, has not changed the general rule of law aforesaid by making the domicile of the guardian the situs for taxation of the intangible personal property of his ward, when the ward is domiciled in this state. Nor does the statute divest the ward of his beneficial ownership of such property. Where a ward is domiciled in this state, therefore, his domicile fixes the situs of his intangible personal property for taxation therein.

In such case, no statutory designation of the situs for taxation of such property is needed, unless it be the purpose of the Legislature to alter the settled policy of the state aforesaid. Such a purpose will not be assumed, but, as aforesaid, must be made to plainly appear by the language of the statute. In the absence of such a statute, the maxim, "*Mobilia sequuntur personam*," is operative, and fixes such situs.

The case of *Hurt v. Bristol*, 104 Va. 213, 51 S. E. 223, 7 Ann. Cas. 679, however, is cited and strongly relied upon by the plaintiff in error. That case, it is true, held that the situs of intangible personal property owned by a lunatic, who had a committee having possession or control of the property, was at the domicile of the committee. But that was a case of a committee who, under section 1702 of the Code, had a certain custody and control of the person of the lunatic, and the same principle did not apply which is applicable in the case of a guardian and ward with respect to the situs for taxation of the intangible personal property of the ward.

For the foregoing reasons, we find no error in the action of the court below, and the judgment under review will be affirmed.

Affirmed.

(124 Va. 370)

SLATER et al. v. SLATER.

(Supreme Court of Appeals of Virginia.
Jan. 16, 1919.)

1. DOWER §95—ASSIGNMENT—AWARD OF GROSS SUM.

Under anomalous circumstances, a court of equity may direct a gross sum to be paid a widow as dower in lieu of an annuity, without the consent of all the parties interested.

2. DOWER §95—AWARD OF GROSS SUM—STATUTES.

Code 1904, § 2281, providing for award of a gross sum as dower, merely provides a rule for

determining the gross value of an annuity, and does not change the pre-existing general rule, which, in the absence of anomalous circumstances, requires both the willingness of the widow and the consent of heirs at law to the payment of a sum in lieu of dower.

3. EXECUTORS AND ADMINISTRATORS §221(1)—CLAIMS AGAINST ESTATE—PRESUMPTIONS.

In proceedings by a widow to establish a claim against her husband's estate as the legal owner of two bonds, drawn by him and payable to her, long overdue, found in decedent's possession, allowance of the bonds as debts against the estate was erroneous; it being presumed that the bonds had not been delivered or that they had been paid.

4. EXECUTORS AND ADMINISTRATORS §59—PROPERTY OF DECEDENT—PRESUMPTIONS.

Where bonds and certificates of deposit were assigned to the widow by decedent, and found in her personal possession at the time of his death, it will be presumed that they are her property, and not that of the estate.

5. EXECUTORS AND ADMINISTRATORS §59—HUSBAND AND WIFE §25(6)—ESTATE OF DECEDENT—OWNERSHIP OF BONDS.

In proceedings to settle a decedent's estate, the widow being a creditor, on a bond indorsed by him to her and reassigned to himself by signing his wife's name, *held*, under evidence, that decedent was acting as wife's agent, and bond belonged to widow, and not to estate.

6. EVIDENCE §265(5)—ADMISSIONS OF DECEDENT—EFFECT AS TO HEIRS.

Admissions by a decedent that certain property belongs to his widow is binding upon his heirs at law and distributees, if such admissions would have been binding upon decedent, if living.

Error to Circuit Court of City of Williamsburg and County of James City.

Proceeding by Mary Lou Slater against O. H. Slater and others to settle the estate of R. B. Slater, deceased. From a decree of settlement, both parties assign error. Reversed and remanded.

Frank Armistead, of Williamsburg, for petitioners.

Henley, Hall, Hall & Peachy and T. H. Geddy, Jr., all of Williamsburg, for claimant.

PRENTIS, J. The petitioners, C. H. Slater, R. H. Slater, and Bettie M. Harvey, brothers and sister and the heirs at law of R. B. Slater, who died suddenly intestate, complain of a decree entered in the chancery cause involving the settlement of the decedent's estate, so far as it sustains the claims of Mary Lou Slater, as his widow and as creditor of the estate, and she assigns cross-error in so far as the decree fails to do so.

1. The lands of the intestate, consisting of a large number of small parcels lying in different counties and cities, were sold by con-

sent of the parties, and at her request and against the protest of the heirs at law, the court commuted the dower of the widow, allowing her a gross sum to be computed in accordance with section 2281 of the Code.

As the law was before that statute, which was adopted at the 1877 session, it is perfectly clear that in this state a widow could not have her dower commuted by the payment of a gross sum in lieu thereof without the consent of the heirs at law. *Wilson v. Davisson*, 2 Rob. (41 Va.) 384; *Simmons v. Lyles*, 27 Grat. (68 Va.) 922; *Harrison v. Payne*, 32 Grat. (73 Va.) 387.

The material part of the statute, which is relied upon for the view that the law has been changed in Virginia, reads thus:

Section 2281: "When a party, as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or is entitled to the use of any estate, or a part thereof, and is willing to accept a gross sum in lieu thereof, or the party liable for such interest, or affected by such claim, has the right to pay a gross sum in lieu thereof, or if the court in any legal proceeding decree a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the following table," etc.

The table follows at the end of the section.

Before the enactment of that statute there was no definite and certain method of ascertaining the present value of annuities, and several different methods had been used in different cases. *Wilson v. Davisson*, supra.

It is argued with convincing force that this statute was merely intended to remove these difficulties, and to provide a table or rule by which in proper cases the amount of the commuted value of the dower or of the annuity is to be ascertained. The original title of the act goes very far to sustain this view, for that title was:

"An act to establish a rule and table for computing the value of a life estate or annuity."

While this restrictive title cannot now limit the construction to be put upon the section, if its language shows that it was intended both to provide a table and to change the pre-existing law, because since the act was adopted there have been two general revisions of the Code, and in both it has been embodied without any reference to the original title, still, if the language is obscure in its meaning, this title is helpful. We must then, in this case, determine whether this statute should be construed as changing the pre-existing law in Virginia, requiring the assent of the heirs at law to the commutation of dower by the payment of a gross sum in lieu thereof when such settlement is desired by the widow.

It is observed that in *National Bank v.*

Taylor et al., 112 Va. 1, 70 S. E. 534, Ann. Cas. 1912D, 40, decided long since the enactment of the statute, this court, citing the cases decided before its enactment, said:

"As a general rule, a party who has a life estate in a fund arising from the proceeds of the sale of land is not entitled to have the value of his life estate commuted and paid to him in gross, instead of the annual interest on the fund, unless the parties in interest agree to it."

[1] It is true that in that case it was adjudged that, by reason of the anomalous state of facts there existing, the general rule could not be followed because the fund available for investment was less than the principal amount on which the annuitant was entitled to interest, and that, therefore, some other mode must be adopted which, quoting from *Simmons v. Lyle*, supra, "will produce the greatest equality with the least inconvenience." It thus appears that under anomalous circumstances, and because of the impossibility of following the general rule, a court of equity can direct a gross sum to be paid in lieu of an annuity without the consent of all the parties interested.

Bragg v. Tinkling Land Co., 115 Va. 1, 78 S. E. 541, is referred to as sustaining the opposing view, because there the bill of the widow expressly claimed that under section 2281 she was entitled to have her dower commuted and a gross sum paid to her, and this court said that the bill was not demurrable. This, however, is only a dictum. The question considered and decided in that case was that the heirs at law were necessary parties to the suit, inasmuch as it sought to have the dower assigned out of the unaliened lands in the hands of the heirs to the exoneration of those aliened by the husband in his lifetime. The question here involved was not contested, considered or determined.

The statute presents three alternatives, in either of which the table or rule provided thereby must be applied. The first clause requires its application when the widow or other annuitant is willing to accept a gross sum in lieu of the annuity. It is apparent that such willingness to accept a gross sum clearly implies that the person liable therefor, or whose interest is affected by the claim, has either tendered it, expressed a willingness to do so, or is under obligation to do so. Acceptance necessarily implies an offer of that which is accepted. So that for this clause of the statute to operate there must be an offer to the annuitant thus to commute, or its equivalent. Then the second alternative applies the table when the party liable for the annuity, or who is affected by such claim, has the right (unconditionally) to pay a gross sum in lieu thereof; and this certainly does not change the pre-existing law or confer any new right. Such a right to pay must depend upon something outside of

this statute. Then the third alternative is that, if the court in any legal proceeding shall decree a gross sum to be paid, the table or rule shall apply. Here we think it equally apparent that no new jurisdiction is by the statute conferred upon the court, but that it is intended to require the application of the rule under any circumstances in which the court by virtue of some jurisdiction otherwise existing, is authorized to enter such decree.

[2] We think, then, that the only effect of the statute is to provide a rule for determining the gross value of an annuity, and that it does not change the pre-existing general rule, which requires both the willingness of the widow and the consent of the heirs at law to the payment of a gross sum in lieu of dower. This record discloses no anomalous circumstances which justify the court in ignoring this general rule, and it follows, therefore, that the trial court erroneously determined that the widow was entitled to have her dower thus commuted over the objection of the heirs at law. One-third of the net proceeds of the land of which the widow was endowed should have been invested, and the court should have decreed that the interest thereon should be paid to her during her natural life.

2. Another question raised arises out of a claim asserted by the widow against the estate, that she is the owner of two bonds drawn by the decedent, payable to her, of \$900 each, one dated May 25, 1908, payable 60 days after date, and one dated June 14, 1910, payable 90 days after date. The decedent was killed by a stroke of lightning on Saturday evening, July 15, 1915, and on July 18, 1915, when the brother-in-law of the widow was examining his papers, trying to locate his will, he found these bonds in his store, in a drawer in his safe. There is nothing upon the papers or upon the decedent's books to indicate that either of them has been paid. In the answer of the widow, Mary Lou Slater, to the cross-bill filed by the defendants, among other things, she says, in another connection, that the decedent kept his valuable papers in the storehouse used and occupied by him at the time of his death, while this respondent kept her valuable papers in the dwelling house used and occupied by her said husband and herself.

[3] The commissioner reported against this claim, but upon exception to the report, the court adjudged Mary Lou Slater to be the legal owner of these two bonds, and established them as debts against the decedent's estate. We think that this was erroneous. The evidence fails to show that she kept any of her private papers at the store, which was a separate building, though within a few feet of the dwelling. The legal inference to be drawn from the fact that these bonds,

long overdue, were found as they were, is either that they had never been delivered, or that, if delivered, being at his death in the decedent's possession, that they have been paid. The claimant has failed to overcome these presumptions of law, which are adverse to her claim.

3. The commissioner reported against the claim of Mary Lou Slater that she is the owner of the following bonds: One of George A. Jones for \$237.90, one of C. H. Slater for \$1,000, one of George Allen and Lucinda Allen for \$408.40; and of a certificate of deposit in the Peninsula Bank for \$1,000. The facts as to this claim are that these evidences of debt were all payable to the decedent, but had been indorsed by him, each substantially in the same language:

"Pay to M. L. Slater.

"[Signed] R. B. Slater."

Upon the night of the death of the decedent, and at her residence, Mary Lou Slater gave these bonds and certificate of deposit, which were in an envelope, to her brother for safe-keeping. There is no contradiction of the facts stated, though there is some effort made to question the genuineness of R. B. Slater's signature.

[4] They had no children, and it is shown that the deceased husband used his wife's funds freely, and signed her name to checks and other papers at will. It also appears that several years ago he used some of her money, and that in recent years he collected rents from property belonging to her. The legal inferences to be drawn from these facts are that these bonds and this certificate of deposit found in her possession, duly assigned to her, had been delivered and were the property of Mary Lou Slater, and that they do not belong to the estate of R. B. Slater as the commissioner reported. Being assigned to her by the original owner, her husband, and being found in her personal possession at the time of his death, in the absence of evidence to overcome such inferences, they are her property. The court erred, therefore, in overruling her exceptions to the commissioner's report and holding otherwise.

[5, 6] 4. On the 1st of September, 1914, R. H. Slater, one of appellees, executed and delivered to his brother, R. B. Slater, a bond for the sum of \$1,950.39, payable six months after date, and on the 1st day of October, 1914, that bond was indorsed:

"Pay to M. L. Slater, October 1, 1914.

"R. B. Slater."

This bond was taken by the decedent for collection to the city of Newport News, and one of the witnesses, T. H. Geddy, testifies that the decedent told him that it was his wife's money. Slater, the decedent, when he went to the bank, drew a draft upon the debtor for the amount of the bond and interest,

and deposited it in the Colonial State Bank for collection, reassigning the bond to himself by signing his wife's name. We think the evidence shows that at the time of this transaction R. B. Slater was acting as agent for the benefit of his wife, and that this bond is the property of M. L. Slater. The admission of the decedent that it was her property would bind him if he were living, and his heirs at law and distributees are equally bound by this admission.

It does not appear to be necessary to cite authority for these latter propositions of law, which are well settled. The facts as shown by the evidence being clear, the legal inferences to be drawn therefrom are equally free from doubt. The court erred in overruling the exceptions of Mary Lou Slater to the commissioner's report as to this bond also, and she must be held to be the legal owner of the debt of which it is the evidence.

The case will be remanded for such further proceedings as may be necessary to effectuate the views here expressed.

Reversed and remanded.

(124 Va. 791)

Ex parte SMITH.

(Supreme Court of Appeals of Virginia. Nov. 20, 1913.)

1. INFANTS ↔12—DELINQUENT CHILDREN—STATUTE.

In view of the definition of "delinquent child" in Acts 1914, c. 350, § 1, and section 8, providing that whenever a child under 18 years of age shall be charged before any police justice with an offense embraced in section 1, a hearing shall be had on the evidence bearing upon the guilt or innocence of the child, and if sufficient to justify conviction or send the child on to a grand jury, the court may proceed under the provisions of the act, is valid, and a police justice has jurisdiction to enter an order committing, as a delinquent child, the defendant in a criminal prosecution, without other initial proceedings.

2. HABEAS CORPUS ↔4—DELINQUENT CHILDREN—JURISDICTION OF POLICE JUSTICE.

Where a police judge had jurisdiction under Acts 1914, c. 350, of a prosecution in which petitioner was committed as a delinquent child, the question whether there was a warrant containing the charge, or whether the charge descended sufficiently into detail to afford due process of law, were matters within the jurisdiction of the justice subject to proceedings on appeal.

3. HABEAS CORPUS ↔85(1) — DELINQUENT CHILDREN—EVIDENCE.

On habeas corpus to obtain release from commitment as a delinquent child, parol evidence that petitioner was tried before a police justice on the charge of fornication is immate-

rial, since such charge was embraced in the charge that petitioner was a delinquent child.

4. INFANTS ↔16—DELINQUENT CHILDREN—JURISDICTION OF POLICE JUSTICE.

That an order committing petitioner as a delinquent child erroneously stated that the charge was that of being a delinquent child, when it in fact was that of fornication, held immaterial under Act 1914, as the police justice had jurisdiction upon trial of such offense to have entered the order of commitment.

5. HABEAS CORPUS ↔85(1) — COMMITMENT OF DELINQUENT CHILD.

An order, committing petitioner as a delinquent child under Acts 1914, c. 350, is conclusive, on habeas corpus to obtain release, of the fact that the charge upon which petitioner was tried and committed was as stated in the order of commitment.

6. INFANTS ↔16—DELINQUENT CHILDREN—COMMITMENT.

After expiration of the day on which petitioner was ordered committed as a delinquent child, the police justice no longer had jurisdiction of the case for any purpose except the entry of an allowance of an appeal at any time within 10 days, as allowed by Acts 1914, c. 350, § 8, and Code 1904, § 4107, and a subsequently entered order, purporting to discharge petitioner from custody, is ultra vires and void.

Ex parte petition by Hazel Smith for a writ of habeas corpus. Petition denied.

R. W. Ivey, of Richmond, for petitioner.

Assistant Attorney General J. D. Hank, Jr., and F. B. Richardson, of Richmond, for respondent Virginia Home & Industrial School for Girls.

PER CURIAM. [1] The Virginia Home & Industrial School for Girls relies upon an order of the police justice of the city of Petersburg, entered on May 22, 1918, committing to it the custody and control of the petitioner, Hazel Smith, to legalize such custody. It appears from the original order of commitment aforesaid that it was entered when the petitioner was personally in custody, and on her being brought before said police justice for trial upon the charge, upon the oath of one John T. Byers, of being a "delinquent child not suitable to be placed on probation," and that upon such trial such justice was of opinion that petitioner had not attained the age of 17 years and was guilty of such charge, whereupon the said order of commitment was entered by such justice.

By reason of the definition of the words "delinquent child" contained in the statute (Acts 1914, p. 696, § 1 at page 697), such charge embraced either that of a criminal offense, or of such an offense as concerned the public welfare in such a way that the said statute is constitutional in its provisions in section 8 thereof (Acts 1914, p. 700), which

authorized the trial which was had as aforesaid, and the entry of the order aforesaid, without other initial proceedings. The said police justice, therefore, had jurisdiction of the case under the statute. *Mallory v. Va. Colony for the Feeble-Minded*, 123 Va. —, 96 S. E. 172.

[2] The police justice having jurisdiction of the case whether there was or was not a warrant containing the charge against the petitioner, or whether the charge descended sufficiently into detail, to afford the latter due process of law, were all matters within the jurisdiction of the justice to determine, subject to proceedings on appeal as provided by statute, which are intended, among other things, to afford such due process when demanded by the accused.

[3-5] Furthermore, we cannot enter into a consideration of the parol evidence in the case to the effect that the petitioner was in fact tried before the police justice on the charge of fornication. If that was a fact, it is immaterial to the habeas corpus proceeding before us, since such charge was embraced in the charge that petitioner was a "delinquent child." Moreover, if the order of commitment erroneously stated that the charge aforesaid was that of being "a delinquent child," and was in fact that of fornication, a criminal offense, the justice had jurisdiction under the statute upon the trial of petitioner for such offense to have entered the order of commitment on finding the petitioner guilty of such charge. However, the order of commitment is conclusive in this proceeding of the fact that the charge on which petitioner was tried and committed to the custody drawn in question before us was as aforesaid, and as is stated in the order of commitment. Such order, being entered in a case of which the justice had jurisdiction, cannot be collaterally assailed. Hence the sole remedy of petitioner in the premises is by appeal, as provided for in said statute.

[6] The petitioner relies on an order of said police justice purporting to discharge her from custody, which was entered on June 2, 1918, according to the certificate of the justice and the certificate of the clerk of his court in evidence before us. If it were conceded that the parol evidence in the case is admissible to show, and that it does show, that such date is erroneous, and that such order was in fact entered on June 1, 1918, still it was entered on a day subsequent to that on which the order of commitment was entered. The latter was a final order, and the subsequent order of June 2d, or of June 1st, purporting to reopen the case and to discharge the petitioner from custody, was ultra vires and void, for the reason that after the expiration of the day on which the order of conviction and commitment was entered, the justice no longer had jurisdiction of the case

for any purpose, except that of the entry of an allowance of an appeal at any time within ten days from the date of the last-named order. Acts 1914, § 8, p. 700; Code of Va. § 4107.

It is alleged in the petition that an appeal was taken by petitioner, by counsel, by application to the said justice within the said ten-day period to note the allowance of the appeal as required by law. If this be the fact, the answer of the respondent in this case concedes that the appeal may still be prosecuted by the petitioner if she be so advised. At any rate, the petitioner has no remedy by habeas corpus proceedings before this court, and her petition must be dismissed.

Dismissed.

(124 Va. 389)

STEPHEN PUTNEY SHOE CO. v. RICHMOND, F. & P. R. CO.

(Supreme Court of Appeals of Virginia. Jan. 16, 1918.)

1. APPEAL AND ERROR ⇨1097(1) — FORMER APPEAL—LAW OF CASE.

A matter fixed by a decree which has been affirmed upon a former hearing has become the law of the case, and cannot be reopened, upon subsequent appeal.

2. RAILROADS ⇨72(1) — DEEDS — CONSTRUCTION.

In a suit between a shoe company and a railroad company regarding tracks to former's factory, a deed from their common grantor held to contemplate use of locomotives, and to entitle shoe company to tracks over which cars could be operated for a customary distance from plaintiff's factory, but not for the entire length of track, by pinch bars.

3. APPEAL AND ERROR ⇨1194(2) — FORMER APPEAL—LAW OF CASE—DECREE—CONSIDERATION.

A decree granting to defendant the right to permit vehicles to pass over a strip upon which plaintiff had an easement construed as in violation of an appellate judgment reversing a former decree permitting defendant to open said strip for public driveway.

4. EASEMENTS ⇨58(1)—DOMINANT ESTATE—INTERFERENCE WITH USE.

The proposed opening for driveway purposes of a strip over which plaintiff had an easement held to conflict with the dominant right of use.

Appeal from Circuit Court, Henrico County.

Suit by the Stephen Putney Shoe Company against the Richmond, Fredericksburg & Potomac Railroad Company. From a decree therein the former appealed, and the case was affirmed in part and reversed and rendered in part, and subsequently the railroad company filed its petition to reinstate in the circuit court, and the Putney Company filed

NOTE.—The width of the right of way for the railroad tracks mentioned above is not shown by the above diagram, and the two tracks in question are shown only a part of the way from the northern line of the lot of the shoe company to the main line of the railroad company; but the position of the shoe company in the cause prior to and upon the former appeal was that such tracks, so far as laid from said northern line, as shown on such plan, fixed the proper location of said right of way, and that, when called for by it, that that one of the two tracks shown which extends only a part of said way should be extended alongside the other to said main line, so that such right of way should provide for ultimately carrying two tracks, so located.

1. The positions taken by the parties, respectively, and the material facts bearing on the subject of the proper location of the right of way for the tracks aforesaid before the court on the former appeal, were as follows:

The railroad tracks shown on the above diagram, which were located on the lot of the shoe company, and those extending from the northern line of such lot toward and to the main line of the railroad company, were located and constructed under a certain agreement entered into between said parties in 1906. This agreement, however, contained a provision under which it might be terminated, and accordingly it was terminated in 1908. The agreement, however, contained also the following, among other provisions, namely:

"Said railroad company reserves the right at its option to change the location of that part of said tracks which are outside of the property of the Putney company at any time and to use the same for any purpose it may deem proper, provided that such change of location, or such use, does not interfere with the shipping to or from the property of said Putney company.

"The acceptance of the tracks herein provided for shall be in lieu of the rights of Putney Company under said deed from the fair grounds company and others [the 1906 deed] to have two tracks as therein provided during the existence of this contract, but on the termination of this contract the Putney Company shall be remitted to all its rights under said deed as if this contract had not been made."

In said 1903 deed the fair grounds company and a trustee, who was a mere formal party, were designated as "the parties of the first and second parts," and the shoe company as the "party of the third part." The provisions in such deed with respect to the right of way for railroad tracks aforesaid were as follows:

"The said parties of the first and second parts covenant and agree that they will permit the party of the third part and its assigns to use a strip of land forever for the purpose of con-

structing thereon one or two railroad tracks running from the main line of Richmond, Fredericksburg & Potomac Railroad Company to the said property hereby conveyed to the said party of the third part. Said strip of land to be selected and designated by the parties of the first and second parts across its land. Said party of the second part covenants and agrees to construct, or cause to be constructed and completed, one or two tracks when called for by said party of the third part, from the said main line of Richmond, Fredericksburg & Potomac Railroad across said strip of land to the north line of the property hereinbefore conveyed to said party of the third part, for the use of the said party of the third part and its assigns, and then to connect with the tracks placed by said party of the third part upon their lot so purchased."

The shoe company was the plaintiff in the cause as originally instituted. By its pleadings in the cause, its position prior to and upon the former appeal was, in substance, that while the railroad company, as grantee of the fair grounds company, had originally the right to select and designate the location of the strip of land for the railroad tracks mentioned in the clause of the 1903 deed above quoted, extending from the northern line of the lot of the shoe company to the main line of the railroad company, the railroad company by its location and construction of the tracks, shown on the diagram above, from its main line to the northern line of the shoe company lot at the point of juncture of such tracks with the tracks located on such lot, had elected and selected once for all the location of such right of way as a permanent location (subject to the right of the shoe company at any time to require two tracks), and after the termination of the 1906 agreement the railroad company could not change such location without the consent of the shoe company, that the shoe company had built its warehouse on the lot and located its tracks thereon, from B to C, as shown on said diagram, through the center of its said building, to conform to the location of said right of way for said railroad tracks made by the railroad company as aforesaid, and that neither at the point of junction of such right of way with the northern line of the shoe company's lot, to wit, at the point of entrance of the tracks thereon into the shoe company's building, nor elsewhere, could the location aforesaid of such right of way be changed, but must remain as if it had been located under the 1906 deed without regard to the 1906 agreement.

The railroad company, by its pleadings in the cause, took the position, prior to and upon the former appeal, in substance, that its action, in the selection and location of said right of way from the northern line of the shoe company's lot to the main line of railroad aforesaid, and its construction of said tracks from such northern line of such lot to

such main line of railroad, was not under the 1903 deed, but only under the 1906 agreement; that upon the termination of the latter agreement, by the express terms thereof, the railroad company was remitted to its right under the 1903 deed to make such selection and location; and that accordingly it announced that for reasons set forth in its pleading, which it is alleged it would be inequitable, unjust, and unreasonable to disregard, it did then select a certain location mentioned and described in its pleading, to wit, a strip of land 23 feet in width, running from the northern boundary line of the said shoe company's lot to the said main line of railroad, the exact location of which was shown on a certain plat filed in the cause.

Such location of such strip of land for said railroad tracks was from a part of the northern line of the said lot of the shoe company which was near the northeastern corner of such lot, and lay thence parallel, or approximately parallel, with the location of said tracks constructed under the said 1906 agreement, until, nearing the main line of the railroad company, the former approached the single track located under such agreement by a gradual curve, until it formed a junction with such main line of railroad almost at the same point as did such single track.

The shoe company declined to accept the proposed new location of said tracks as "announced" by the railroad company as aforesaid, and in this connection the shoe company by its further pleadings in the cause made the following, among other allegations:

"This plaintiff avers that said defendant has no right to remove any tracks upon its land which will disconnect the rails on the property of this plaintiff, and avers that such action would greatly injure and would practically destroy the business of this plaintiff and would be against the rights of this plaintiff, and against the covenants of said fair grounds company and their assignee, and against the covenant of the defendant."

Referring to the location aforesaid "announced" as aforesaid by the railroad company, the shoe company alleged:

"* * * That said location does not conform to the terms of the covenant which provides that the tracks on said right of way shall connect at the northern line of plaintiff's lot with the tracks placed by said plaintiff upon the lot so purchased by it. * * *

"This plaintiff further alleges that to permit the defendant to locate said tracks according to said now proposed location will defeat the very covenant itself, since the covenant calls for two tracks for the business interests of this plaintiff, while the proposed location will only permit the plaintiff to use one track at a time. If the tracks are placed side by side in the eastern portion of the building of the plaintiff, as claimed by defendant, it will be seen that the track near the eastern wall can only be

loaded from one side, the west side, and the other track being just west thereof, the person loading will always be in danger, and if there is a car on the western track that it will prevent the loading of the car on the eastern track. This is an effort to defeat the spirit of the contract and to hamper and inconvenience the plaintiff in its business."

Upon issues presenting the aforesaid antagonistic positions of the parties on the subject of the proper location of said right of way for said railroad tracks under the said 1903 deed and upon certain evidence, in addition to such deed and said 1906 agreement, which is not material to be set forth here, the court below, on July 30, 1902, entered the decree which was under review on the said former appeal. The material provisions of such decree concerning the location of such right of way were as follows:

"As to the right of way, for track purposes, to which said Stephen Putney Shoe Company is entitled, the court is of opinion and doth decide as follows, viz.:

"(1) The land conveyed to said railroad company by [the 1903 deed] was and is subject to the burden that a strip of said land may be used by said shoe company and its assigns for the purpose of constructing on said strip one or two railroad tracks.

"(2) Said railroad company had, and still has, the primary right to select and designate the location and course of said strip. The exercise of that right was deferred by contract between said shoe company and said railroad company, dated March 27, 1906 [the 1906 agreement]. Said railroad company must, however, be considered as having acquiesced in the present point of entrance into said shoe company's building as the point at which must be connected the tracks above referred to.

"(3) Said railroad company is now and hereby authorized and required to select and locate the strip aforesaid, along a route to be designated by said railroad company, provided such route is reasonably safe and convenient, and that said strip shall be of sufficient width for two tracks, and that said strip shall be so located as to permit the proper operating connection of tracks thereon with the present tracks at the aforesaid point of entrance into said shoe company's building, and that said railroad company shall notify said shoe company of the route selected. * * *

"(5) Before proceedings to incur any expense hereunder, said railroad company is directed to inquire of said shoe company: (1) Whether the latter desires two tracks, or only one track to be constructed; and (2) whether said shoe company prefers to construct, or cause to be constructed, the roadbed and track or tracks, rather than have such construction done by said railroad company. Within 30 days after such inquiry is communicated to said shoe company, the latter is required to deliver to said railroad company a complete and definite reply to each of the questions aforesaid, and, in the event of its failure to do so, said railroad company shall proceed to construct two tracks. If, however, such reply is made, as

above required, and said shoe company indicated its preference that the construction aforesaid be done by said railroad company, the latter shall proceed to construct either one track, or two tracks, whichever may be stated in said reply.

"(6) The cost and expense of grading and constructing a roadbed, and placing thereon the proper equipment, shall, in any event, be paid by said shoe company, which shall fully reimburse said railroad company for actual cost incurred by the latter in connection with such matters. * * *

"(7) If said shoe company, in reply to the inquiry aforesaid, indicates its preference to do, or cause to be done, the construction referred to in said inquiry, then and in that event it is required to proceed promptly therewith, and to complete the same within a reasonable time. But all construction must be upon the strip which said railroad company shall designate, as hereinbefore required, and must be done under the supervision of said railroad company's engineers, and along lines and grades to be prescribed by said railroad company."

The decree of this court (the Supreme Court of Appeals) on the former appeal, in so far as it concerned said right of way for said railroad tracks provided for in said 1903 deed, was as follows:

"* * * The court * * * is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from, in so far as it determines the rights and obligations of the parties as to the location of the right of way for a railway leading to the shoe company's property over the railroad company's land and the tracks, etc., laid thereon, and the said decree is in this respect affirmed."

Subsequent to the last-named decree the railroad company selected a location of the right of way aforesaid, which provided for two tracks of railroad. The point of departure of such right of way from the northern line of the lot of the shoe company aforesaid is from the center of the said building thereon and is so located that the two tracks to be constructed on such right of way will connect with the present tracks on the lot of the shoe company, located, as aforesaid, through the center of its said building, at the aforesaid point of entrance into such building. Such right of way then extends, by a slight curve, to the east for a little distance, and then, by a slight reverse curve, extends still farther to the east, until it reaches a distance of approximately 50 feet to the east of the right of way as located under the 1906 agreement as aforesaid, then extends parallel with the latter for some distance until, as it approaches the main line of the said railroad, it curves to the north and gradually approaches the location of the right of way under the 1906 agreement, and forms a junction with the said main line at practically the

same point as did the aforesaid 1906 location.

In May, 1914, the railroad company notified the shoe company of its selection of the location last named and submitted to the shoe company the inquiries directed by the decree of July 30, 1912, contained in paragraph 5 thereof above quoted.

The shoe company promptly replied to the effect that it did not accept, but rejected, the proposed location; and, answering said inquiries, made the following statements:

"(1) We desire to have two tracks connecting our lot, and then to converge into one track at a convenient point after leaving our lot.

"(2) We desire you to construct the tracks, and we will pay you for actual cost incurred by you, if constructed as herein designated.

"We desire to place two tracks on our open lot or space between the western line of our lot in such manner as to furnish the best railway facilities for our premises. The two tracks on our lot will run to our northern line adjoining your lot, and the center of each track is designated by a stake on the northern line of our lot.

"You will therefore construct two tracks to connect at those points, with our designated tracks to be constructed, and extend the two tracks from those points to a convenient point to converge into one track, and thence the one track to run on the east side of this right of way to the main line of the Richmond, Fredericksburg & Potomac Railroad Company's right of way, in a reasonably safe and convenient route over a selected strip of land as provided in said decree. We reserve our right to place an additional track on the right of way at a future time. * * *"

The shoe company submitted with its said reply a diagram on which the location it demanded of said right of way is shown. Its point of departure from the northern line of the said lot of the shoe company, and of entrance of the tracks thereon upon such lot, is outside of said building and immediately to the west of the northern corner thereof. Such location of such right of way then extends in a straight line in a northeasterly direction, on the same course as that of the outside line of the western side of said building, until it approached nearly to the main line of railroad aforesaid, and there curves slightly to the north, to a point of junction with such main line immediately to the northwest of the point of junction therewith of the right of way as located under the 1906 agreement as aforesaid.

The location of the right of way last mentioned, as made by the shoe company, is designated A as shown on the following diagram, that made by the railroad company as next above mentioned is designated C on such diagram, and that made under the 1906 agreement as aforesaid is designated B on such diagram:

low now under review was entered. The provisions of such decree which concern the proper location of the right of way in question and the tracks thereon are as follows:

"As to the right of way for track purposes, to which said shoe company is entitled, the court is of opinion, and doth hereby decide, as follows, viz.:

"(1) That by the notice dated May 27, 1914, and the plat thereto attached, which notice and plat were duly served upon the shoe company and are filed as a part of the railroad company's petition in this cause, the railroad company definitely selected and located the strip for such right of way; that the strip, so selected and designated, complies in all respects with the requirements of the decree heretofore entered in this cause, as affirmed by the Supreme Court of Appeals of Virginia; that the demand of the shoe company for a different location, and all of its objections to the right of way selected by the railroad company, should be, and are hereby, rejected and overruled; that the prayer of the railroad company's said petition upon this point should be, and is hereby, granted; and that the only right of way for such track purposes, to which said shoe company is entitled, should be, and is hereby, definitely and finally located and established upon the strip and along the route so selected and designated by the railroad company.

"(2) That the shoe company is in default in having failed and refused to state whether two tracks, or only one track, shall be constructed on said right of way, and whether it prefers to do the necessary construction, rather than have the same done by the railroad company; that, therefore, the shoe company itself should be, and is hereby, required to do, or cause to be done, all and necessary and proper work and construction upon said right of way, including either one or two tracks, as it may prefer; that all such construction shall be done under the supervision of the railroad company's engineer or engineers, and along lines and grades to be prescribed by the railroad company within a reasonable time after definite written demand of the shoe company, stating whether one or two tracks are desired, and, if two, the point at which each track shall commence and terminate; that such written demand shall constitute a final election by the shoe company as to the number of tracks which shall ever be placed upon said strip for said shoe company or its assigns; that the shoe company shall make such written demand within 30 days after this decree becomes effective; that thereafter, upon being furnished with such lines and grades, it shall proceed promptly with the work of construction, and shall complete the same in a reasonable time; but that it shall give written notice to the railroad company of the time when such construction will be commenced, in order that the said engineer or engineers may properly supervise the same, as herein required."

2. The positions taken in their pleadings by the parties, respectively, and the material facts bearing on the subject of their rights, respectively, in, to, and over the said 27-foot strip of land, were as follows:

The following is the clause in the said

1903 deed which prescribed the rights of the parties touching the 27-foot strip of land, viz.:

"As a part consideration of the deed said fair grounds company covenants that the said strip of land just east of and adjoining the lot hereby conveyed and fronting twenty-seven (27) feet on the north line of Broad street and running back two hundred and twenty-nine feet four inches (299 ft. 4 in.) shall be kept open as an open space and said party of the third part shall at all times have free use of said twenty-seven (27) foot lot, with free ingress and egress on to and through said lot and all parts thereof."

In the executory contract evidencing the purchase by the shoe company of the lot conveyed to it in fee by the 1903 deed, which antedated such deed, there was a different provision as to said 27-foot strip of land, namely:

"It is further agreed that the said party of the first part will keep open as a street the twenty-seven (27) feet running along the eastern line of this property. * * *

One position of the shoe company in the cause prior to and upon the former appeal was that it was the beneficial owner of such strip of land, had the exclusive right of use of it, and that the railroad company had merely a bare legal title thereto. Another position of the shoe company at that time was that the only right the railroad company had as to such 27-foot strip of land was to have it kept open as—

"an open space,' yet it [the railroad company] has demanded that it be thrown open to be used as a street or driveway, and it has threatened to use the same as a driveway, not alone for its employes, but also for use by any and all patrons of said railroad company."

"The shoe company, prior to the former appeal, also alleged that its wagon is 26½ feet long, and, when it is at the entrance of your orator's warehouse on the east opening [of] said 27-foot strip, it blocks the said strip of land, as it has a right to do, and if the same were permitted to be used as a driveway it would greatly reduce the free use thereof by your orator, and prevent it from using it as contracted for in said deed."

The position of the railroad company before and upon the former appeal as to said 27-foot strip of land was that it was the owner of it in fee, subject merely to the "free use" of such strip—

"for the purpose of 'free ingress and egress in, to, and through' the same and all parts thereof; and that this respondent [the railroad company] is entitled to make or permit other persons to make any use of said strip which does not prevent complainant [the shoe company] from a reasonable use of the same for the purpose aforesaid, and also to insist that the said strip 'shall be kept open as an open space.' And this respondent denies that the complainant is entitled to the exclusive use of said strip for any purpose. * * *

The railroad company also alleged that the shoe company had such strip inclosed by certain fences and was continually blocking said strip—

"by placing across the same a wagon whose length is only 6 inches less than the width of said strip."

Evidence was introduced which, so far as material to be mentioned here, was to the effect that the fences aforesaid were erected by the shoe company temporarily, subject to the request of the railroad company for their removal, and would be removed on such request, but that the use by the shoe company of its wagons, which were 26½ feet long, did at times block the said 27-foot strip from the passage of it by other vehicles.

Thereupon the decree of July 30, 1912, aforesaid was entered, which as to said 27-foot strip of land provided, so far as material to be noted here, as follows:

"As to the 27-foot strip of land, mentioned and described in the pleadings, being a strip of land fronting 27 feet on Broad street, and adjoining the land of Stephen Putney Shoe Company on the east, and running back two hundred and ninety-nine (299) feet and four (4) inches, the court is of opinion, and doth decide, as follows, viz.:

"The defendant railroad company is the owner of said strip in fee simple, subject, however, to the easement therein of said shoe company. The said shoe company has a right of ingress and egress in, to, and through said strip, and all parts thereof, and also has a right to enter the said strip, at any point thereof, from its own land adjoining the same, and to use said strip in the receipt and delivery of its goods from and to its vehicles into and from any building upon its own land, such use to be exercised in a reasonable manner; but, in so doing, said shoe company must not block said strip unreasonably, so as to prevent other wagons passing through the same in single file. The said railroad company has the right to make any use of said strip not interfering with, or inconsistent with, the reasonable exercise by said shoe company of its aforesaid rights, which rights are primary."

"And the said Stephen Putney Shoe Company, its officers, agents, servants, and employes, are hereby perpetually restrained and enjoined from making use of said strip of land, other than such as hereinbefore set forth, and in the manner above described, and from obstructing, or continuing to obstruct, the said strip, or any part thereof, in any manner or to any extent not hereinbefore permitted, and from inclosing, or continuing to keep inclosed, the said strip, or any part, or either end, thereof, and from erecting, or maintaining, any fence upon any part, or at either end, of said strip, and from interfering in any way, or at any time, with other persons in any use of said strip not inconsistent with the reasonable exercise by said shoe company of its rights hereinbefore set forth, and from doing any act or thing which will prevent the said strip, and all parts thereof, from being and continuing, at all times, an open space."

The decree of this court (the Supreme Court of Appeals) on said former appeal, upon review of so much of the said July 30, 1912, decree as referred to said 27-foot strip of land, provided as follows:

"* * * The court is of opinion, for reasons stated in writing and filed with the record, [that] in so far as it determined the rights of the parties in the 27-foot strip of land in the bill and proceedings mentioned, it must be reversed. And this court proceeding to enter such decree as the said circuit court ought to have entered as to the said strip of land fronting on Broad street, and adjoining the land of the said Stephen Putney Shoe Company on the east, and running back 299 feet and 4 inches, the court doth adjudge order and decree that the Richmond, Fredericksburg & Potomac Railroad Company is the owner in fee of the said 27-foot strip of land, subject, however, to the appellant shoe company's easement therein; that the said shoe company and the said railroad company are entitled to have the said 27-foot strip of land kept open as an open space, without the right on the part of either to erect or maintain a fence upon any part or at either end thereof; that the said shoe company has the right at all times to have the free use of the said strip of land for ingress and egress in, to, and through said strip of land, and all parts thereof, to and from all buildings upon its said land, from and to its vehicles standing upon or across said strip of land, and to every other accommodation and advantage which said strip, kept open as an open space or court, may furnish to the said property of the said shoe company, and that the said railroad company, its agents, employes, or patrons, are not entitled to make use of said strip of land in any manner that will interfere with or obstruct the said shoe company in the full enjoyment of its said easement."

In its petition subsequently filed in the cause the railroad company alleged that the shoe company had not removed but still maintained—

"gates and fences upon and inclosing said strip," also that the shoe company "claims the right to use a portion of said strip as a flower garden, and to prevent employes and patrons of your petitioner from passing through such portion, and also claims the right to use said strip for storing boxes, etc., and also claims the right to keep its vehicles standing across said strip, even when they are not being loaded or unloaded—in fact, claims the right arbitrarily to block said strip, and to the exclusive use and occupation thereof, for any purpose and period of time, whether temporarily or permanently.

"All such claims your petition most emphatically denies; and, as your petitioner has thus far been prevented by the shoe company from making any use whatever, in any manner, or at any time, of said strip, your petitioner's only recourse is to invoke the court's decision, defining precisely all rights and duties of the parties."

In answer to such petition the shoe company takes the following positions as to said 27-foot strip of land, namely:

"* * * This respondent is ready and willing to remove the fences at the north end of said 27-foot strip of land, but that the fence running along the eastern side thereof is a fence dividing the said 27-foot strip from the adjoining lot to the east thereof, owned by other parties.

"This respondent says that the flower garden referred to by petitioner railroad company is largely located on the private property of this respondent, which lies to the west of the said 27-foot strip of land, and on the Broad street front there is only a partial hedge.

"Respondent would have long since removed the fence at the north end of said strip, but for a conference between Mr. T. P. Giles, of respondent company, and Mr. W. D. Duke, of railroad company, in which the fence was not required to be removed.

"This respondent denies any allegation contained in said petition to the effect that this respondent claims any rights in said 27-foot strip of land, beyond the rights granted to it under the various deeds and contracts and under the decisions of the Supreme Court of Appeals of Virginia."

Certain evidence was introduced by both parties bearing upon the issue as to the use being made of said 27-foot strip by the shoe company, which is referred to below in the opinion of the court.

Thereupon the decree of the court below now under review was entered, containing the following provisions concerning the rights of the parties in, to, and over said 27-foot strip of land, namely:

"As to the 27-foot strip of land, fronting on Broad street, and adjoining the land of the shoe company on the east, and running back 290 feet and 4 inches, the decree entered by the Supreme Court of Appeals of Virginia has adjudged that the railroad company is the owner in fee of the said 27-foot strip of land, subject, however, to the shoe company's easement therein; that the said shoe company and the said railroad company are entitled to have the said 27-foot strip of land kept open as an open space without the right on the part of either to erect or maintain a fence upon any part or at either end thereof; that the said shoe company has the right at all times to have the free use of said strip of land for ingress and egress in, to, and through said strip of land.

"(2) The railroad company has the right to permit persons and vehicles to pass through any and all parts of the said 27-foot strip, at any time and for any purpose: Provided, always, that the shoe company is not thereby obstructed or interfered with in the exercise and enjoyment of its superior rights aforesaid. Such use of the said strip by other persons and vehicles is not inconsistent with the existence of the aforesaid rights of the shoe company; it is only the exercise by the shoe company of its said superior right, which is not to be obstructed or interfered with by such passage of other persons and vehicles.

"(3) The shoe company has no right to maintain upon the said strip, or any part thereof, or at either end thereof, any fence, hedge, gate, or other inclosure, nor the sign or posts thereto attached, described in the testimony of E. M.

Hastings, nor the pile of fence posts described in said testimony. And the said shoe company, its officers, agents, servants, and employes, are hereby perpetually restrained and enjoined from obstructing, or continuing to obstruct, the said strip, or any part or either end thereof, by any fence, hedge, gate, or other inclosure, or by any such sign or posts, and from hereafter maintaining, upon said strip, or any part, or at either end thereof, any fence, hedge, gate, or other inclosure, or any such obstruction as aforesaid, and from doing any act or thing in violation of the aforesaid right of the railroad company to have the said strip kept open as an open space."

S. A. Anderson and A. G. Collins, both of Richmond, for appellant.

John S. Eggleston, of Richmond, for appellee.

SIMS, J. (after stating the facts as above). As appears from the above statement, this is the same cause which was before us on a former appeal therein (Stephen Putney Shoe Co. v. R., F. & P. R. Co., 116 Va. 211, 81 S. E. 93); the parties, the issues, and the material facts, consisting of writings to be construed and the actions of the parties thereunder, are all the same as shown by the record on the present as on the former appeal, in so far as some of the matters in issue now before us are concerned. And there is no controversy in the cause over the well-settled rule that, such being the case, the decision and decree of this court on the former appeal is the law of the case, in so far as such decree passed upon and adjudicated the questions which are presented for our decision upon the present appeal. The points of difference between the parties on that subject are merely as to how far the decree of this court on the former appeal did pass upon and adjudicate such questions. There are also further points of difference between the parties as to what should be the decision of certain questions in issue which they claim, respectively, were left open for future consideration and determination by the decree aforesaid on the former appeal. We will consider and pass upon the questions raised by such points of difference in their order as stated below.

[1] 1. We will consider first the controversy in the cause upon the subject of what is the proper location of the right of way for certain railroad tracks as provided for in the deed of 1903 mentioned in the above statement.

1a. We are of opinion that the decree of this court on the former appeal, in its affirmance of the decree of the court below of July 30, 1912, in so far as it concerned the subject now under consideration (such provisions of such decrees being quoted in the above statement), passed upon and adjudicated the question of the proper location of the right of way under consideration at its point or place of departure from the northern line of the lot

of the shoe company, and fixed the location of such place of departure of such right of way as the railroad company has now located it, as shown by the above statement and the diagram last above exhibited therein, being where the right of way indicated by the lines marked C on such diagram form a junction with what is designated in the record as the northern line of the boundary of the lot of the shoe company, such junction being somewhat to the east or southeast of the center of such northern line, and is "so located as to permit the proper operating connection of tracks thereon with the present tracks [on the shoe company's lot] at the point of entrance into said shoe company's building [the latter point being in the center of such building]," as was required by paragraph 3 of said decree of July 30, 1912, which was affirmed on the former appeal.

The question whether such junction point or place of departure of the right of way from the northern line of the lot of the shoe company had been permanently fixed and located under said 1903 deed, or whether it could be changed, was put directly and expressly in issue by the pleadings and proof of both the shoe company and railroad company in the proceedings in the cause prior to and upon the former appeal, and the material facts bearing on such issue were also the same as shown by the record in the former as on the present appeal, as is set forth in detail in the above statement. It necessarily resulted from the position taken by the shoe company prior to and upon the former appeal as to what its action had been with respect to its exercise of its rights under the 1903 deed to locate the railroad tracks upon its own lot, that the conclusion was unescapable that it, at least, had elected and selected such location once for all under such deed; it could, of course, make but one election and location under such deed, and that carried with it the further conclusion that the railroad company, since it had acquiesced in that location, was bound under the 1903 deed to so locate the right of way in question on its land as to connect with the tracks so located on the shoe company's lot, which settled the question of whether the point of juncture of such right of way with such tracks could be afterwards changed. Accordingly, the decree of the court below of July 30, 1912, and its affirmance on appeal as aforesaid expressly passed upon and adjudicated such question, and expressly fixed the location of such point or place of departure of such right of way as aforesaid; that thereby and thereupon it became the law of the case, and hence the proper place of location of such point or place of departure of the right of way was no longer a subject of inquiry or of consideration or determination by the court below, nor can it be reopened by us on the present appeal.

[2] 1b. The decree of this court on the former appeal did leave open for future consideration and determination the location of the said right of way from its said point or place of departure thence on to its junction with the main line of railroad on the railroad company; the adjudication on the subject upon the former appeal, affirming the decree of the court below then under review, being merely, in the language of the latter decree, so far as material, that—

"Said railroad company is now and hereby authorized and required to select and locate the strip aforesaid along a route to be designated by said railroad company, provided such route is reasonably safe and convenient. * * *

We come now, therefore, to the consideration of the only points of difference between the shoe company and railroad company on the subject of the proper location of said right of way which are open for our consideration upon the present appeal.

The positions of the shoe company on these points are, in substance, as noted in the above statement, that the location of the right of way which has been now made by the railroad company from the said point or place of departure of it to the main line of the railroad company is not "reasonably safe and convenient," as required by the decree of July 30, 1912, for the following reasons:

(a) Because "it contains reverse curves, * * * is filled with curves, and the natural lay of the land is irregular, requiring great danger in operating the cars upon a track built to conform thereto."

(b) Because it "is the most incompetent and least safe route it could locate over its lot." And

(c) Because it is "expensive to build and operate, * * * It [the railroad company] selected the most expensive location and will call on respondent [the shoe company] to pay the cost thereof."

These positions assail the location of the right of way in question, on three grounds, namely:

First. Because the operation of the cars on the tracks thereon will be dangerous, by reasons of the curves therein and the grade thereof, if the tracks are built to conform to the natural lay of the land.

Secondly. Because the operation of the cars will be expensive, and,

Thirdly. Because it is the most expensive to build and operate.

We will consider these positions in their order as stated.

First. As to the danger of operation of the cars, if the tracks are built to conform to the natural lay of the land:

This is as yet a moot question. The decree aforesaid involved in the former appeal in the cause did not require the railroad company to disclose in its notice to the shoe company the grade proposed. It did require, howev-

er, all construction to be "done under the supervision of said railroad company's engineers and along lines and grades to be prescribed by said railroad company." It appears from the evidence in the cause that no grades have as yet been prescribed by the railroad company for the proposed tracks. Its position taken in its reply brief in the cause is that it has never been its "intention to establish any 'but a reasonable grade, which could be successfully and conveniently operated throughout the entire length to the Putney building,'" and that it has never intended to prescribe the building of the tracks "to conform to the natural lay of the land."

Secondly. As to the expense of operating the cars on the tracks as now proposed by the railroad company:

There is testimony in the cause for the shoe company and railroad company on the question of whether the cars on the tracks as proposed by the railroad company can be operated without steam or equivalent motive power—i. e., by hand, by the use of pinchbars—as easily as on tracks if located without the reverse curve, or without as great curves as there will be in the tracks, if located as proposed. The preponderance of the evidence is to the effect that, if the pinchbar method of operating the cars were adopted, they could be more easily operated on a track with lesser curves in them. But we find nothing in the deed of 1903, when construed in the light of the situation and circumstances surrounding the parties, which warrants the construction of it to the effect that the shoe company is entitled to have the right of way for said tracks so located that the latter can be or that they should be so constructed that cars thereon can be operated the entire length of the tracks by hand, by the use of pinchbars, without other motive power. On the contrary, we think that the motive power in use by the railroad company in 1903 for the placing of cars on spur and switch tracks, namely, that of locomotives, or some equivalent motive power, was in contemplation of the parties for the movement of cars to and from said main line of railroad upon and from said tracks at the time of the covenant in the deed of 1903, which fixed the rights of the parties as to such right of way and tracks and that the shoe company is not entitled to have the "convenient" character of the proposed tracks required by the decree of July 30, 1912, measured and determined by their fitness for use for the movement of cars thereon to and from the main line of railroad by any other motive power than steam locomotive power or its equivalent. The tracks should be so constructed that it would be practical for the shoe company to move single cars empty or loaded, for short distances to and from its building by handpower by the use of pinchbars, since there is tes-

timony in the case tending to show that such use of handpower in moving cars to such extent was usual and customary among mercantile concerns under similar conditions, and hence must be taken to have been in contemplation of the parties at the time of the execution of said deed of 1903, and the preponderance of the evidence in the cause shows that, if the grade of the tracks is on a level at the curves on their ends nearest the lot of the shoe company, that will be practical.

Thirdly. As to the route now proposed by the railroad company for the railroad tracks aforesaid being the most expensive to build and operate:

The evidence in the cause is to the effect that the expense of building the railroad will be less on the route mentioned than on that proposed by the shoe company.

The preponderance of the evidence is that if the roadbed is constructed upon a reasonably proper grade, so that it can be reasonably "conveniently operated throughout the entire length to the Putney building," the cars to and from the main line of railroad can be operated by steam locomotive power, or its equivalent, without any excessive expense, and that single cars, loaded or empty, can be moved with reasonable care for short distances to and from its building by the shoe company by hand power by the use of pinchbars, which will eliminate any excessive expense in such operation of the cars.

Our conclusion, therefore, on the branch of the cause considered next above, is that the location of the right of way aforesaid, which has been selected by the railroad company as aforesaid, complies with the requirements of the former decrees in the cause, and that there is no error in the decree of the court below now under review in so deciding.

[3, 4] 2. We have now to consider the controversy in the cause upon the subject of what are the rights of the parties, respectively, over and upon the 27-foot strip of land mentioned in the statement of the case preceding this opinion.

As set forth in such statement, the question of what were the rights of the parties aforesaid, respectively, in, to, over, and upon such strip of land under the provisions of the deed of 1903, and of the preceding contract of "sale" in such statement of the case, was involved on the former appeal. The proper construction of such provisions on such subject in such deed and contract was in issue between these same parties to this cause on the former appeal; the material facts bearing on such issue were also the same as shown by the record on the former as on the present appeal; and, under the well-settled rule above adverted to, in so far as such rights have been passed upon and adjudicated by the opinion and decree of this court on the former appeal, such adjudication

then became and is now the law of the case. The question which first confronts us on this branch of the case, therefore, is how far the decree of the court below now under review is in accord with the decree of this court on the former appeal touching the same matters in controversy then and now in issue.

The chief matter of controversy now before us, with respect to said 27-foot strip of land, is, as appears from the statement of the case preceding this opinion, whether, in addition to the use of such strip by the railroad company as a passageway to and from Broad street to the property of the railroad company as a walkway for its officers and employes, when using it in such a way as not to interfere with the rights of the shoe company as fixed by the decree aforesaid on the former appeal, the railroad company has the right to use such strip of land—

"as a driveway not alone for its [officers and] employes, but also for the use by any and all patrons of said railroad."

The language last quoted is from a pleading in the cause prior to the former appeal, and the precise question of whether the railroad company had the right to use such strip of land as a driveway as aforesaid, "not alone for its employes, but also for use of any and all patrons of said railroad," was before this court for decision on the former appeal. The position of the shoe company then was, and is now, that to make of the said strip a driveway for all of the patrons of the railroad company would make it a public street for all practical purposes touching the rights of the shoe company over and upon such strip of land.

As will appear from the opinion of this court on the former appeal, it was then held that since the executory contract of sale preceding the deed of 1903 contained the provision that the vendor "will keep open as a street" the said strip of land, and such provision was changed when the deed of 1903 came to be made, the provision contained in the deed on the subject being substituted for said provision in the executory contract of sale, the former must be construed in the light of the consideration that it was a substitute for the latter provision, and the opinion of this court was, in substance, that the railroad company was not entitled to make such use of said strip of land as would be made of it, if it were a street, and it reversed the preceding decree of the court below in its provisions which allowed the use of such strip as a driveway, which will be hereinafter more specifically adverted to.

The decree of the court below now under review, in its dealing with the subject now under consideration, follows very closely the decree of this court aforesaid on the former appeal, as appears from the quotation

from it given in the statement preceding this opinion; but it does decree that the railroad company "has the right to permit * * * vehicles to pass through any and all parts of the said 27-foot strip at any time and for any purpose, * * *" and it is of this provision in such decree, in so far as the 27-foot strip of land is concerned, that the shoe company now complains. Such use as so allowed is not confined to the officers or employes and patrons of the railroad company, but permits a general use by any and all persons with the assent of the railroad company, which means such use by the public generally, if permitted by the railroad company. This is in substance, the very provision of the decree of the court below of July 30, 1912, on the subject now under consideration, which was reversed by the decree of this court on the former appeal, only the decree now under review goes farther and is less restricted in its express allowance of a use of the strip as a driveway. It is true that such provision is coupled with the limitation, "provided always that the shoe company is not thereby obstructed or interfered with in the exercise and enjoyment of its superior rights aforesaid"; but the same proviso was, in substance, contained in the decree of July 30, 1912, on this subject, yet such decree was reversed as aforesaid. The provision in the decree of July 30, 1912, touching the rights of the railroad company with respect to the use of said strip as a driveway was as follows, as appears from the terms thereof quoted in the above statement:

"Said shoe company must [not] block said strip unreasonably, so as to prevent other wagons passing through the same in single file. The said railroad company has the right to make any use of said strip not interfering with, or inconsistent with, the reasonable exercise by said shoe company of its aforesaid rights, which rights are primary."

Such were the provisions of such decree under consideration by this court upon which its former opinion, decision, and decree on this subject were rendered. The result thereof, therefore, was the holding that a use of said strip as a passageway for wagons "in single file," subject to be interrupted by the reasonable exercise by the shoe company of its rights of easement, was not permissible on the part of the railroad company. Such holding was thereby made the law of the case.

The decree now under review does not confine the use in question to wagons "in single file." Otherwise its provisions on this subject are substantially the same as those of the decree of the court below which was reversed as aforesaid.

In truth, any substantial use of said strip as a driveway by all of the patrons of the railroad company would be inconsistent with

the "superior rights aforesaid" of the shoe company.

It is true that the evidence in the cause is meager as to the frequency of the use which the shoe company has heretofore made of said strip as a driveway, or as to how often it is blocked by its 26½-foot wagons standing across the strip to be loaded or unloaded, and it seems from the record that for the greater part of the time the whole of the strip is not occupied by the use the shoe company makes of it for the purposes for which it is entitled to use it; but the evidence shows that such strip is so used by the shoe company as it has need therefor, and that it is the only possible way for ingress and egress of the vehicles of the shoe company to and from its stables, and is the only open space upon which it can load and unload these vehicles, and that such strip is at times entirely obstructed by such use, and it is manifest that the use of such strip as a driveway by the patrons of the railroad company and others, or even by such patrons alone, would, in practice, inevitably produce innumerable collisions and endless conflict between the agents and employes of the shoe company in its rightful use of said strip and those using it as a driveway under the permission of the railroad company. In view of this situation, which inheres in the very nature and character of the use of the strip as a driveway by the public generally, or even by the patrons of the railroad company, which serves the public generally, such use is impracticable. It would be in conflict with the dominant right of the shoe company, adjudicated by the decree of this court aforesaid, entered on the former appeal, which provided for the shoe company—

"at all times to have the free use of said strip of land for ingress and egress in, to, and through said strip of land and all parts thereof to and from its own land adjoining the same, to the use of the said strip of land in receipt and delivery of its goods into and from all buildings upon its said land, from and to its vehicles standing upon or across said strip of land, * * * and that said railroad company, its agents, employes, or patrons, are not entitled to make use of said strip in any manner that will interfere with or obstruct the said shoe company in the full enjoyment of its said easement."

Indeed, we are of opinion that any use of said strip as a driveway, even by the officers and employes of the railroad company, if it were so frequent as to amount to such a substantial use as to be of any worth to the railroad company, would inevitably at times "interfere with or obstruct the shoe company in the full enjoyment of its said easement," and hence would be impracticable, in view of the dominant rights of easement of the shoe company aforesaid. Theoretically this may not be so, in view of the proviso con-

tained in the decree now under review, above quoted; but practically it is so, as we think. It is a law of physics that two objects cannot occupy the same space at the same time; and two or more moving objects, of the like character, seeking to use the same space at the same time, where the right of such use of one is dominant, will inevitably produce conflict of rights. The situation is wholly different from what it would be if these rights were equal, as is true of vehicles on a public highway, in which case mutual concession or a law of the road would serve to avoid conflict of rights.

We are therefore of opinion that the effect of the decree aforesaid entered on the former appeal was to adjudicate that the railroad company has not the right to itself use, or to authorize any one else to use, said strip of land as a driveway; and hence we are of opinion that the decree of the court below under review in this particular is not in accord with the former decree of this court.

As to the right of the railroad company "to permit persons * * * to pass through any and all parts of the said 27-foot strip, at any time and for any purpose, provided always that the shoe company is not thereby obstructed or interfered with in the exercise and enjoyment of its superior rights" fixed by the decree aforesaid on the former appeal, which right is allowed the railroad company by the decree of the court below now under review. As the property of the railroad company is now used, and as the said strip of land has at present no walkway for persons, its use as a passageway by persons would likely be small, and would be practical without causing interference with the full enjoyment of its easement by the shoe company; but if it were used as a walkway by the public generally, in passing from Broad to Marshall street, or if the railway were to locate a passenger depot on its property, and said strip were used as a passageway for its passengers to and from Broad street, it is very probable that thereby interference with and obstruction of the full enjoyment of said easement by the shoe company would be caused. Such a situation, however, as we understand the record, has not yet arisen. Hence we are of opinion that the record does not disclose that the decree under review is not in accord, on the subject under consideration, with the decree aforesaid entered on the former appeal.

As to the right to have or maintain on said strip the "gates and fences" which are located thereon, and the alleged claim of the shoe company of the right to use a portion of the strip as a flower garden, and to use the strip for storing boxes, etc., and the right to keep its vehicles standing across said strip, even when they are not being loaded and unloaded, drawn in question before us on the present appeal, as noted in the state-

ment above, the shoe company does not claim in its pleadings in the cause to have any of such rights, and it is apparent that such rights have been denied to it by the decree of this court on the former appeal. So that, in so far as such subjects are mentioned, among others, in the decree now under review, we are of opinion that such decree is in accord with the decree aforesaid on the former appeal, and in so far as not so mentioned the denial of such rights is, in effect, adjudicated by the last-named decree.

Our conclusion, therefore, on the subject of the rights of the parties with respect to the said 27-foot strip of land, is that, as such strip of land and the adjacent property of the railroad company is now situated and used, the decree under review correctly adjudicates such rights and is in accord with the decree of this court on the former appeal, except in the single matter of the right of the railroad company to use or permit the use of said strip as a driveway, but that as to this matter there is error in the decree under review.

For the foregoing reasons, we are of opinion to affirm the decree complained of in all respects, except in so far as it concerns the rights of the railroad company to use or permit the use of the 27-foot strip of land in the bill and proceedings mentioned as a driveway. The decree will be amended, so as to deny such right to the railroad company. We are of opinion to provide in the decree of this court, however, that it is entered without prejudice to the right of the shoe company, or its successors or assigns, to seek relief in future by any suit or action which it might lawfully institute, but for the said decrees, and the present decree of this court in this cause, in the event that it should be found impracticable to construct the roadbed for the tracks aforesaid to such grades and lay the tracks thereon in such manner, along the right of way therefor aforesaid, that cars may be operated thereon by steam locomotive power, or an equivalent motive power, to and from the main line of railroad of the railroad company with reasonable safety and convenience, and so that single cars, loaded or empty, can be moved with reasonable ease on the two curves in the tracks nearest the shoe company's lot, by the use of pinchbars, or in the event that the use of said 27-foot strip of land as a passageway of persons, without interference with and obstruction of the full enjoyment of said easement by the shoe company, should be found in future to be impracticable from any cause not due to the fault of the shoe company or its successors or assigns, as the case may be. And we are of opinion to award the costs of this appeal to the railroad company as the party substantially prevailing.

Amended and affirmed.

(124 Va. 465)

A. S. WHITE & CO., Inc., v. JORDAN.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. CONSTITUTIONAL LAW §309(2)—CORPORATIONS §500—DUE PROCESS OF LAW—SERVICE ON DOMESTIC CORPORATION BY PUBLICATION.

Code 1904, § 8225, authorizing service by publication on domestic corporation having no person in the county or corporation wherein action is commenced on whom process can be served, is not violative of Const. U. S. Amend. 14, and Const. 1902, § 11, prohibiting taking of property "without due process of law."

2. CORPORATIONS §507(12)—PROCESS—PUBLICATION—DESIGNATION OF NEWSPAPER.

Code 1904, § 8225, authorizing service by publication on domestic corporations having no person in the county or corporation in which action is brought upon whom service can be had, upon an order by court or clerk of court directing publication, requires, by implication, that court or clerk designate the particular newspaper to publish the process.

3. EVIDENCE §83(1) — PUBLICATION — PRESUMPTION—ACTS OF OFFICER—DESIGNATION OF NEWSPAPER.

Court or clerk designating newspaper to publish process on domestic corporation having no person in county or corporation wherein action is brought upon whom service can be had, under Code 1904, § 8225, will be presumed to require publication in such newspaper as is most likely to give defendant notice.

4. CONSTITUTIONAL LAW §48—CONSTRUCTION FAVORING VALIDITY.

If language of statute is fairly susceptible of two constructions, under one of which it is valid and under the other invalid, the construction sustaining validity will be adopted.

5. CONSTITUTIONAL LAW §48—VALIDITY OF STATUTE—PRESUMPTION.

Intention of Legislature to respect constitutional inhibitions and pass a valid statute will be presumed.

6. PRINCIPAL AND AGENT §144—ACTIONS—SUIT IN AGENT'S NAME.

Action on contract in name of agent and in which agent has an interest can be brought in agent's name.

Burks, J., dissenting.

Error to Circuit Court, Nelson County.

Action by J. W. Jordan against A. S. White & Co., Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Caskie & Caskie, of Lynchburg, for plaintiff in error. S. B. Whitehead, of Lovings-ton, for defendant in error.

PRENTIS, J. The main question here presented is identical with that determined by

this court in the case of *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 59 S. E. 477, 17 L. R. A. (N. S.) 324; that question being: Is section 3225 of the Code, so far as it authorizes the service of process on a domestic corporation which has no person in the county or corporation wherein the case is commenced on whom process can be served, by the publication of a copy of the process in a newspaper, violative of the fourteenth amendment of the United States Constitution and of section 11 of the Virginia Constitution, which prohibit the taking of property "without due process of law"?

In that case this court decided that the section does afford due process of law and is constitutional.

[1] The learned counsel for the petitioner reopens the question and presents the contrary view with consummate ability and force. However much we are impressed thereby, we are not disposed to disapprove the former ruling, though its soundness is doubted by very high Virginia authority. *Burks' Pl. & Pr.* 312.

One difference between this, and the question to which most of the cases relied on to support this contrary view, is that here we are dealing with a domestic corporation, which received its charter from this state and is within its jurisdiction; whereas, *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and the multitude of cases following it, nearly all refer to foreign corporations or natural persons who are not within the jurisdiction of the state in which the action is brought. The underlying principal of these cases is that a statute can have no extraterritorial effect, and it is nowhere now questioned that no personal judgment can be rendered against a foreign corporation or nonresident, proceeded against by order of publication, and that a court, in such cases, can only subject the property within the jurisdiction of the state to the claim.

As Judge Cardwell points out in *Ward Lumber Co. v. Henderson-White Co.*, *supra*, this statute, section 3225, has been in force for a great many years. It had at that time never come under review in this court, but in the case of *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. 77, although the case was hotly contested, no doubt whatever was suggested and no question raised as to the validity of the statute; its constitutionality being assumed both by the court and counsel.

Dr. Lile, in his *Notes on Corporations* (page 342), refers to and analyzes the statute, but does not question its constitutionality; and in a note said to have been written by that great jurist, Judge Burks, the elder, in 2 Va. Law Reg. at page 545, the history of the statute is given. It is shown that in its present form it originated with the learned revisors of the Code of 1887 (of

whom one was Judge Burks); and here again no question as to the constitutionality of the statute is intimated.

Judge Cardwell called attention to certain expressions of that great master of the law, Judge Cooley (*Cooley's Const. Lim.* [7th Ed.] p. 236), one of which is:

"The courts cannot run a race of opinions of right reason and expediency with the lawmaking power."

It is agreed that the courts cannot condemn any method of service which the Legislature prescribes, if it appears reasonably probable that the method prescribed will give the defendant notice of the proceeding and afford him an opportunity to defend.

In the case of *Bicknell v. Herbert*, 20 Hawaii, 132, Ann. Cas. 1913A, 1186, it is said:

"Notice by publication is, perhaps, a method more often used as a substitute for personal service, but there is no distinction in principle between the one method and the other. Neither is based on the theory that it will necessarily give actual notice to the defendant, but merely that it will give such notice to himself or to his agents, if he cares to take reasonable precautions for the protection of his property."

In a note to that case, Ann. Cas. 1913A, at page 1189, this is quoted from *Chatham v. Mansfield*, 1 Cal. App. 298, 82 Pac. 343:

"Due notice to the defendant is essential to the jurisdiction of all courts, but such notice may be either actual or constructive in certain cases, as prescribed by the law pertaining to the forum in which such notice is given. If the Legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is given him to defend, and the notice is given as the law requires, this will be held sufficient and due process of law."

In *Freeman on Judgments* (4th Ed.) § 127, p. 219, this is said:

"Therefore citizens and residents of a state may, if its laws so provide, be served with process by the publication thereof, or leaving it at their usual place of abode, or in such other mode as the Legislature deems proper under the circumstances of the case, if it appears probable that it will advise them of the proceedings against them, and afford them an opportunity to defend."

[2-5] In the case in judgment the plaintiff in the trial court could only sue the defendant either in the county of Nelson, in which the cause of action arose, in the city of Lynchburg, in which the principal office of the corporation was located, or in the county or city in which its chief officer resided. It exercised its option to institute the action in the county of Nelson, but the original process of the circuit court of Nelson county

could not be sent to the city of Lynchburg (Code, § 3220), so that, although the circuit court of Nelson county had jurisdiction of the case, there was no other method provided by which the defendant could be brought into court except the method pursued. It should be noted that section 3225, in such cases, requires first an affidavit of the fact that there is no agent in the county or corporation wherein the case is commenced, and that there is no other person in that county or corporation on whom there can be service; and then, before there can be any lawful publication, the statute requires that there shall be an order entered in the case, either by the court or by the clerk of the court, directing the publication of process. The jurisdiction to enter an order, thus conferred upon the court in which the case is pending, to direct the publication, by necessary implication imposes upon the judge or clerk the duty to enter such order as is appropriate in that particular case, which order should therefore properly designate the newspaper in which it is directed to be published. If this be not the proper construction of the statute, the requirement of a specific order is superfluous. Upon the filing of such an affidavit, the statute authorizes a publication; but the requirement of an order in the case as an additional prerequisite clearly confers upon the court or clerk the jurisdiction, and therefore the corresponding duty, to select the newspaper in which it shall be published. Thus construed, the statute does not authorize publication to be made at the option of the plaintiff "in any newspaper in the state," as is claimed, but only in such newspaper as may be directed by the judge or clerk in the order. There is a presumption that the impartial officials charged with this duty will require the publication to be made in such newspaper as is most likely to give notice to the defendant. Under a statute so safeguarded, the courts should not run a race of opinion with the Legislature and say that it is not probable that such a publication will give sufficient notice. If the language of the statute is fairly susceptible of two constructions, under one of which it is valid and under the other invalid, the courts should adopt the construction which sustains its validity, rather than the other, for there is always the presumption that the Legislature intended to respect constitutional inhibitions and to pass a valid statute.

In the case of *Wytheville Ins. Co. v. Stultz*, supra, it does not appear that the defendant claimed that it did not have notice, and in the case in judgment the defendant in fact had ample notice, because it appeared at the very first rules to which the process was returnable and filed its plea to the jurisdiction of the court; so that, accord-

ing to experience in these two cases, it appears that the defendants did receive the notice in due time and appeared and defended, and such notice and opportunity constitute the essential characteristics and only requisites of due process of law as used in this connection.

In *Nelson v. Chicago, etc., R. Co.*, 225 Ill. 197, 80 N. E. 100, 8 L. R. A. (N. S.) 1186, 116 Am. St. Rep. 133, it is held that publication of process and mailing a copy thereof is due process of law, following the former decision of *Bickerdike v. Allen*, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 732; and the case of *Clearwater Mercantile Co. v. Roberts, etc., Shoe Co.*, 51 Fla. 176, 40 South. 436, 4 L. R. A. (N. S.) 117, 120 Am. St. Rep. 153, holds a statute giving notice to domestic corporations by publication in a newspaper in the county in which the action is instituted to be due process of law under the Florida statute. *Hinckley v. Kettle River, etc.*, 70 Minn. 105, 72 N. W. 835, holds that a statute authorizing service of process on a state official, if there be no officer of a domestic corporation in the state, and by mailing a copy to the corporation, affords due process and is valid. Note, 50 L. R. A. 585.

While the question is a close one, and there is room for a fair difference of opinion, we decline to overrule *Ward L. Co. v. Henderson-White Mfg. Co.*, supra. The question will soon be removed from the forum of debate by a wise provision of the new Code, which becomes effective January 13, 1920, because section 6063 (Report of Revisors, p. 2013) omits the clauses of section 3225 here involved and provides that whether there be an agent in the city or county in which the suit, action, or proceeding is commenced or not, process may be sent to the county or city in which is located the principal office of a domestic corporation, and there be served on any officer or agent of such company found at such office.

[8] The defendant demurred to the evidence in the trial court, and its demurrer was overruled. We think that the demurrer raises no new question and none that requires any discussion. The action was brought in the name of the agent with whom and in whose name the contract in writing was made, and who had an interest therein. While there can, of course, be only one satisfaction of the debt, it is clear that such an agent has the right to sue upon the contract in his own name. *Hartshorne v. Whittles*, 3 Munf. (17 Va.) 357; 31 Cyc. 1564, 1619, and 1621, and cases cited; *Leterman v. Charlottesville, L. Co.*, 110 Va. 772, 67 S. E. 281; *Deitz v. Prov. Wash. Ins.*, 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

Affirmed.

BURKS, J., dissents.

(124 Va. 150)

CORE v. WILHELM.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. TRIAL \S 156(3)—DEMURRER TO THE EVIDENCE.

On demurrer to plaintiff's evidence, the truth of the evidence and all just inference which a jury might draw therefrom must be admitted.

2. MUNICIPAL CORPORATIONS \S 706(6)—AUTOMOBILE COLLISION—NEGLIGENCE—EVIDENCE.

In action by pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, question of defendant's negligence *held* for the jury.

3. MUNICIPAL CORPORATIONS \S 705(2)—USE OF STREETS—RECIPROCAL RIGHTS.

The rights of a pedestrian and one operating automobile at a street crossing are equal and reciprocal.

4. MUNICIPAL CORPORATIONS \S 705(10)—AUTOMOBILE COLLISION—DUTY OF PEDESTRIAN.

The rule of look and listen applicable to grade crossings of steam railroads is not applicable to a pedestrian about to cross a street.

5. MUNICIPAL CORPORATIONS \S 705(10)—AUTOMOBILE COLLISION—DUTY OF PEDESTRIAN.

The nature of duty imposed upon a pedestrian about to cross a city street, where motor vehicles of all kinds are frequently passing, is to use such care as a person of ordinary prudence would use under like circumstances.

6. MUNICIPAL CORPORATIONS \S 706(7)—COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a pedestrian, injured while crossing a street where motor vehicles of all kinds are frequently passing, used the proper degree of care, is ordinarily a question for the jury.

7. MUNICIPAL CORPORATIONS \S 706(7)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In action by pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, question of contributory negligence *held* for the jury.

8. MUNICIPAL CORPORATIONS \S 706(3)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In action by plaintiff pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, defendant had the burden of proving contributory negligence.

9. MUNICIPAL CORPORATIONS \S 706(7)—AUTOMOBILE COLLISION—CONTRIBUTORY NEGLIGENCE—DEMURRER TO EVIDENCE.

In the absence of evidence as to want of care by a pedestrian injured by an automobile, the jury would have been warranted in inferring that plaintiff was not negligent, and

hence on demurrer to the evidence by the defendant the court must so find.

Error to Circuit Court of City of Norfolk.

Action by N. J. Wilhelm against Mrs. W. A. Core and another. Judgment against defendant named, and she brings error. Affirmed.

Baird & Swink, of Norfolk, for plaintiff in error.

Levy & Mitchell, of Norfolk, for defendant in error.

BURKS, J. This is an action to recover damages for a personal injury inflicted on the plaintiff by the defendant by striking him with an automobile at a street crossing in the city of Norfolk. The collision and the consequent injury to the plaintiff is not denied, but the defense is that the defendant was not negligent, or, if she was, that the plaintiff was also guilty of negligence proximately contributing to his injury. The defendant offered no evidence, but demurred to the evidence offered by the plaintiff. The jury assessed the plaintiff's damage at \$2,000, and the court overruled the defendant's demurrer and entered up judgment on the verdict for the plaintiff. To that judgment this writ of error was awarded.

The collision occurred at a regular crossing of Granby street in the city of Norfolk, but the details of it are very meager. Only two witnesses testify as to what occurred at the time—the plaintiff and a policeman. The plaintiff was a Russian, who could neither understand nor speak the English language, and gave his testimony through the medium of an interpreter. He arrived in the city by boat from Newport News only a few hours before the accident, and, after walking up Granby street for some distance, was attempting to cross in quest of Church street, to which he had been directed. His account of what occurred is that he went to the corner and attempted to cross Granby street, and proceeded as far as the first track of the street car line, when he was struck by the automobile which ran over his ankle and also badly injured one of his wrists. He says he looked just when he left the sidewalk, and that there was no automobile in that block, but that "there was an automobile in the other block"; that the latter was a long distance from him, and was far enough away for him to cross the track; that no gong was sounded or bell rung; and that he did not hear the machine approaching. On cross-examination, he states that he came from a city in Russia-Poland, where they have automobiles and street cars, that the whole street was empty, and that the automobile which struck him was the only one in the block at the time. When asked what

part of the machine struck him, he replied, "If he could see it, he would run away from it." This is practically all of his testimony relating to the accident. His wounds were of quite a serious nature. The policeman's statement is that he could not tell how many machines were in the block at the time, but that he saw the defendant coming down Granby street at 5 minutes to 7 on November 2d; that she ran into the plaintiff and knocked him out into the street; that he "saw the man fall from the automobile"; that she never made any attempt to stop after striking him until he stopped her; that she did not go back with the machine to pick him up; and that he did not hear her blow a horn, or ring a gong. He estimated the distance of the scene of the accident from him at 150 feet. He also stated that the street lights were burning at the time. The defendant, who was called as witness for the plaintiff, admitted that she was operating an electric automobile which came in contact with the plaintiff on Granby street, Norfolk, Va., on November 2, 1916. The foregoing is the substance of the evidence demurred to, and is given largely in the language of the witnesses themselves.

[1, 2] Admitting the truth of this evidence and all just inferences which a jury might have drawn from it, as must be done on a demurrer to the evidence, the question is: Would a jury have been warranted in finding a verdict for the plaintiff? The rights of the parties at the crossing were equal and reciprocal, and it was the duty of each to look out for the other. The defendant saw, or ought to have seen, the plaintiff attempting to make the crossing, and it was her duty to have had her car under such control that she could have stopped it if necessary in order to have avoided the accident. The injury occurred at a corner where the defendant might reasonably have expected to encounter foot passengers crossing the street, and it was her duty to keep a lookout for them. Her view was unobstructed—"there was no other automobile on the block"—and she had no right to endanger the lives or limbs of other people on the street whose rights in the street were equal to her own. She was operating an electric automobile, approaching a crossing which the plaintiff was upon and attempting to cross, and she saw or ought to have seen him, and yet gave no signal of her approach. There is no evidence of the speed at which she was driving, or that the speed was lessened. The jury would have been warranted, under these circumstances, in inferring that she did not have her car under such control as would have enabled her to have avoided the injury, and that she was negligent in its operation.

[3-6] The rights of the plaintiff and of the defendant at the crossing were equal and reciprocal. Neither had the right of way over

the other, and each had the right to assume that the other would discharge the duty imposed upon him. The rule of "look and listen" applicable to grade crossings of steam railroads is not applicable to cases of this kind. The measure of duty imposed upon a pedestrian about to cross a city street, where motor vehicles of all kinds are frequently passing, is that he shall use such care as a person of ordinary prudence would use under like circumstances, and whether or not he did use such care is ordinarily a question for the jury. *Va. Ry. & Power Co. v. Boltz*, 122 Va. 649, 95 S. E. 467. Of course, he cannot blindly or negligently expose himself to danger; but he is not required to be continuously looking and listening to ascertain if automobiles are approaching, under penalty that upon failure to do so, if he is injured, his negligence must be conclusively presumed. *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 845, 4 Ann. Cas. 396; *Shea v. Reems*, 36 La. Ann. 966.

In *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487, the negligence of the defendant was admitted, but there was conflict in the testimony as to the plaintiff's contributory negligence. In that case it was said:

"The footman is not required, as a matter of law, to look both ways and listen, but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control. *Buhrens v. Dry Dock, E. B. & B. R. Co.*, 53 Hun, 571 [6 N. Y. Supp. 224], affirmed 125 N. Y. 702 [26 N. E. 752]. At such street crossings both pedestrians and drivers are required to exercise that degree of prudence and care which the conditions demand. *Brooks v. Schwerin*, 54 N. Y. 343. It is impossible to formulate any more precise definition of these relative rights and duties."

In *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214, the facts were that the plaintiff alighted from a street car, at the front end of it, which was customary, and started across the track in front of the car to go to the opposite side of the street. He hesitated at first, but the motorman told him to go ahead, and he proceeded to cross. As he stepped beyond the end of the car, the automobile, which was running at 10 or 12 miles an hour, struck him and knocked him down. He was just stepping on the other track, about 4 feet from the end of the car, when the automobile struck him. It was a rainy day, and he had his umbrella raised and was walking rapidly. He testified that the street car obstructed the view down the street, and that as he passed the car he looked down the street, but did not see the automobile approaching, and failed to see it until too late to get out of the way. There was ample space between the street

car and the other side of the street for the automobile to pass. It was there said:

"It cannot be held that the failure of a pedestrian upon a public street to look up and down the street before crossing constitutes, under all circumstances, negligence as a matter of law. There is no statute or rule of law which raises a presumption of negligence from the failure of a pedestrian, on a public street, not at a railroad crossing, to look. The rule is that a pedestrian, having equal rights with others to the use of the streets, must exercise ordinary care for his own safety, and this is generally a question for the jury to say whether such care has been exercised."

While the pedestrian must bear in mind the dangers he may encounter in the street, he is only bound to use such precautions for his own safety as the danger to be apprehended would reasonably suggest to a person of ordinary prudence.

[7, 8] In the case at bar it affirmatively appears that the plaintiff looked just as he started to cross the street, and the way appeared clear, as there was no automobile in the block. What, if any, further precautions he took for his safety, does not affirmatively appear from the evidence. The failure to take such precautions was a matter of defense, as to which the burden of proof was upon the defendant, unless it was disclosed by the plaintiff's evidence, or was fairly to be inferred from all the circumstances, for it is as much the duty of the defendant to show the negligence of the plaintiff as it is the duty of the plaintiff to show the negligence of the defendant. *Southern R. Co. v. Bryant's Adm'r*, 95 Va. 212, 28 S. E. 183, and cases cited.

[8] The instinct of self-preservation generally forbids the imputation of recklessness, and, in the absence of evidence as to the want of due care on the part of the plaintiff, the jury would have been warranted in inferring that the plaintiff was not negligent, and hence, on a demurrer to the evidence by the defendant, we must so find. In *Southern R. Co. v. Bryant's Adm'r*, 95 Va. 212, 220, 28 S. E. 183, 185, this court, discussing the law applicable to an injury to a traveler at a grade crossing of a steam railroad, uses this language:

"If the defendant company relied upon contributory negligence on the part of the deceased to defeat a recovery by the plaintiff, it is well settled in this state, whatever may be the de-

cisions elsewhere, that the burden was on the company to prove it, unless such negligence was disclosed by the evidence of the plaintiff, or might be fairly inferred from all the circumstances; and, in the absence of such proof, the person injured must be presumed to have been without fault. *B. & O. R. Co. v. Whittington*, 30 Grat. [71 Va.] 805; *Balto. & O. R. Co. v. McKenzie*, 81 Va. 71; *Improvement Co. v. Andrew*, 86 Va. 273 [9 S. E. 1015]; *N. & W. R. Co. v. Gilman*, 88 Va. 239 [13 S. E. 475]; *Kimball & Fink v. Friend*, 95 Va. 125 [27 S. E. 901]. See, also, *R. Co. v. Horst*, 93 U. S. 298 [23 L. Ed. 898]; *R. Co. v. Gladmon*, 15 Wall. 401 [21 L. Ed. 114]; and 2 Wood on Railroads, 1455.

"It cannot be inferred as a matter of law, under the circumstances disclosed by the record, that, because Bryant drove upon the track without stopping, he did not listen. The instinct of self-preservation forbids the imputation of recklessness to any one. Where a traveler is killed at a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. *Kimball & Fink v. Friend*, supra. As has been aptly said by a learned author in discussing this question: 'One cannot fail to call to mind that contributory negligence is as distinctly a wrong in the plaintiff as negligence is in the defendant, and that it is as much against the principles of the law to presume it on the one side as on the other; resulting, therefore, in the conclusion that the defendant can no more avail himself of the one than can the plaintiff of the other.' Bishop on Noncontract Law, § 470."

In *Southern Ry. Co. v. Jones' Adm'r*, 118 Va. 685, 689, 88 S. E. 178, 180, it is held that—

"The inferences to be drawn from the evidence as to contributory negligence must be certain and incontrovertible, or they cannot be made by the court. If, under all the facts and circumstances of the case, it is a question about which reasonably fair-minded men may differ, it must be decided by the jury; and if the jury might have found for the plaintiff, on the defendant's demurrer to the evidence, the court must so find."

See, also, *Perkins v. Southern Ry. Co.*, 117 Va. 351, 85 S. E. 401; *Saunders v. Southern Ry. Co.*, 117 Va. 396, 84 S. E. 650.

We find no error in the judgment of the circuit court, and it is therefore affirmed.

Affirmed.

(124 Va. 460)

WASHINGTON-SOUTHERN RY. CO. v. GRIMES' ADM'R.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. TRIAL \Leftrightarrow 253(4)—INSTRUCTIONS—OMISSION OF DEFENDANT'S THEORY.

In an action for the death of plaintiff's decedent in a collision between the automobile wherein she was driving with her husband and defendant's engine at a public crossing, an instruction, directing a verdict for plaintiff if "defendant was guilty of any negligence alleged in plaintiff's declaration," was erroneous as omitting defendant's theory that decedent was guilty of contributory negligence.

2. TRIAL \Leftrightarrow 296(4, 5)—INSTRUCTIONS—CURE OF ERROR—CONTRADICTORY INSTRUCTIONS.

Where an instruction directing verdict for plaintiff is erroneous as omitting defendant's theory of the defense of contributory negligence, the error cannot be cured by other instructions, since it cannot be said whether the jury was controlled by one instruction or the other.

Error to Circuit Court, Fairfax County.

Action by Caroline H. Grimes' administrator against the Washington-Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Moore, Keith, McCandlish & Hall, of Fairfax, and Eppa Hunton, Jr., of Richmond, for plaintiff in error.

C. V. Ford, of Fairfax, Nicol & Son, of Alexandria, for defendant in error.

WHITTLE, P. Defendant in error, administrator of Caroline H. Grimes, brought this action against plaintiff in error, the Washington-Southern Railway Company, to recover damages for the death of his intestate alleged to be due to defendant's negligence. Plaintiff recovered a verdict for \$5,000, to the judgment upon which this writ of error was granted.

The accident happened at 4:59 p. m. on December 21, 1916, while Joseph H. Grimes and his wife, plaintiff's intestate, were traveling east, in a Ford runabout, along the public highway where it crosses defendant's tracks at Lorton crossing. The automobile was struck by a fast north-bound passenger train, and both of the occupants were instantly killed. Intestate was on the side of the automobile from which the train was coming, and therefore it is contended was in better position to have discovered its approach than was her husband.

Instructions were requested both by plaintiff and defendant. The principal assignment of error for which a reversal of the judgment is pressed is to the giving of the last para-

graph of instruction No. 1 at the request of plaintiff. The instruction is as follows:

"The court instructs the jury that though they should believe from the evidence that Joseph S. Grimes was guilty of negligence whereby Caroline H. Grimes came to her death by reason of the collision of an automobile in which were seated said Joseph S. Grimes and his wife, Caroline H. Grimes, with an engine of the Washington-Southern Railway Company, yet if they further believe from the evidence that Joseph S. Grimes, the husband, was driver of said automobile at the time of said collision, and that his wife neither had nor exercised any control over her husband, in the operation of said automobile immediately prior to said collision or at the time of said collision, the negligence, if any, of said Joseph S. Grimes, cannot be imputed to his wife, the said Caroline H. Grimes; and the jury are further instructed that if they believe from the evidence that the defendant was guilty of any negligence alleged in plaintiff's declaration, whereby the said Caroline H. Grimes came to her death, they should find a verdict for the plaintiff in this case." (Italics ours.)

The correctness of the first part of the instruction is conceded. Va. Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632.

Nevertheless:

"While the negligence of the driver is not to be imputed to the passenger, it is the duty of the passenger to use ordinary care for his own safety. In approaching a grade crossing of a railroad, he should look and listen for approaching trains. The track is a signal of danger to him, and his failure to exercise reasonable precaution for his own protection is contributory negligence and bars a recovery." Southern Ry. Co. v. Jones, 118 Va. 685, 88 S. E. 178.

[1] It was to the last paragraph of the instruction that the first assignment of error was directed. Although the instruction directs a verdict, it omits the theory of the defendant that plaintiff's intestate was guilty of contributory negligence that barred her right of recovery and deprived it of the right to rely on that defense. While we forbear to intimate any opinion on the merits of the defense of contributory negligence as a bar to a recovery, we have no doubt of the sufficiency of the evidence to entitle the defendant to have the jury correctly instructed on that theory of the case.

Judge Harrison, in Virginia & S. W. Ry. Co. v. Skinner, 117 Va. 851, at page 853, 86 S. E. 131, at page 132, in discussing a similar instruction, observes:

"We are of opinion that this instruction is fatally defective, in that it ignores the question of contributory negligence on the part of each of the plaintiffs. The contributory negligence of each of these plaintiffs was relied on by the defendant as a ground of defense, and the evidence tended strongly to show that they were

guilty of contributory negligence and that such negligence continued up to the time of the accident. This court has repeatedly sustained the objection taken to this instruction and held that where the contributory negligence of the plaintiff is relied on as a defense to an action of tort, and the evidence tends to support that view of the case, it is error to instruct the jury to find for the plaintiff if they believe the defendant was negligent, ignoring entirely the contributory negligence of the plaintiff."

[2] We have thus quoted at length from Judge Harrison's opinion, because what he says is as applicable to the case in judgment as it was to the case in which the opinion was delivered. Both cases involved injuries to passengers in automobiles from collisions with railway trains at public road crossings. The two cases are similar in their facts and indistinguishable in principal, and that case, upon the instruction, is decisive of this. Authorities to the same effect might be multiplied, but the above case sufficiently illustrates the doctrine we are considering. It also decides that—

"It is equally well settled that the defect in this instruction is not cured by other instructions given by the court with respect to contributory negligence. That makes a case of contradictory instructions upon a material point, which would require the verdict to be set aside, as it cannot be said whether the jury were controlled by the one or the other."

A number of decisions are cited to sustain the last proposition.

This view renders it unnecessary to notice the remaining assignments of error, which either involve questions controlled by this ruling, or that are not likely to arise at the next trial.

Our conclusion is that the judgment under review must be reversed, the verdict of the jury set aside, and the case remanded for a new trial in conformity with the views herein expressed.

Reversed.

SIMS, J., absent.

(124 Va. 379)

SOUTHERN RY. CO. v. ABEE'S ADM'R.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. RAILROADS \S 312(7)—WARNING SIGNALS—STATUTES—"HIGHWAY CROSSING."

A railroad crossing on extension of an alley from a street to a factory gate, recognized by the railway by the erection of a whistle post, held a "highway crossing" within Code 1904, \S 1294d, subd. 24, requiring engines to give warning signals on approaching highway crossings.

2. RAILROADS \S 312(1)—HIGHWAY CROSSINGS—NEGLIGENCE.

It is negligence for a railway company to run an engine at a high rate of speed without lights or warning over a highway crossing used by large numbers of persons.

3. RAILROADS \S 330(3)—HIGHWAY CROSSINGS—LIGHTS AND SIGNALS.

One who crosses a railroad track at a highway crossing after waiting for a train to pass may assume that any engine or train approaching on the adjacent track will carry lights and give proper signals.

4. RAILROADS \S 346(5)—CROSSING ACCIDENTS—PRESUMPTION OF EXERCISE OF ORDINARY CARE.

It will be presumed, in the absence of proof to the contrary, that one killed by a railroad engine at a highway crossing was in the exercise of ordinary care.

5. RAILROADS \S 346(5)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Where plaintiff's decedent was struck by a locomotive at a highway crossing, the burden of showing contributory negligence was on defendant, unless it was disclosed by plaintiff's own evidence, or fairly inferable from all the facts.

6. RAILROADS \S 312(4), 320—CROSSING ACCIDENTS—DUTY TO MAINTAIN LOOKOUT.

It is the duty of railroad employees running an engine and tender to exercise ordinary care and diligence in keeping a lookout to avoid persons crossing the tracks at a highway crossing, and to warn them of approaching danger.

7. TRIAL \S 296(3)—INSTRUCTIONS.

Where decedent was killed by defendant's locomotive backing across a highway crossing, an instruction that defendant owed the duty of maintaining a lookout was not erroneous as leading jury to believe that a lookout in the rear of the tender should have been maintained, in view of instructions to disregard stricken evidence as to such lookout.

8. TRIAL \S 253(7)—INSTRUCTIONS.

Where plaintiff's decedent was killed by a backing engine at a highway crossing, an instruction held not erroneous as directing a verdict on a partial view of the evidence.

Error to Circuit Court, Pittsylvania County.

Action by Loyd Abbee's administrator against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leigh & Leigh, of Danville, for plaintiff in error.

B. H. Custer, of Danville, for defendant in error.

KELLY, J. On the 15th day of January, 1916, Loyd Abbee was killed at a crossing by a shifting engine owned and operated by the Southern Railway Company. His adminis-

trator brought this action alleging that his death was due to the negligence of the defendant company. There was a verdict for the plaintiff, and thereupon the trial court rendered the judgment under review.

Stated briefly, and in general terms, the negligence complained of was that the engine approached the crossing at a reckless and dangerous rate of speed, in the dark, without lights, and without sounding the whistle or ringing the bell.

As to the most material facts and circumstances bearing upon these charges of negligence, the evidence is in glaring conflict; but the conflict has been conclusively settled for this court by the verdict of the jury. We must look at the case, so far as the facts are concerned, in the light of such of the evidence as tended materially to support the verdict; and, as thus portrayed, it is substantially as follows: The plaintiff's decedent, Loyd Abee, was a young man slightly over 20 years of age, of good habits, strong, active, and intelligent. He was physically well-developed, except that his hearing and power of speech were so limited that he could only utter a few familiar words, like digital numbers and family names, and could only hear loud sounds, like a nearby shout, a gunshot, a train bell or whistle. The accident occurred shortly before daylight, just outside the limits of the city of Danville. Abee lived in Danville, and was on his way to the Boatright furniture factory where he was regularly employed. In going there, like many other persons, he approached the railroad crossing through an alley extending from Stokes street to the gate entering the factory premises. Stokes street runs parallel with the railroad, and is about 160 feet west of the right of way. The crossing in question is between Stokes street and the factory, and the alley along which Abee was traveling crosses the railroad about at right angles. The railroad, which runs north and south at that point, is double-tracked, and trains pass there at frequent intervals, both day and night. Abee came east on the alley and had reached the crossing just as a south-bound passenger train was passing on the track next to him. Shortly after it passed, he crossed the first track, and had started across the second, when he was struck by the tender of a north-bound shifting engine, commonly known as a "shifter," which was moving backwards over the crossing. The conflict of evidence already adverted to is particularly marked as to: (a) The distance between the rear of the passenger train and the crossing when Abee crossed the south-bound track, (b) the rate of speed at which the shifter was moving, (c) the presence of signal lights thereon, (d) the distance from the crossing at which the shifter could have been seen by a man looking for it at that point, and (e) the sounding of the bell and whistle. These are

vital and controlling facts, and the jury accepted the plaintiff's theory upon evidence which tended to show that, when Abee attempted to cross the track, the rear of the passenger train was some distance beyond the crossing, that the shifter was running downgrade at a speed of perhaps 30 miles or more an hour, without any lights, making very little noise by its movement, sounding no whistle or bell, and that in the darkness then prevailing the shifter itself was not visible until within a few feet of the crossing.

[1, 2] Taking up the assignments of error in the order of their importance, the first is that the court ought to have granted the defendant's motion for a new trial on the ground that the verdict was contrary to the law and the evidence. We are of opinion that the motion was properly overruled. The negligence of the defendant company, viewing the evidence as upon a demurrer thereto, must be conceded. The Boatright alley, though owned by the furniture company, was in constant use by numbers of persons, employees of that company and others, who crossed the tracks there every day. The engineer and conductor in charge of the shifter both knew that the crossing was used every day by large numbers of persons at the very hour when the accident occurred; and there was evidence tending to show that the defendant company had recognized it as a highway crossing by the erection there of a "whistle post." It was clearly such a crossing as to fall within the letter and spirit of section 1294d(24) of the Code, requiring the sounding of the whistle and the ringing of the bell by all locomotive engines as a warning of their approach to highway crossings (N. & W. R. Co. v. Bristol, 116 Va. 955-962, 83 S. E. 421); and the case is not at all within the influence of the decision of this court in Washington, etc., Co. v. Fisher, 121 Va. 229, 92 S. E. 809, relied upon by counsel for the defendant company. That it was negligence to run the engine at a high rate of speed over this crossing without lights and without giving timely warning of its approach (all of which the jury may have properly believed was true from the evidence) is a proposition too plain for argument.

[3-5] Was the plaintiff's decedent guilty of contributory negligence? This question we think was likewise concluded by the verdict. We are unable to say, as a matter of law, that he was guilty of any negligence at all. That depends upon the same conflicting evidence which envelops the question of the defendant's primary negligence. There is no middle ground in the case. If, as contended by the railroad company, Abee crossed the south-bound track immediately after the passenger train had passed, and, without looking, stepped directly in front of an engine equipped with lights, giving the statutory

signals, and running at a cautious rate of speed, then there was no negligence in the case at all except his own. On the other hand, if, as the plaintiff claims, the passenger train had passed some distance beyond the crossing, and if the engine was moving in the dark, at a dangerous speed, without sounding any warning, without any lights, then the only negligence which appears is that of the defendant. Abee had the right to assume that any engine or train then coming would carry lights and would give proper signals. If this engine had done these things, since the track was straight for a long distance from the crossing, Abee would certainly have discovered its presence if he exercised ordinary care, and this, in the absence of proof to the contrary, he is presumed to have done. The burden of showing his contributory negligence rested upon the defendant company. The trial court submitted this question to the jury upon an entirely correct instruction (plaintiffs No. 9), as follows:

"The court instructs the jury that as a general rule the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff if relied on as a ground of defense, unless contributory negligence of the plaintiff is disclosed by his own evidence or may be fairly inferred from all the facts and circumstances of the case." *Southern Ry. Co. v. Bryant's Adm'r*, 95 Va. 212, 220, 28 S. E. 183; *Southern Ry. Co. v. Bruce's Adm'r*, 97 Va. 92, 83 S. E. 548; *Core v. Wilhelm*, 98 S. E. 27, decided to-day.

The opinion of this court in *So. Ry. Co. v. Mason*, 119 Va. 256, 89 S. E. 225, cited and relied upon by counsel for the defendant company, is not in any way in conflict with the instruction here approved.

Certain witnesses, who are not contradicted by any direct testimony, stated that they could see Abee as he stood at the crossing while they were at some distance from him, and it is earnestly argued that, as nobody contradicted these witnesses, it necessarily follows, as a fact established without conflict, that Abee himself could see a like distance from the point at which he stood, and must therefore have been able to see the engine before it reached the crossing. There are two sufficient answers to this contention: First, that an electric light which stood near the intersection of Stokes street and Boatright alley threw a dim light down the alley on the crossing so as to probably make objects there visible without giving light to any appreciable distance on either side of the crossing; and, second, there was direct testimony that the engine could not be seen until it had arrived at the crossing, and that, after Abee was struck and his body had been carried a short distance from the crossing, the darkness was such as to make it necessa-

ry to strike matches and use lanterns before the persons who went to him could determine whether he was a white man or a negro.

[6] The next error assigned and discussed in the petition upon which this writ was awarded involves the action of the court in giving instructions 8 and 9 for the plaintiff. We have already quoted instruction 9, and cited the authorities which show that it was correct. Instruction 8 was as follows:

"The court instructs the jury that it was the duty of the defendant's employes who were controlling the engine and tender on the morning of January 15, 1916, to have exercised ordinary care and diligence in keeping a lookout to avoid injury to the plaintiff's intestate and to warn him of approaching danger."

[7] In the light of the facts of this case as already stated, it is manifest that this instruction was free from error. The objection urged to it is that it tended to mislead the jury because during the course of the trial the plaintiff offered proof of an alleged rule of the company requiring the crew in charge to keep a man as a "lookout" on the rear of the tender; this proof having been at first allowed, and afterwards stricken out by the court. The contention here is that, because such evidence was first admitted and afterwards excluded, the giving of the instruction in question might have led the jury to believe that it was the duty of the company to have a man riding on the rear of the tender at the time of the accident. The court, in directing the jury to disregard the evidence about the rule, explicitly told them that the rule did not apply to the case on trial, and we are unable to appreciate the force of the objection to the instruction under consideration. As an independent proposition, it was entirely correct, and the introduction of the proof in question, in view of the express terms in which it was afterwards stricken out, could not in any reasonable probability have caused the jury to misunderstand the instruction.

The defendant asked the court to give two instructions, respectively designated as "B" and "C," which the court gave as requested, except that it added to each the words, "the approach of which could have been seen by him if he had looked in that direction," appearing in italics in the instructions as here set out.

Instruction B:

"The court instructs the jury that if they believe from the evidence that, when Loyd Abee approached the tracks of the Southern Railway Company at Boatright's Crossing, a train on the Danville & Western Railroad Company was passing over said crossing on the south-bound track going south; that said Loyd Abee stopped to allow said train to pass, and, immediately after said train had passed, proceeded over said south-bound track in the rear of said train and on to the north-bound track, imme-

diately in front of an engine and tender moving on said north-bound track, *the approach of which could have been seen by him, if he had looked in that direction*, and that when he stepped upon said north-bound track he was so near to said engine and tender that it could not, in the exercise of ordinary care, have been stopped in time to have avoided striking him—then they should find for the defendant in this action." (Italics added.)

Instruction G:

"The court instructs the jury that it is not the duty of the engineer of a railroad engine or train to stop when he sees a person standing near the track in a place of safety. He has the right to assume that the person will not go upon the track in front of a moving engine or train in plain view but will remain in a place of safety, and the duty of the engineer to stop his train or slow down does not arise until the engineer sees that the person is about to go upon the track in front of his engine or train, and if the jury believe from the evidence that Loyd Abee was standing near the track in a place of safety, and then went upon the track in front of the engine and train of the Southern Railway Company, *the approach of which could have been seen by him if he had looked in that direction*, and so near thereto that it could not be stopped in time to avoid injuring him, then the said Loyd Abee was guilty of such negligence on his part as bars a recovery in this action, and they should find for the defendant in this suit." (Italics added.)

[8] It is urged that the court erred in adding the italicized words to each of these instructions; but we are of opinion that the addition was entirely proper, and that both would have been misleading and erroneous without such addition. The purpose of both instructions was to present to the jury the defendant's theory that the plaintiff had blindly and negligently walked in front of a moving engine, but they ignored the plain-hear the engine because of the defendant's own breach of duty. Thus, the instruction B as offered told the jury that they must find for the defendant if Loyd Abee stepped on tiff's contention that he could neither see nor the track in front of the engine after it was too late for the engine to be stopped in time to avoid the accident (the very thing the plaintiff admits, but charges to the default of defendant), leaving out entirely the plaintiff's theory that Abee could not have seen or heard the engine up to the time when he went on the track. In other words, the instruction peremptorily directed a verdict for the defendant upon a partial view of the evidence, which this court has repeatedly held to be reversible error. *Washington So. Ry. Co. v. Grimes' Adm'r*, 98 S. E. 30, decided to-day.

Instruction G, as offered, apparently started out with the assumption that the plaintiff's decedent could see the engine; but,

when it came to the proposition upon which it told the jury to find for the defendant, it omitted that assumption, and thus became amenable to the same fault which vitiated instruction B as offered.

We have discussed the only errors assigned in the petition. In the reply brief, the action of the trial court as to some of the other instructions is attacked, and, while this is not a sufficient assignment of error, we have considered all the questions thus made, and are of opinion that the court committed no error in regard to any of them.

The judgment is affirmed.
Affirmed.

(124 Va. 296)

PAYNE v. BUENA VISTA EXTRACT CO.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. QUIETING TITLE ⇨23—CLOUD ON TITLE—POSSESSION AND LEGAL SEISIN.

Prior to Pollard's Code 1904, § 2728, one could not maintain bill quia timet to remove cloud on title, unless having the legal title and the actual possession; and under such section he could not do so unless having the legal seisin, undisturbed by the possession of another, unless for some special reason the remedy by ejectment was inadequate.

2. ESTOPPEL ⇨68(2)—POSITION IN JUDICIAL PROCEEDING—QUIETING TITLE.

Maintenance of suit quia timet to remove cloud on title could not be justified on the theory that plaintiff's legal seisin was undisturbed, notwithstanding defendant's actual possession, because of defendant's claim to be a vendee of plaintiff's grantor, and the rule that the entry and possession of a vendee is tolled against his vendor and those in privity of estate with the vendor; plaintiff having throughout the litigation denied existence of any contract of sale to defendant.

3. QUIETING TITLE ⇨23—CLOUD ON TITLE—POSSESSION—WHITE ACT.

Bill quia timet to remove cloud on title can, under the White Act, amending Pollard's Code 1904, § 3058, be maintained, though plaintiff be not in possession, if otherwise it could be maintained.

4. QUIETING TITLE ⇨19—CLOUD ON TITLE—EXERCISE OF JURISDICTION—DISCRETION.

Exercise of jurisdiction to remove cloud on title by bill quia timet is discretionary, where plaintiff has legal title and actual possession, only when there is doubt whether there is such a cloud that injury may reasonably be apprehended therefrom.

5. CONSTITUTIONAL LAW ⇨70(3)—JUDICIAL FUNCTIONS—POLICY OF LAW.

The Legislature having power to authorize bill quia timet to remove cloud on title, though defendant be in possession, the argument of policy against a law so doing cannot avail with the court.

6. JUDGMENT §570(12)—“DISCONTINUANCE”—EFFECT.

Under Pollard's Code 1904, § 3312, providing that a pending case, wherein for more than five years there has been no order or proceeding except to continue it, may be ordered struck from the docket, and it shall thereby be “discontinued,” such order is not a bar to a subsequent suit for the same cause; a “discontinuance” being in effect a nonsuit, which simply puts an end to the present action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discontinuance.]

7. JUDGMENT §562—RES JUDICATA—JUDGMENT ON MERITS.

A final order, to be a bar to a subsequent suit on the same cause of action, must be on the merits.

8. JUDGMENT §570(16)—BAR—DISMISSAL—RETRAXIT.

An order of dismissal is not a retraxit, which is a bar to another action for the same cause.

9. JUDGMENT §562—CONCLUSIVENESS OF JUDGMENT—STATUTE.

The judgment in ejectment, which Pollard's Code 1904, § 2756, provides shall be conclusive as to the title or right of possession established in the action, is one on the merits.

10. VENDOR AND PURCHASER §221—BONA FIDE PURCHASER—POSSESSION UNDER UNRECORDED CONTRACT—STATUTE.

Amendment of Code 1887, § 2465, by Acts 1895-96, c. 758 (Pollard's Code 1904, § 2465), by addition of proviso that possession of any estate without notice shall not be notice to a subsequent purchaser for value, affected possession under unrecorded contract existing at the time of the amendment, as regards subsequent purchasers, so that such possession was not constructive notice, as it was before the amendment.

11. CONSTITUTIONAL LAW §109—VESTED RIGHTS—CHANGING RULE OF EVIDENCE—POSSESSION AS CONSTRUCTIVE NOTICE.

Amendment of Code 1887, § 2465, by Acts 1895-96, c. 758 (Pollard's Code 1904, § 2465), that as to subsequent purchasers possession of land under unrecorded contract was not constructive notice, did not divest one then in such possession of any vested right of property; it merely changing a pre-existing rule of evidence.

Appeal from Circuit Court of City of Lynchburg.

Bill quia timet by the Buena Vista Extract Company against T. O. Payne. Decree for plaintiff, and defendant appeals. Affirmed.

This suit in equity was instituted in the court below by the appellee, which will be hereinafter designated the Extract Company, against the appellant, who will be hereinafter designated as Payne, by a bill quia timet to remove an alleged cloud upon the title

to a certain tract of uninclosed wild mountain land, of certain boundaries supposed to contain over 300 acres, which will be hereinafter designated the 300-acre tract.

The Extract Company and Payne both claim title to the 300-acre tract as derived from a common source, namely, Henry Loving, executor of John Thompson, deceased, hereinafter designated Loving.

Payne's claim of title rests upon a deed to him from A. W. Fitzgerald and wife, of date May 19, 1905, duly recorded May 23, 1905, conveying the 300-acre tract, and upon an alleged executory contract in writing between Loving and A. W. Fitzgerald and his father, evidencing a purchase by the two latter from Loving of a tract of land of definite boundaries, but of uncertain acreage, hereinafter designated the 375-acre tract, which included the said 300-acre tract within its bounds. There is evidence in the cause that A. W. Fitzgerald was let into actual possession, under said contract, of a part of such 375-acre tract outside the bounds of the 300-acre parcel thereof, and that he from time to time exercised acts of ownership over the 300-acre tract, such as the cutting of timber therefrom, from some time in 1880 until the execution of said deed to Payne, and, indeed, afterwards down to the institution of the suit now before us, and after that, as will be hereinafter again mentioned, claiming the equitable title to the whole of this land under said contract as color of title.

There was another claim of title by A. W. Fitzgerald to a portion of said 375-acre tract, to wit, a parcel of 43 acres of it, not embraced in said 300-acre parcel, which it is not material, however, to further mention.

There is much conflict in the evidence in the cause over the questions of fact mentioned in the preceding paragraphs, but it will be assumed that the preponderance of the evidence shows that the contract mentioned existed; that a valuable consideration therefor existed (consisting of a giving up by the Fitzgeralds to Loving of the possession of a parcel of land as to which there was a controversy between such parties), and that other circumstances existed, not material to be mentioned, which made the contract valid and binding upon Loving and upon all subsequent purchasers from him with actual or constructive notice of such contract; and that A. W. Fitzgerald was in the actual possession aforesaid of a part of the 375-acre tract of land, claiming the right to hold possession of the whole of it under said contract as color of title, as aforesaid, at the time that the Extract Company first purchased and obtained its deed to its land hereinafter more particularly mentioned, and at the time the latter obtained its second deed to

the same land, as will be also hereinafter more particularly set forth.

Payne makes no claim of title to said 300-acre tract of land as acquired by adverse possession of himself or of those under whom he claims title thereto.

The contract aforesaid was never recorded.

The Extract Company, as a complete purchaser for value thereof, derived title to a larger tract of land, which included in its boundaries the said 375-acre tract, by successive deeds, as follows (the full names of some grantors and grantees being omitted, as immaterial):

Loving to Rittenhouse, of date October 16, 1883.

Rittenhouse to Whelen, of date October 19, 1883.

Whelen to Buena Vista Extract Company, December 9, 1903.

Buena Vista Extract Company, to Leas & McVitty, December 14, 1906.

Leas & McVitty back to Buena Vista Extract Company, April 1, 1910.

The testimony in the cause of A. W. Fitzgerald is that Whelen, at the time of the purchase by and the conveyance aforesaid to the latter, had no notice of Fitzgerald's claim of equitable title. But according to the preponderance of the evidence in the cause Whelen was afterwards informed of such claim, and, as shown by the record, he instituted an action of ejectment against A. W. Fitzgerald to recover said 375-acre tract of land by declaration filed at the second January rules, 1901, with a statement that mesne profits were demanded for the unlawful use and occupation of such land, for five years next preceding the filing of the statement, of a certain sum per year, and also certain damages for shingles, tan bark, locust plins, and other timber alleged to have been unlawfully taken from the land. The defendant entered a plea of not guilty. On July 31, 1908, the following order was entered in that case:

"Alfred Whelen v. A. W. Fitzgerald.

"In Ejectment.

"It appearing to the court that no order has been entered in this case for more than five years, upon motion of the defendant it is ordered that it be stricken from the docket."

On December 10, 1908, the following other order was entered by the same court in which said action of ejectment was instituted as aforesaid:

"Alfred Whelen v. A. W. Fitzgerald.

"This day came the Buena Vista Company, by its attorneys, and, representing to the court that it has purchased the title of the plaintiff to the lands in litigation here, who has conveyed the same to said Buena Vista Extract Company by deed, moved the court that this cause, which, by order entered at the July term, 1908,

was stricken from the docket, no order therein having been entered for more than five years, be reinstated and hereafter proceeded in the name of said Buena Vista Extract Company. And, counsel for defendant being absent from court, it is ordered that this motion be docketed and continued to the first day of the next term."

On July 24, 1916, after the cause before us was instituted, the following further order was entered by the court last named:

"Alfred Whelen v. A. W. Fitzgerald.

"In Ejectment.

"On motion of Buena Vista Extract Company, by counsel, the motion heretofore (on December 10, 1908) made by said Buena Vista Extract Company that this cause be reinstated upon the docket and be hereinafter proceeded in in its name, which was then docketed and continued, is now dismissed."

The cause before us was instituted on November 4, 1915. At that time the plaintiff in such suit was not in actual possession of said 300-acre tract, or any part of it. It was not in the actual occupancy even of any part of its larger tract of land, so far as the record discloses. The only acts of possession of the Extract Company shown by the record consisted in the patrol of its larger body of land, including the 300-acre tract, by rangers who passed over parts of such land at intervals of several months, and whose duties were to report any trespassing discovered and to protect the timber against fire.

Moreover, A. W. Fitzgerald was then still in actual occupancy of something less than 43 acres of said 375-acre tract, claiming the equitable title to the residue, which consisted of said 300-acre tract, under the above-mentioned contract, under which he had originally taken such actual possession as aforesaid. He still held such possession under such claim and color of title, as he testifies, in substance, in the cause, notwithstanding the said deed from himself and wife to Payne, because under an agreement between himself and Payne, he (Fitzgerald) still remained the beneficial owner of said 300-acre tract after such deed was made. This testimony was given in the presence of Payne, who did not testify, or introduce any evidence in the cause, to the contrary; and there is other evidence in the cause tending to prove such continued beneficial ownership in A. W. Fitzgerald.

Further mention of material facts will be found in the opinion below.

Volney E. Howard, of Lynchburg, for appellant.

Wm. A. Anderson, of Lexington, for appellee.

SIMS, J. (after stating the facts as above). Among the questions presented by the as-

signments of error, those involving the construction of the statute law of the state in the particulars hereinafter mentioned are novel in this jurisdiction and of exceptional interest and importance. We are indebted to the learned and able arguments of counsel on both sides of the cause, and we will consider and determine the questions presented in their order as stated below.

The first question we have to consider is this:

1. Did the court below have jurisdiction of this suit in equity by bill quia timet to remove a cloud upon the title to the 300-acre tract of land mentioned in the above statement?

We are of opinion that, under the statute presently to be cited, this question must be answered in the affirmative.

The Extract Company takes the positions: (a) That such jurisdiction existed independently of statute, because it was in possession of the 300-acre tract of land, and for that reason could not maintain an action of ejectment; and that, if this be not so (b) such jurisdiction was conferred by what is designated as the "White Act," enacted February 20, 1912, amending section 3058 of the Code, and contained in Acts 1912, pp. 76-78, and 4 Pollard's Code, § 3058.

[1] (a) Now, it is true that, if the Extract Company, at the time it instituted this suit, had had actual possession of the 300-acre tract of land (having, as it did, the legal title to the land), it could have maintained this suit without the aid of the statute next above mentioned, because, in such case, such plaintiff would have had no remedy at law by action of ejectment (Hogg's Eq. Pr. § 46, pp. 82, 83); but it appears from the statement of facts preceding this opinion that it did not have such actual possession. It is also true that under the statute in Virginia (Pollard's Code 1904, § 2726), if the Extract Company at such time had had the legal seisin of the land, undisturbed by any actual possession of another, it might have maintained such suit against the defendant, Payne, as a "person claiming title thereto," without the aid of the White Act. *Stearns v. Harman*, 80 Va. 48, 54, 55; *McNamara v. Boyd*, 112 Va. 145, 70 S. E. 694. But the Extract Company and those under whom it claimed and derived title had their legal seisin of said land disturbed by the actual possession of A. W. Fitzgerald, set forth in the statement preceding this opinion, taken and held under the claim of equitable title also set forth in such statement. Legal seisin will not support the equity jurisdiction to remove clouds from title, where the plaintiff is not in actual possession, unless the possession be vacant. 2 Story's Eq. Jur. (13th Ed.) note on p. 11.

[2] The rule of the common law that the entry and possession of a vendee is tolled as against his vendor and those in privity of

estate with the latter does not differentiate the cause before us; for the position of the Extract Company throughout this litigation has been that it denied the existence of any contract of sale to the Fitzgeralds. Therefore it could not have taken the position in a bill quia timet that A. W. Fitzgerald was a vendee of its predecessor in title, and that for that reason its legal seisin was undisturbed. Hence the Extract Company could not have maintained a suit quia timet in the premises on the jurisdictional ground that it had undisturbed legal seisin of the land.

The Extract Company therefore had its remedy at law by action of ejectment to try the title to and to recover the possession of said land; and so far as appears from the allegations of the bill or the evidence in the cause, such remedy was complete and adequate. No allegation is made in the bill of any impending injury or damage, to redress which the remedy at law aforesaid was inadequate. Therefore, prior to the White Act, the Extract Company could not have maintained this suit to remove a cloud from its title, on the jurisdictional ground that it had no remedy at law by action of ejectment, nor on the ground that that remedy was inadequate.

[3] (b) We come now to the consideration of the question whether under the White Act this suit can be maintained?

This act, so far as material, is as follows:

" * * * Whenever the circuit and corporation courts have jurisdiction on the chancery side to remove clouds from title to real estate by bill quia timet, in case the party filing such bill were in possession of such real estate, such courts shall have jurisdiction to maintain such a bill whether the party filing the same be in possession of such real estate or not. And any suit now pending to remove clouds from title, in which a final decree has not been entered, which, but for this act, would be dismissed for want of jurisdiction, shall be retained by the court and proceeded in as if brought after this act. * * *"

This statute, therefore, confers a jurisdiction on the courts mentioned which they did not possess as the law was before the enactment of the statute; and it confers such jurisdiction in all cases of bills quia timet, where the plaintiff is not in possession of the real estate affected, in suits instituted in one of the courts mentioned, where that court would have had jurisdiction of the case, as the law stood prior to the act, if the plaintiff had been in possession of such real estate at the time the suit was brought; in other words, the statute confers such jurisdiction in such a suit in all cases where the court, but for the act, would, under the law as it stood aforesaid, have to dismiss the suit on the sole ground that the plaintiff was not in possession of the real estate affected at the time the suit was instituted. Such a

dismissal of such a suit on such ground was plainly what the act, in the language of it above quoted, sought to prevent. That was the mischief in the pre-existing law which this part of the statute meant to cure, as is manifest from the language used.

The statute leaves undisturbed the jurisdiction of suits by bills quia timet as it existed prior thereto, in cases where the plaintiff is in possession of the real estate affected at the time of suit brought. And we are not concerned in the cause before us with any consideration of the situations in which such a plaintiff may maintain a suit in equity on other grounds than that of removing a cloud from his title, such as to avoid a multiplicity of suits or to enjoin a trespasser; nor, indeed, are we here concerned, beyond what is said above, with the question of when a plaintiff not in possession of real estate may maintain a suit in equity to remove clouds upon the title or to enjoin a trespasser, although the plaintiff may have the legal title to the land, on the ground that his remedy at law is inadequate; nor with the question of when a plaintiff in or out of such possession may maintain a suit in equity to remove a cloud from his title on the ground that his title is equitable, which last named jurisdiction is the subject of a portion of the White Act that is not involved in the cause before us. Our consideration of the subject in hand, therefore, is confined to the new jurisdiction conferred on the courts aforesaid by that portion of the White Act which is above quoted.

Now, prior to the White Act, the courts mentioned had jurisdiction on the chancery side to remove clouds from title to real estate in all suits by bills quia timet, where the plaintiff held the legal title to such real estate and was in actual possession of it, if the deed, or other instrument or proceeding sought to be canceled, in truth constituted a cloud upon the title, as does the deed to Payne in the cause before us. 4 Pomeroy's Eq. (3d Ed.) § 1398; Hogg's Eq. Pr. § 46, pp. 82-85; 1 Barton's Ch. Pr. (2d Ed.) pp. 299, 300; Carroll v. Brown, 28 Grat. (69 Va.) 791; Steinman v. Vicars, 99 Va. 598, 39 S. E. 227; Va. Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020; Kane v. Va. Coal & Iron Co., 97 Va. 329, 33 S. E. 627; Smith v. Thomas, 99 Va. 86, 37 S. E. 784. The ground upon which this jurisdiction rests in such class of cases, as appears from the authorities on the subject, is that injury from the continued existence of the cloud upon the title is reasonably apprehended by the plaintiff, and that, being in possession of the real estate affected, he cannot maintain an action of ejectment to try the title, and hence he is, in such case, without any remedy whatsoever at law, and the injury would be irreparable, but for the remedy in equity. In some of such cases it may be a matter of some doubt

whether the instrument or proceeding which is alleged to be a cloud upon the title is in truth such a cloud thereon that the plaintiff may reasonably apprehend injury therefrom, as where doubt exists as to whether an instrument is so apparently void on its face that it creates no cloud on the title. 2 Story's Eq. Jur. (13th Ed.) §§ 698-710. And it is to the question of the reasonableness of the apprehended injury from the alleged cloud upon the title that Mr. Barton refers on page 284 of his valuable work (1 Barton's Ch. Pr. [1881 Ed.]), where, in reference to the relief by bill quia timet, he says:

"The application of this species of relief is addressed to the sound discretion of the court under the circumstances of the particular case, and relief will ordinarily be afforded where injury may reasonably be apprehended; the ground for such relief resting upon the danger of irreparable mischief."

Mr. Barton cites, to support such text, 3 Daniell's Chy. Pr. (4th Am. Ed.) 1961, note, and Story's Eq. Jurisprudence (13th Ed.) supra, § 710.

[4] The quotation next above is cited and relied on for the appellant, Payne, to sustain the position that prior to the White Act the courts mentioned did not have jurisdiction to remove clouds from title to real estate in all suits by bills quia timet, where the plaintiff held the legal title to such real estate and was in actual possession thereof at the time of suit brought; it being urged that such jurisdiction exists only where its exercise is allowed in the sound discretion of the court. The exercise of such jurisdiction was (and is) undoubtedly in the sound discretion of such courts, when the reality of the apprehended danger of injury from the alleged cloud upon the title is in question, as aforesaid, but not otherwise. If, as in the instant cause, there be no doubt upon the point of the reality of such apprehended danger—if it be a real cloud upon the title which exists—and the plaintiff has the legal title to the land and the actual possession of it, the courts mentioned in every such case have the jurisdiction under consideration and had it prior to the White Act. And prior to the White Act it was precisely when such a case was alleged in the pleading that it was held that, if—

"upon the hearing of the cause the evidence failed to show his [the plaintiff's] possession, the bill would be dismissed for want of jurisdiction in a court of equity." Smith v. Thomas, 99 Va. at page 87, 37 S. E. 784, citing a number of Virginia cases, including those above cited.

[5] The ancient landmarks of the exclusive jurisdiction at law to settle controverted boundaries of land and to try the title thereto by action of ejectment, and the ill effects that may flow from the disruption of so many established principles as would result from the allowance of a bill to be maintained

to try the title to land under the guise of removing a cloud from the title thereto, are urged by the appellant, Payne, upon our consideration, and the following other authorities are cited and relied upon in that connection, viz.: *Sulphur Mines Co. v. Boswell*, 94 Va. 480, 485, 27 S. E. 24; *Litz v. Rowe*, etc., 117 Va. 752, 757, 86 S. E. 155, L. R. A. 1916B, 799; *Deane v. Turner*, 113 Va. 237-239, 74 S. E. 185; *Callaway v. Webster*, 98 Va. 790, 791, 792, 37 S. E. 276; *Collins v. Sutton*, 94 Va. 127, 128, 26 S. E. 415. But these authorities merely lay down the established rules governing the subject of the jurisdiction of courts of law and chancery independent of statute. The power of the Legislature over the subject is, confessedly, plenary. It has acted in the matter by the enactment of the statute under consideration in plain and unambiguous terms. That statute, therefore, must, from the time it went into effect, govern the subject. The argument touching the policy of such a statute must be addressed to the legislative branch of the government. The courts cannot afford relief in the premises.

We may remark, however, that the statutory suit authorized by the White Act is, as far as it goes, viz. to the extent of authorizing suits to remove clouds from title, substantially the same as the statutory suits to quiet titles which have been authorized in a number of other states. As said in 4 *Pomeroy's Eq. Jur.* (3d Ed.) § 1396, this "in many states is the ordinary mode of trying titles." And he adds:

"The states adopting such statutes may be separated into two classes; the first and most numerous class requiring the plaintiff to be in possession, and the second allowing the action to be brought by a plaintiff either in or out of possession."

In section 1397 of this valuable work the same learned author says:

"* * * Possession is not required in states of the second class. The action may therefore be brought here in cases where a party at common law would be left to his remedy by ejectment. Several of the statutes in express terms allow the action to be brought to remove clouds from title; others are sufficiently general to include this as well as other adverse claims."

We may also mention that the Virginia statute, in a portion of it not above quoted, provides for a jury trial, by issue out of chancery, of any issue which, but for the act, would have entitled any party to a trial by jury, upon motion of such party. However, the verdict does not have the same effect as in an action at law, but only of verdicts in ordinary issues out of chancery.

It follows, from what is said above, that we are of opinion that the Extract Company had the right and option to institute its action of ejectment under the common-law rule

on the subject, or its suit in equity, as it has done, under the White Act aforesaid.

2. Did the former pendency of the action of ejectment (set forth in the statement preceding this opinion), involving the same 300-acre tract now involved in this cause, wherein a predecessor in title of the Extract Company was plaintiff, and A. W. Fitzgerald, a predecessor in title of Payne, was defendant, and the order of court entered under what is generally designated as the five-year rule of the statute (section 3312 of the Code), directing that such action "be stricken from the docket," operate as a bar or estoppel to the institution or maintenance of the cause now before us?

We are of opinion that such question must be answered in the negative.

It is urged by the appellant, Payne, that said order "was such a final termination of the matter in litigation as [will] estop the plaintiff in that action and his privies, who acquired their interests after the commencement of that suit, from asserting the same claim in a subsequent suit," and section 2756 of the Code is referred to in this connection.

[6] Section 3312 of the Code, under which said order was entered, is as follows:

"Any court in which is pending a case wherein for more than five years there has been no order or proceeding except to continue it, may, in its discretion, order it to be struck from its docket; and it shall thereby be discontinued. A court making such order may direct it to be published in such newspaper as it may designate. Any such case may be reinstated, on motion, within one year from the date of such order, but not after. (Code 1849, p. 657, c. 173, § 7.)"

By the express terms of the statute, the order operated upon the pendency of the suit or action, and the authority thereby given the court extends no farther than to "order it to be struck from the docket." And as to what shall be the effect of such order, the statute itself provides that "it [the case or cause] shall thereby be discontinued."

Now, the term "discontinuance" has a well-settled meaning in the law, and has had from a very ancient time. "A discontinuance is 'in effect a nonsuit.'" *Burks, Plead. & Pr.* p. 598. To the same effect, 2 *Chitty's Blackstone*, p. 296; *Muse v. Farmers' Bank of Va.*, 27 *Grat.* (68 Va.) 257; *Doan v. Bush*, 130 *Ark.* 566, 198 S. W. 261, L. R. A. 1918B, 525, 527. "The effect of a nonsuit is simply to put an end to the present action, but is no bar to a subsequent action for the same cause." *Burks, Plead. & Pr.* p. 596.

The cases of *Echols' Ex'r v. Brennan*, 99 Va. 150, 37 S. E. 786, *Jones v. Turner*, 81 Va. 709, and *Battalle v. Maryland Hospital*, 76 Va. 63, are cited and relied on by appellant. The first-named case, however, on the point under consideration, involved only the question of whether a cause dismissed under said statute can be reinstated on the docket and

be further proceeded in after the expiration of the period allowed for such reinstatement by the statute. The other two cases last cited involved the question whether a final decree (not under section 3312) dismissing the cause can be set aside, except on a bill of review in the court which rendered it, or by appeal, and that within the time limited by the general statute on these subjects. None of these cases involved or decided the question which we have under consideration, namely, of the effect of a final decree or order upon the rights of the parties to the suit or action in which it is entered, when such rights are in controversy in a subsequent and different suit or action between the same parties.

The recent case of *Snead v. Atkinson*, 121 Va. 182, 92 S. E. 835, not cited in argument, involved the question whether a decree is void which is entered on proceedings by petition in a cause, subsequent to the order of dismissal thereof under the five-year rule and statute aforesaid, without any reinstatement of the cause on the docket. It was held in such case that the order of dismissal was final, and put an end to all further proceedings in that cause, until and unless the cause was reinstated on the docket, and that the subsequent decree therein was void. But that holding, likewise, did not touch the question which we have now under consideration in the cause before us.

[7] The question last mentioned must be resolved by the application of the rule of res adjudicata, where the cause of action and the parties or their privies are the same in the subsequent proceeding as in that in which the final decree or order was entered, but the suits or actions are not the same, which is the situation as presented by the cause before us. This rule is well settled. One essential factor for the application of such rule, it is true, is that there must have been a final decree or order in the former proceeding. But this is not of itself sufficient to make the rule applicable. There is another factor, the existence of which is equally essential to render the decree or order in a former proceeding a bar to a subsequent suit or action on the same cause of action by the same parties or their privies, and that is this: Such final decree or order must have been entered "on the merits." *Steinman v. Clinchfield Coal Corp.*, 121 Va. 611, 619, 93 S. E. 684, and authorities cited. This is a well-established exception to the general rule that a final decree or order in a proceeding puts an end, as between the parties thereto and their privies, to all subsequent litigation over the same claim or demand, whether pleaded or litigated in the first proceeding or not, if it might have been so pleaded and litigated.

[8] An order of retraxit has the effect contended for by appellant, Payne. *Burks, Plead. & Pr.* p. 590. But such an order, in truth, goes to the merits of the case, because it is

based on the renunciation by the plaintiff of his cause of action; and an order or decree dismissing an action or suit "agreed" has the same effect, but that is because such an order imports that the dismissal is on the merits by stipulation of the parties. *Hoover v. Mitchell*, 25 Grat. (66 Va.) 387; *Doan v. Bush*, supra, 130 Ark. 566, 198 S. W. 261, L. R. A. 1918B, 523-525. The mere dismissal of a case "is not a retraxit, but stands on the same footing as a nonsuit, and does not bar another action for the same cause." *Burks, Plead. & Pr.* 590; *Cahoon v. McCulloch*, 92 Va. 177, 23 S. E. 225.

[9] The judgment referred to in section 2756 of the Code, relied on for appellant, Payne, as above noted, is a judgment on the merits.

Now, the order in the ejectment suit was unquestionably a final order, and put an end to all further proceedings in that case, as the case was neither reinstated on the docket (nor any motion made therefor after notice to the opposite party) within the statutory period allowed for such reinstatement. But, not being an order on the merits of the case in which it was entered, the effect of such final order was merely to put an end to further proceedings in that case. It could not and did not have any effect upon the rights of the same parties not adjudicated therein, which are involved in a subsequent litigation between them in a different cause.

We will say, in passing, that the question whether, in such a case, a motion to reinstate, if made on legal notice to the opposite party, before the expiration of the year, but which is not acted on until after the expiration of the year period mentioned in the statute, will prevent the bar of the statute, if then favorably acted upon, is not presented by the cause before us, and hence is not passed upon by us.

[10, 11] 3. By the statute law of Virginia (section 2465 of the Code), as it stood when and after the contract was entered into between Loving, the predecessor in title of the Extract Company, and A. W. Fitzgerald, the predecessor in title to Payne, the possession of Fitzgerald under that contract, set forth in the statement preceding this opinion, until the Act of March 4, 1896 (Acts 1895-96, p. 842), went into effect, and again after that act was repealed by Acts 1897-98, p. 834, until the act of January 15, 1900 (Acts 1899-1900, p. 89), went into effect, was constructive notice of the rights of A. W. Fitzgerald under said contract to subsequent purchasers for value, the same in effect as the notice which is imputed by the recording acts. *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846.

Section 2465 of the Code, so far as material, then read as follows:

"Every such contract in writing * * * shall be void as to subsequent purchasers for

valuable consideration without notice, * * * until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract * * * may be."

By the Acts 1895-96, p. 842, section 2465 of the Code was amended by the addition of the following language:

"Provided, that the possession of any * * * estate or term, without notice or other evidence of title, shall not be notice to said subsequent purchasers for valuable consideration."

It is a part of the well-known history of the subject in this state that such proviso was enacted to change the rule announced in *Chapman v. Chapman*, supra.

This proviso was omitted from the amendment of the statute by Acts 1897-98, p. 834, but was restored by the act amending the same statute in Acts 1899-1900, p. 89, so that long before the deed from Whelen to the Extract Company, of date December 9, 1903, and before the second deed to the Extract Company from Leas & McVitty of date April 1, 1910, set forth in the statement of facts preceding this opinion, the rule of *Chapman v. Chapman* had been abolished by the statutory provision aforesaid, and the said possession of A. W. Fitzgerald did not operate to give the Extract Company constructive notice of the alleged rights of A. W. Fitzgerald under the contract aforesaid, unless the statute was inoperative or invalid as to contracts in existence prior to such enactment.

The positions of appellant, Payne, in his petition for appeal, are in substance as follows:

(a) That, if properly construed, the statute in question, as amended, does not affect contracts in existence prior to its enactment; that to so construe the statute would make it retroactive, which is never done, unless such an intent is plainly expressed, which is denied of this statute; and, if this position be not sound—

(b) That, as the law was when A. W. Fitzgerald took the possession aforesaid under said contract, he acquired a vested right of property under the doctrine of *Chapman v. Chapman*, aforesaid, that this vested right continued to inhere in A. W. Fitzgerald until he transmitted it from himself to the appellant, Payne, and that A. W. Fitzgerald could not have been divested of such right by the recording act aforesaid; that the latter contains no saving clause to owners of land who had acquired their rights under the law as it previously existed; that it provides no method by which such owners might put on record their claim to previously acquired rights, as, for instance, it fails to provide for the recordation or the filing of notice of claims under contracts for land which have not been acknowledged for re-

cordation; that it was not within the power of Fitzgerald to have had his contract acknowledged for recordation after the enactment of the statute, for the reasons herein-after more particularly mentioned; and that when this new recording act was enacted Fitzgerald had been in possession of this land under his written contract for a period of 16 years, and that to construe this statute so as to deprive him of these rights, or the rights of transmission of the same to others, would be nothing short of confiscation.

These positions raise for our determination the questions which will be passed upon in their order as stated below.

4. Does the new recording statute (section 2465, as amended) under consideration affect contracts in existence prior to its enactment?

This question must be answered in the affirmative.

We are of opinion that the purpose and meaning of this statute, as amended, is to provide that on and after it took effect, and so long as it remained in force, the mere possession aforesaid should not operate to give the constructive notice aforesaid in lieu of recordation of the contracts therein mentioned, so that the original and preceding portion of the statute (section 2465) would thereupon become operative upon all contracts of the kind mentioned in the statute, and every such contract would "be void as to subsequent purchasers for valuable consideration without notice, * * * until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract * * * may be," as provided in such preceding portion of the statute.

Such construction of the new recording statute may result in its affecting some contracts in existence prior to its enactment, but not necessarily so. Only those contracts which are not recorded as required by the statute prior to the acquisition of rights by purchasers for value and without notice are affected by the statute. The purchasers who are protected by such statute are future purchasers only. So that in no true sense can the statute be said to be retroactive in its operation.

The practical operation of the statute as amended as aforesaid was to give said A. W. Fitzgerald, from the time of its first enactment, March 4, 1896, until the Extract Company obtained its first deed, December 9, 1903—a period of over 7 years—within which to comply with such statute by recording said contract, before any rights of the Extract Company as a purchaser for value attached under such statute. Similarly, a period of nearly 14 years was given for such purpose before the second deed of the Extract Company was obtained on April 1, 1910.

We come now to the consideration of the following questions:

5. Did the recording statute under consideration in its effect upon the contract aforesaid divest A. W. Fitzgerald of any vested right of property? And was the statute for that reason invalid?

These questions must be answered in the negative.

The statute merely changed a pre-existing rule of evidence.

As said in *State v. King*, 64 W. Va. 546, 63 S. E. 468:

"The Legislature can, without infraction of the Constitution, * * * change the rules of evidence, * * * even as to pre-existing contracts and rights, provided it does not destroy the contract or right. *Cooley's Const. Lim.* 286, 288, 361. 'The right to have one's controversies determined by existing rules of evidence is not a vested right.' *Cooley's Const. Lim.* 367. *Cooley* says these rules go to remedy, and do not constitute a part of the contract, and cannot be regarded as of the same essence of any right, which a party may enforce. *Dequasie v. Harris*, 16 W. Va. 345. 'There is no vested right in a rule of evidence, and, as such rules only affect the remedy, it is within the constitutional power of the Legislature to modify them.' 6 *Am. & Eng. Ency. of Law*, 950. See cases cited in *Marx v. Hanthorn*, 148 U. S. 181 [13 Sup. Ct. 508, 37 L. Ed. 410]. See *Burk v. Putnam* [118 Iowa, 232, 84 N. W. 1053] 86 *Am. St. Rep.* 372 and note."

Recordation statutes have for their purpose the better security and repose of titles, and they—

"may postpone one who voluntarily neglects to avail himself of registry acts, which enable him to give notice to all the world of his claim, to the claim of a subsequent purchaser who acted on the faith of a public record." *Connecticut Mutual Life Co. v. Talbot*, 118 Ind. 873, 14 N. E. 586, 3 *Am. St. Rep.* 661, citing cases.

As to the position of appellant, Payne, that the contract under which he claims was not acknowledged for recordation, and that, the vendor party thereto having died in 1895, before the statute was enacted, his acknowledgment could not be obtained, and hence it was not in the power of A. W. Fitzgerald to have had such contract recorded after the enactment of the statute, so as to prevent the taking away of his rights aforesaid by the operation thereof.

We are of opinion that such facts are immaterial, and there is no merit in such position.

The statute (section 2465), as it existed at the time such contract was executed, required it to be recorded in order to give notice of its existence to all the world, unless the vendee, A. W. Fitzgerald, thereunder chose to rely on the then existing rule of evidence that actual possession of the land

embraced in the contract gave notice of its existence. If he made that election, he took the risk of a subsequent change of law which might change such rule of evidence.

Further: Notwithstanding the death of Loving in 1893, leaving the contract unacknowledged for recordation, as the registry statute theretofore and has ever since required, the possession aforesaid of A. W. Fitzgerald gave the constructive notice aforesaid to the predecessors in title of the Extract Company, before said statute and while it was not in force. The contract, if valid and binding as claimed by appellant, Payne, might have been asserted by A. W. Fitzgerald by suit by bill quia timet (if the contract was not then for any reason immediately enforceable), against such predecessors in title of the Extract Company, up until the first deed to the latter aforesaid—that is to say, during a period of over 7 years—and during a period of nearly 14 years before the second deed to such company, by which suit the predecessors in title of the Extract Company could have been enjoined and restrained from selling or conveying to any one else the land embraced in the contract, which would have prevented the taking away or impairment of any of the aforesaid rights of Fitzgerald, or of appellant, Payne, by the operation of said recording statute.

The sole question remaining for our consideration is the following:

6. Does the evidence show that the Extract Company had actual notice, or such notice as placed upon it the duty of inquiry, which would have led to actual notice of the equitable title aforesaid in A. W. Fitzgerald, subsequently transmitted to appellant, Payne, as aforesaid, prior to the first or second deed to such company?

The evidence in the record on this subject is conflicting. The court below was of opinion that it does not prove such notice to the Extract Company. As no legal principle is involved in this question, we do not feel that any good purpose would be served by a detailed discussion of the evidence pro and con. We deem it sufficient to say that we have carefully considered all of the evidence in the record, and we are of opinion that it appears by a decided preponderance of the evidence that the Extract Company did not have the notice in question, either before its first or second deed, on both of which occasions, therefore, it became a complete purchaser for value of the 300-acre tract of land involved in this suit without notice of the contract aforesaid on which the appellant, Payne relies.

The decree of the court below under review was in accord with the views above expressed on all points, and it will therefore be affirmed.

(124 Va. 221)

NORFOLK HOSIERY & UNDERWEAR MILLS CO. v. AETNA HOSIERY CO.

(Supreme Court of Appeals of Virginia.
Jan. 16, 1919.)1. PLEADING \hookrightarrow 93(2)—ANSWER—INCONSISTENT DEFENSES—SALE.

In seller's action for buyer's failure to accept and pay for ordered goods, buyer, under Code 1904, § 3264, may plead rescission of contract by interposing plea of non assumpsit, notwithstanding special plea of recoupment, under section 3290, to recover for seller's failure to deliver under the contract.

2. PLEADING \hookrightarrow 94—ANSWER—INCONSISTENT PLEAS.

In view of Code 1904, § 3264, inconsistent pleas are allowable; but each plea must be regarded as separate and distinct from every other, and the defenses under one cannot be straitened or curtailed by the existence of the other.

3. SALES \hookrightarrow 379—SELLER'S ACTION—PLEADING.

In seller's action to recover for buyer's failure to accept ordered goods, buyer may show, under plea of non assumpsit, rescission by it for seller's failure to manufacture and deliver the goods.

4. APPEAL AND ERROR \hookrightarrow 1033(1)—ERROR FAVORABLE TO APPELLANT.

Errors favorable to plaintiff in error are not assignable errors.

5. SALES \hookrightarrow 170—NONPERFORMANCE BY SELLER WITHIN SPECIFIED TIME.

Where time is of essence of sales contract, seller, after failing to perform within specified time, cannot recover for buyer's refusal to accept goods.

6. SALES \hookrightarrow 369 — BREACH — RESCISSION — WAIVER.

Party having right to rescind contract because of breach by other party may waive such right and hold other party to performance.

7. TRIAL \hookrightarrow 253(10) — INSTRUCTION — IGNORING EVIDENCE.

In action for refusal to accept ordered goods, defended on ground that seller breached contract by failure to deliver within specified time, instruction as to buyer's right to rescind upon such breach, without reference to buyer's right to waive right of rescission, was properly refused, where there was evidence of such waiver.

8. SALES \hookrightarrow 121—RIGHT TO RESCIND—WAIVER—EFFECT OF WAIVER.

Where buyer, upon seller's nondelivery within specified time, waived right to rescind, and elected to hold seller to contract, contract was kept alive in favor of seller, as well as buyer, and neither could sue, except for breach thereafter occurring.

9. SALES \hookrightarrow 121—EVIDENCE—BUYER'S WAIVER OF RIGHT TO RESCIND.

Buyer, by insisting on performance, waived right to rescind contract because of seller's failure to deliver within required time.

10. SALES \hookrightarrow 181(1) — ACTION BY SELLER — ABILITY TO PERFORM.

Seller, suing on contract which he was prevented from performing by buyer, to recover, must show, not only readiness and willingness to perform, but also ability to perform.

11. APPEAL AND ERROR \hookrightarrow 1064(1) — HARMLESS ERROR—INSTRUCTIONS.

In action for failure to accept ordered goods, instruction that buyer breached contract, if it prevented seller from performing, where seller was ready and willing to perform, though erroneous, because omitting to require finding that seller was able as well as ready and willing to perform, *held* not to have misled jury, in view of the evidence.

12. SALES \hookrightarrow 182(1)—SELLER'S ACTION—JURY QUESTION.

Whether seller had been ready and willing to perform, and had been prevented from performing by buyer, was for jury.

13. SALES \hookrightarrow 388—INSTRUCTION—BREACH BY BUYER.

In action for failure to accept ordered goods, evidence of buyer's rejection of sample conforming to contract, of seller's ability, readiness, and willingness to deliver, and of buyer's conduct excusing delivery, *held* to warrant instruction that buyer, by preventing seller from performing, where seller was ready, able, and willing to perform, breached contract.

14. SALES \hookrightarrow 383—SELLER'S ACTION—SUFFICIENCY OF EVIDENCE—DAMAGES.

In seller's action for buyer's refusal to accept ordered goods, evidence *held* sufficient to enable jury to ascertain damage seller sustained.

15. APPEAL AND ERROR \hookrightarrow 930(1)—REVIEW—VERDICT.

Supreme Court will not set aside verdict unless, considering case as on a demurrer to evidence by plaintiff in error, it is of opinion that verdict is without evidence to support it, or is plainly contrary to evidence.

16. SALES \hookrightarrow 387 — SELLER'S ACTION — JURY QUESTION—ABANDONMENT OF CONTRACT.

In seller's action for buyer's failure to accept ordered goods, whether contract had been abandoned by both parties was for jury.

17. SALES \hookrightarrow 127—RESCISSION—ELECTION.

A breach of contract does not effect a rescission, without the assent of the other party.

18. SALES \hookrightarrow 371—ACTION BY SELLER—BURDEN OF PROOF—TENDER.

Seller, suing for buyer's refusal to accept ordered goods, must show that its tender had been made in good faith, with a present ability and willingness to perform, and that it had kept itself ready to perform whenever called upon by buyer during life of contract.

19. SALES \hookrightarrow 176(1) — BREACH BY BUYER — WAIVER BY SELLER.

Seller could not recover for buyer's refusal to accept ordered goods, after having waived its rights against buyer growing out of such breach.

20. SALES $\$175$ — PERFORMANCE — BUYER'S REFUSAL TO ACCEPT.

Where contract required seller to ship or store goods seller had agreed to manufacture for buyer, seller was relieved of such duty upon buyer's refusal to accept sample conforming to contract, for manufacture, after notice that buyer would not accept, would have been idle performance.

Error to Circuit Court of City of Norfolk.

Action by the Aetna Hosiery Company against the Norfolk Hosiery & Underwear Mills Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action of assumpsit, brought by the Aetna Hosiery Company (hereinafter called the plaintiff) against the Norfolk Hosiery & Underwear Mills Company (hereinafter called the defendant), to recover damages for failure to accept and pay for goods ordered by the defendant of the plaintiff. The defendant is a partnership composed of Joseph B. Hecht and Morton E. Hecht, trading and doing business under the name of the Norfolk Hosiery & Underwear Mills Company. There was a verdict and judgment for the plaintiff, and to that judgment a writ of error was awarded the defendants.

In the transactions which led up to the present litigation, the plaintiff was represented by Charles S. Holden, its manager, and the defendants by Joseph B. Hecht, a member of the firm. The plaintiff was a manufacturer of hosiery located at Worcester, Mass., and the defendants were wholesale dealers in hosiery, located at Norfolk, Va. Holden and Joseph B. Hecht were personal friends, and the defendants had been purchasing hosiery from the plaintiff four or five years before the present controversy arose. In the fall of 1914, a few months after the great war in Europe began, the defendants had placed with the plaintiff two orders for the manufacture of half hose, one for 1,000 dozen per week at $\$1.07\frac{1}{2}$ cents per dozen, and the other for 1,000 dozen per week at $\$1.20$ per dozen. These orders were to run until March 1, 1915. These two orders were filled by the plaintiff and paid for by the defendants, and need not be further noticed. They are referred to in some of the subsequent correspondence. The plaintiff had hitherto manufactured only fine goods, but the defendants also wished to purchase large quantities of coarser goods, knit on larger needles, for the use of the soldiers in France. These the plaintiff was not prepared to manufacture. On January 5, 1915, Holden and Hecht, representing the plaintiff and the defendants, respectively, met in the city of New York and discussed the situation. The parties are not agreed as to what took place at this meeting. On the day of this meeting, to wit, January 5, 1915, the defendants addressed the following letter to Holden:

"The Norfolk Hosiery & Underwear Mills Co.

"Norfolk, Va., Jan. 5, 1915.

"Mr. C. S. Holden, Worcester, Mass.—Dear Sir: Confirming our talk of this morning, it is understood that, in addition to the 2,000 dozens, or more, per week, of the grades of wool half hose that you are now making on contract for me at $\$1.07\frac{1}{2}$ and $\$1.20$, you will also purchase immediately up to 20 76 needle machines, or a sufficient quantity of same to make a product of 150 dozens per day of wool half hose, weighing approximately 2 pounds 8 eight ounces, and containing approximately 50% wool and 50% cotton, at $\$1.65$ per dozen, freight paid to New York. I agreed to advance to you the full cost of these 20 machines, or any part of same that you require for the purpose of the machine equipment, and the Aetna Hosiery Company, indorsed by Mr. C. S. Holden personally, agreed to pay back to me the money advanced for the purchase of these machines, any time within 18 months, with interest charges at 6% per annum.

"The product of these machines to be shipped to McClure & Co., No. 366 Broadway, New York City; the invoices covering same to be sent to the Norfolk Hosiery & Underwear Mills Company, Norfolk, Va. The cases to be packed approximately 100 dozen, and each case to be marked '(J B) No. 1,' and up.

"In addition to the above, it is further agreed that the Aetna Hosiery Company will give us an output of not less than 750 dozens per week of 128 and 144 needle machines at $\$1.65$, which are to contain not less than 50% wool, and are to weigh not less than 2 pounds 4 ounces. Cases shipped on this order are to be marked '(J H) No. 1,' and up, and also, of course, to have net and gross weights and dimensions on invoices and cases.

"Yours very truly,

"Norfolk Hosiery & Underwear Mills Co.,
"By Jos. B. Hecht."

The coarser goods which defendants desired to obtain are those referred to in the above letter as the "76 needle" goods. It will be observed that the above letter does not fix any time during which the goods are to be furnished, nor the time or terms of payment therefor. On January 13, 1915, the plaintiff wrote to Hecht, and in the course of that letter says, in reference to the 76 needle goods:

"Would you state the time you would be able to take this production for? * * * When I was in New York, you told me you would be willing to give me a contract covering the year 1915. I do not know as I would want to take a contract like that at present, unless I could cover for stock ahead at about the present prices. I am very anxious to make as big a showing for the company the coming year as possible, and I believe you are willing to help me out and assure us about this by showing your faith in the demand for these goods for the coming season."

To this letter Hecht replied from New York on January 14, 1915, as follows:

"My Dear Mr. Holden: I have your letter of the 13th, and your report on the seconds at \$1.05 is satisfactory.

"I note carefully your paragraph in regard to the 76 needle machines. I hope you will get these in a hurry, installed and ready to ship without delay.

"As regards to your question about how long we will take your production, we agree to take the production of these machines at the rate of 150 dozens per day, or more, at \$1.65, freight paid to New York. The weight to be 2 pounds and 8 ounces, 50 per cent. wool and 50 per cent. cotton. I agree to take these goods from you as fast as you make them for a full year. Trust you will view this favorably, and hope to have very large shipments from you daily, as our friends at this end are pushing us hard for the goods here.

"With kind regards, yours truly,
"J. B. Hecht."

On the next day, January 15, 1915, the plaintiff wrote Hecht as follows:

"My Dear Mr. Hecht: We accept your order dated January 14th, for one (1) year from February 1st, to make you one hundred fifty (150) dozen per day, or the production of twenty (20) Banner machines seventy-six (76) needle, four (4) inch gauge, as per your specifications to weigh two (2) pound eight (8) per dozen, and to contain fifty per cent. (50%) wool and fifty per cent. (50%) cotton, at \$1.65 per dozen; net cash upon receipt of goods f. o. b. New York City, or storehouse receipt. We shall begin to ship out some of these next week.

"We also accept your proposition to loan us, for eighteen (18) months, \$1,800 on these twenty (20) machines, with interest at 6 per cent. (6%) per annum; we to have the option of paying the same any time before the expiration of the above eighteen (18) months.

"Respectfully, Ætna Hosiery Company."

This completes the correspondence, so far as it relates to the making of the contract which is the basis of this action. The plaintiff knew, that the goods were being ordered for the use of the soldiers in France, and that time was a most essential element of the contract. It is claimed by the defendants that the letter of January 5, 1915, embodied the terms of a parol contract which was entered into between the parties on that day, and that the letters of January 14, 1915, and January 15, 1915, fixing the period during which the goods were to be furnished, applied as well to the goods to be made on the 128 and 144 needle machines, as to those to be made on the 76 needle machines, and that the contract was one entire contract. Holden, representing the plaintiff, denies that there was any such parol contract on January 5, and says that the letter of Hecht of that date was a mere proposition along the lines of their discussion, and that the part relating to 128 and 144 needle goods was never accepted by him. His language is:

"Well, we didn't accept any order of them. The thing was still in abeyance; that is, we

had talked backwards and forwards in his office and over the phone. We have talked about making something of that kind, but I did not accept any order on them because, as I say, we had talked this matter backwards and forwards, but I did not accept any order on that number on those machines."

He states that he would have been glad to have had the order, and could have made money on it, but did not accept it, "because we didn't consider that we could make it in connection with the other order." The dealings between the parties were conducted in part by personal interviews, in part by conversations over the telephone, and there was a voluminous correspondence. From January 15 to February 24, 1915, the defendants were urgently insisting upon the prompt delivery of the 76 needle goods, and the plaintiff was explaining the difficulty of obtaining the needed machinery for their manufacture, and from time to time promising delivery. Both parties knew that the machinery had to be purchased, and it sufficiently appears from the evidence that the plaintiff did all it could be reasonably expected to do to obtain it in time to begin delivery by February 1, but without success. On February 23, a letter from each party to the other crossed in the mails. These letters are as follows:

"New York, Feb. 23, 1915.

"Mr. C. S. Holden, Ætna Hosiery Co., Worcester, Mass.—My Dear Mr. Holden: I have your letter of the 20th, and really think, unless you have a place to put the goods, that you had better order the 10 cases returned to Worcester. I doubt that you will have a place to sell them, although you might, and it will be very much cheaper and safer to have the goods in your mill, and hold there until we can get further delivery orders on the goods.

"I am very optimistic about the prospects of new contracts on the 515 and 50N, but until these new contracts have come across complete, with the financial end on a basis satisfactory to me, I cannot permit you to ship. Now, do not understand for a minute that I want to hold you for your production on these goods. It would not be fair of me to ask it. If you have an opportunity to sell this product of yours elsewhere, just go ahead and do it.

"After Wednesday of this week, please make no shipments of any kind. Also, do not ship any of the heavy goods on the 84 needle or 108 needle contract, or any goods of any character excepting No. 50N, and discontinue shipping No. 50N after Wednesday.

"As soon as matters here take a different shape, I will advise you promptly, and you know this.

"With kind regards, yours truly,
"J. B. Hecht."

"February 23, 1915.

"Mr. J. B. Hecht, New York City—Friend Hecht: We are sending you by express sample dozen of the seventy-six (76) needle hose. These are in a small size and you will notice weigh forty (40) ounces. These are scoured very hard and as you will see are very dry, so you will

find they will gain nearly (2) ounces going across the water. They are very clean. We think you will find they test about 53 to 55% wool. We think they are now coming through very nicely. We can begin to ship some of these right away.

"We will begin to send you to-morrow noon all the cases we have on the 50N and express at night whatever we can get off in the afternoon.

"We have the twenty (20) machines all tested out and you can send us check for \$1,800 any time you wish. According to the agreement we had with the Hemphill Company was to pay for them \$90 *net cash*.

"Thanking you in advance, respectfully,
"Aetna Hosiery Company."

On February 24, 1915, Hecht wrote the following letter to Holden:

"New York, Feb. 24, 1915.

"Mr. C. S. Holden, Aetna Hosiery Co., Worcester, Mass.—My Dear Mr. Holden: I have your letter of the 23d, and I also received this morning the dozen half hose, 76 needle. I do not like the look of this dozen goods at all, and I am returning 't to you to-day. Of course, I wrote you the other night not to make any shipments of any sort, other than the 50N, until I advise you, but it looks now as if we would be able to start again full blast on wool socks in a very few days, but, until I do advise you, do not ship anything except the No. 50N, which you will have closed by to-night's shipment.

"I am also handing you herewith the notice of arrival of the eight cases which I asked you to order back, and I suppose you have done so. "Will keep you posted with any change in the situation.

"With kind regards, yours truly,
"J. B. Hecht."

Thereafter, no further samples were demanded or sent, and no further explanation was asked or given for refusing the samples, but the plaintiff made repeated demands upon the defendants to remit the \$1,800 agreed to be advanced by the defendants to pay for the 76 needle machines. Some of these demands were not answered, others were answered by suggested arrangements different from the terms agreed on, but in the result the \$1,800 was not advanced, and no satisfactory arrangement made in relation thereto. Holden testifies that the plaintiff was able, ready, and willing to supply the 76 needle goods at all times from February 24, 1915, till February 1, 1916; that he had the materials, the machinery, and the labor, and simply awaited the acceptance of the sample tendered, or an order to proceed with the manufacture. He further testifies that the sample tendered measured up to the requirements of the contract. There was some conflict on this question, growing especially out of the use of wool waste, but on a demurrer to the evidence the statement of Holden must be accepted as true. In addition to the evidence hereinbefore mentioned, the plaintiff relies, upon the subsequent correspondence between Holden and Hecht, hereinafter quot-

ed, to show a breach of the contract to accept the goods. It was claimed by the defendants that they demanded of the plaintiff the output of these machines through their associates, McClure & Co., about April 30, 1915; but this is flatly denied by Holden in his testimony. During the period covered by the contract, the plaintiff manufactured something over 11,000 dozen half hose on the 76 needle machines, but they were not manufactured under any particular contract, and none of them were tendered to the defendants. Part of them were sold, and the residue were on hand at the time this action was brought.

H. W. Anderson, of Richmond, and Tazewell Taylor, of Norfolk, for plaintiffs in error.

R. B. Hicks, of Norfolk, for defendant in error.

BURKS, J. (after stating the facts as above). [1-3] This action was brought in June, 1916, by the Aetna Company against the Norfolk Company to recover damages for the failure on the part of the defendants to accept and pay for the output of the 76 needle machines from February 23, 1915, to February 1, 1916. The defendant pleaded nonassumpsit and a special plea of recoupment under section 3299 of the Code. The special plea sought to recover damages of the plaintiff for failure to manufacture and deliver to the defendants the goods called for in the agreement alleged to have been made on January 5, 1915. It is earnestly insisted by counsel for the plaintiff that—

"When the defendant filed its special plea, it forever waived its right to defend on the ground that it had rescinded the contract because of the failure of the plaintiff to begin deliveries on February 1st."

In this, counsel for the plaintiff is clearly mistaken. The continued existence of the contract was put in issue by the plea of non assumpsit, and while there could be no recoupment if the contract did not exist, and to this extent the two pleas are inconsistent, this is not a valid objection, for the defendant may plead as many several matters of law or fact as he deems necessary. Code, § 3264. Not only so, but with us inconsistent pleas are allowable, and in trying one the court cannot look to the existence of the other; hence we look upon each branch of the pleading as totally separate and distinct from every other, and the defenses under one cannot be straitened or curtailed by the existence of the other. Were it otherwise, the liberty of pleading several, and even contradictory, pleas would be defeated. *McNutt v. Young*, 8 Leigh (35 Va.) 542, 553. Nothing is more common in practice than contradictory pleas. In the case at bar, if the defendant did not seek any recovery over and above the plaintiff's claim, there was no

necessity for the special plea, as the defense set up by it might have been shown under the general issue of non assumption. *Columbia Accident Ass'n v. Rocky*, 98 Va. 678, 25 S. E. 1009; *Burks, Pl. & Pr.* § 239.

[4] On the trial, the court gave six instructions on the motion of the defendants. Some of them were probably more favorable to the defendants than they should have been, but this is not assignable error—not by the defendants, because they were favorable to them and asked by them, nor by the plaintiff, because it was not injured by them, as the verdict was in its favor.

The action of the trial court in refusing defendants' instruction No. 3 is assigned as error. This instruction was as follows:

"The court instructs the jury that if they believe from the evidence that a contract existed between the Ætina Hosiery Company, the plaintiff, on the one hand, and the defendants on the other, whereby the said plaintiff agreed and undertook for the period of one year, beginning February 1, 1915, to make and deliver to the said defendants 150 dozen pair of 76 needle socks per day, for the consideration of \$1.65 per dozen, and that it failed to make and deliver said socks at the time specified, and that said failure continued up to February 23d, that then the defendants had a right to notify plaintiff not to ship any goods after that time, and their so doing did not constitute on their part a breach of the contract sued on, and the jury shall so find."

[5-7] There was no error in refusing this instruction. Undoubtedly time was of the very essence of the contract in suit, and the parties fully realized that fact, and there is no need to cite authority for the elementary proposition that in such case there can be no recovery upon the contract in case of failure to perform within the time stipulated. But there is no reason why one party, who had a right to rescind because of breach by the other, may not waive that right and hold the other party to performance. The law on this subject is well settled. Conceding that the contract bound the plaintiff to begin deliveries on February 1, 1915, the instruction wholly ignored the evidence tending to show a waiver of this provision of the contract, and left the jury free to find for the defendants on this question notwithstanding such waiver. It presented only a partial view of the evidence as to the rights of the parties, respectively, under the contract. It is true that the instruction does not in terms direct a verdict for the defendants; but, ignoring all evidence tending to show that the defendants had waived their rights under the contract, it tells the jury that under the contract—

"the defendants had a right to notify the plaintiff not to ship any goods after that time, and their so doing did not constitute on their part a breach of the contract sued on, and the jury shall so find."

No other instruction given in the case dealt with the subject of waiver by the defendants of their rights under the contract, and to have given the instruction, as asked, would have been misleading. In *New York, etc., R. Co. v. Thomas*, 92 Va. 606, 609, 24 S. E. 264, 265, it is said:

"Calling the special attention of the jury to a part only of the evidence and the particular fact or facts it may tend to prove, and ignoring the residue of the evidence and the facts it may tend to prove, gives undue prominence to such recited evidence, and disposes the jury to regard it and the fact it tends to prove as the particular evidence, and the fact to be relied on in determining the issue before them, and thus mislead them.

"Instructions in writing are carried by the jury to their room when they retire to consider of the verdict, and, if they contain a rehearsal of a part only of the evidence, their tendency is to impress unduly on the jury such part of the evidence, to the disadvantage of the other evidence in the case, which may be equally or more important in determining the issue, but rests only in the memory of the jury."

For other cases on the same subject, see *Burks, Pl. & Pr.* § 268, note 15.

[8] The defendants insisted, and the court so instructed the jury at their instance, that their letter of February 23 was a mere shipping direction and "that it was not intended thereby to terminate the contract." If this be true, then the contract continued in force, and if the failure of the plaintiff to make deliveries between February 1 and February 23, 1915, gave the defendants the right to rescind, they waived those rights and elected to hold the plaintiff to its contract. The defendants were within their rights in doing this, but when they kept the contract alive against the plaintiff, they kept it alive also in its favor, and against themselves, and neither could sue the other except for a breach thereafter occurring.

In *Frost v. Knight*, L. R. 7 Ex. 111, it is said:

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequence of nonperformance; but in that case he keeps the contract alive, for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

In *Bernstein v. Meech*, 130 N. Y. 354, 358, 29 N. E. 255, 256, it was said:

"But whatever view may have been taken of the right of the defendants to treat the contract for the purposes of its performance as at an end, and to act upon that assumption when they received the plaintiff's letter, they disposed of that question by their letter to him.

By this it appeared that the defendants elected to keep the contract in force for the purposes for which it was made. This operated alike upon the rights of both parties, and the plaintiff was justified in so understanding it. In that view the contract was kept alive until the time arrived for performance, and the obligations of the defendants no less than those of the plaintiff for that purpose remained effectual."

See, also, *Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. W. 760.

[9] The defendants' letters of February 24, 1915, and April 12, 1915, also seem to indicate that the defendants intended to insist on the performance of the contract, and the testimony of W. P. McClure, who was associated with the defendants in this contract, and who was examined in this cause as witness on their behalf, is to the effect that between 20th and 25th of April, 1915, he had a talk with Holden "with reference to getting of any of these goods," but could not get them. Hecht also testifies that he tried to get all machine goods from the plaintiff after April 12, but without success, and Holden testifies that the defendants attempted to get goods from him on this order in April, 1915. We have no difficulty, therefore, in arriving at the conclusion that the defendants waived whatever rights of rescission they had for failure of the plaintiff to make deliveries prior to February 23, 1915.

The next assignment of error is to the action of the court in granting the following instruction, on the motion of the plaintiff:

"The court instructs the jury that, if they believe from the evidence that the contract mentioned in the declaration was entered into between the plaintiff and defendant, and that the plaintiff was ready and willing to perform the same, and that performance thereof was prevented by defendant without fault of the plaintiff, then there was a breach of the contract by defendants."

[10-12] There is omitted from this instruction the word "able," which should have been inserted in order to make it accurate. It was necessary that the plaintiff should have been, not only "ready and willing to perform," but also "able" to perform the contract. But no such objection was raised to the instruction, either in the trial court or this court, and, under the evidence, the jury could not have been misled by its omission.

[13] The objection to the instruction is that—

"It was earnestly contended before the trial court, and is now just as seriously urged, that the evidence in this case discloses the fact, not only that the plaintiff was not ready and not willing, but that, on the contrary, the exact opposite condition existed."

The instruction, with the suggested insertion made, correctly propounds the law, and there was more than a mere scintilla of evidence in the cause upon which to base it. The plaintiff's manager testified that the

sample tendered conformed to the contract, but was rejected; that the plaintiff was ever thereafter during the year ready, able, and willing to perform the contract, but received no orders to proceed; and that the only reason for nonperformance was the attitude and conduct of the defendants. Whether the facts were as hypothetically stated in the instruction was a question for the jury, and was properly submitted to them.

The third assignment of error is to the action of the court in granting the following instruction, on the motion of the plaintiff, to wit:

"The court instructs the jury that, if they believe from the evidence that the plaintiff is entitled to recover in this case, then they should proceed to assess the damages to which it is entitled; and the court further instructs the jury that in ascertaining such damages they should first determine from the evidence in this case what the entire costs would have been to the plaintiff to complete its contract with the defendants, and, after ascertaining the costs of completion, to deduct the same from the sum which the plaintiff would have been entitled to receive from the defendant under the terms of the contract, if the same had been performed. From this result they should then deduct any profits which the evidence shows were made by plaintiff by using the 76 needle machines described in the evidence. The result thus ascertained will be the damage which the plaintiff is entitled to recover in this action."

[14] The objection to this instruction is that the contract calls for the output of 20 machines, when the evidence fails to show what that output was, or what the profit was per dozen, and hence the jury did not have before them sufficient data upon which to base a verdict. The defendants' letter of January 5 says:

"You will also purchase immediately up to 20 76 needle machines, or a sufficient quantity of same, to make a product of 150 dozens per day of wool half hose."

The plaintiff's letter of acceptance of January 15 accepted the order "to make you one hundred and fifty (150) dozen per day, or the product of twenty (20) Banner machines." Both parties calculated that the 20 machines would make 150 dozen per day. The price to be paid for the goods was fixed by the contract. Holden testified for the plaintiff that the price of the material, and the cost of manufacture amounted to 96.55 cents per dozen, and an itemized statement of how the amount was arrived at was laid before the jury. Another witness, disinterested, testified that the prices given by Holden were reasonable. While Holden had not actually tested the capacity of the machines, because there had been no necessity to do so, he estimated their capacity at 150 dozen per day, and, figuring on this basis, placed the plaintiff's loss of profits at \$26,255.62. The expert placed on the stand by

the defendants thought that the product of the machines could not be safely placed at over 500 dozen per week. Counting five working days per week, as is done by the plaintiff in error, that would be 100 dozen per day. If this be taken as the proper basis, it would reduce the plaintiff's profits by one-third, and ascertain its loss, on the basis of profits testified to by Holden, at \$17,503.75; but from this there were to be some deductions, testified to by Holden, and mentioned in the instruction. The jury fixed the plaintiff's damages at \$17,100. In view of these facts, we cannot say that—

"There was no evidence of a sufficiently definite character to enable the jury to arrive at the damages sustained by the plaintiff."

[15] The last assignment of error is that the court erred in refusing to set aside the verdict on the ground that it was contrary to the law and the evidence. As the evidence appears in cold print, without the advantage possessed by the jury and the trial court, we probably would not have found or approved the verdict which was found by the jury and approved by the trial judge; but that will not justify this court in setting aside the verdict, unless, after considering the case as on a demurrer to the evidence by the plaintiffs in error, we are of opinion that the verdict is without evidence to support it, or is plainly contrary to the evidence. *Jackson v. Wickham*, 112 Va. 128, 70 S. E. 539, and cases cited.

There has been much argument on the subject of the divisibility of the contract, and counsel have ably discussed the authorities pro and con, but before entering upon that question it is necessary to first ascertain what was the contract between the parties. Only after this has been ascertained will it be necessary to determine whether or not that contract was divisible, provided any such question is involved in it. The defendants contended that there had been a verbal contract between the parties on January 5, 1915, and that it embraced not only the 76 needle goods, but also the 128 and 144 needle goods, and further that the letter of Hecht of that date contained the terms of the contract. It was further insisted that this contract for the two kinds of goods was indivisible, and could not be relied on in part and rejected in part, and further that if the defendants in good faith believed that the contract embraced the 128 and 144 needle goods and the plaintiff believed otherwise there was no meeting of the minds of the parties, and hence no contract. The plaintiff denied that there had been any such verbal contract, and contended that the letter of January 5 was a mere proposal concerning matters which the parties had discussed, that it did not contain the time and terms of payments or the duration of the contract, and that the plaintiff was free to accept any portion or all of the

proposals; that the acceptance or rejection could be made within a reasonable time, and could be either oral or in writing; that, through its manager, Holden, it orally declined to accept the proposal as to the 128 and 144 needle goods, and that by the letter of January 15, 1915, it accepted the proposal as to the 76 needle goods upon the terms therein stated. Evidence was introduced to sustain each of these contentions, and the trial court fairly and fully submitted the question to the jury by instructions to which neither party objected. By instruction B, given for the plaintiff, the court told the jury:

"The court instructs the jury that in order to constitute a contract there must be an agreement of the parties, or meetings of the minds, upon the particular question at issue. A mere proposal, without an acceptance, would not create a contract."

By instruction D, given for the plaintiff, the court told the jury that, if they believed from the evidence that no time was specified during which the plaintiff was to furnish the 128 and 144 needle goods, it had the right to terminate the order at the end of any week. Instruction 5, given for the defendants was as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff understood that the contract between it and the defendants only contemplated the making and delivery by the plaintiff at the rate of 150 dozen per day of half hose made on 76 needle machines, and the defendants on their part understood that the contract between the plaintiff and defendants contemplated, in addition to the 76 needle goods, the making and delivery by the plaintiff at the rate of not less than 750 dozen per week of half hose made on 128 and 144 needle machines, that then and in that event there was a mistake as to the subject-matter of the contract, the result of which was that there was no meeting of the minds of the parties, and the jury shall find for the defendants."

The verdict of the jury, in effect, sustained the contention of the plaintiff, and with that finding we cannot interfere. This finding eliminates any further consideration of the 128 and 144 needle goods.

[16] There was much evidence tending strongly to show that the contract had been abandoned by both parties to it, but whether or not it had been so abandoned was plainly a question for the jury, whose verdict enforcing the contract cannot be disturbed.

As hereinbefore pointed out, nondelivery prior to February 23 was waived; but the jury had further to consider whether or not there was a breach of the contract by the defendants on or after February 23, which gave the plaintiff a right of recovery. On February 24 the plaintiff tendered to the defendants a sample of the half hose to be manufactured, accompanied by a letter, saying:

"These are scoured very hard, and as you see are very dry, so you will find they will gain nearly two (2) ounces going across the water. They are very clean."

These samples the defendants rejected and returned, because they did "not like the look of this dozen goods at all." Thereafter the plaintiff made no inquiry as to any other objections to the sample, furnished no other sample, made no other tender or delivery under the contract, and manufactured no more goods under the contract, but relied upon what it had done as a sufficient tender of performance on its part. Viewed from the standpoint of a demurrer to the evidence, the defendants made no demand for any further samples, gave no further explanation for the rejection of the sample furnished, and made no further demand upon the plaintiff for the goods. The defendants offered evidence to prove that, while the contract called for goods containing 50 per cent. wool, the sample furnished contained only wool waste, that the plaintiff knew the goods were for the French government, and that they were of such character that, if they had accepted them, they would have been rejected and thrown on their hands by the French government. There was evidence on behalf of the plaintiff that the sample conformed to the contract, that the wool was of the same character as that used in all other contracts with the defendants, and was such as any well-organized plant would have put into them under a like contract.

[17] If the goods conformed to the contract of the parties, it is immaterial what the French government would have done upon inspection. The verdict of the jury for the plaintiff was, in effect, a finding that the sample conformed to the contract, and cannot be disturbed. This finding of the jury is a finding of a breach of the contract by the defendants. A breach of contract by one of the parties thereto, however, is by no means a rescission. It is a mere offer to rescind, which the other party may either accept or reject. The offer must be accepted before rescission is complete. It takes the assent of both parties to rescind. Rescission is the undoing of a contract, and the assent of both parties to it is as essential as it is to its making.

[18, 19] The act of the plaintiff in furnishing the sample was not a performance of the contract, but a mere tender of performance as far as performance was then possible. If the plaintiff relied upon the sufficiency of its tender to keep the contract alive and hold the defendants to complete performance, it was necessary for it to show that the tender had been made in good faith, with a present ability and willingness to perform, and that the plaintiff had kept itself ready to perform whenever called upon by the defendants to

do so during the life of the contract. *Inman v. Elk Cotton Mills*, 116 Tenn. 141, 92 S. W. 760. It was also necessary, to entitle the plaintiff to recover, that it should have done no act waiving its rights against the defendants growing out of the breach aforesaid. The plaintiff's manager testified on its behalf that the tender was made in good faith, and that on and after February 24, 1915, the plaintiff had the materials, the machinery, and the labor necessary to perform the contract; that it was able, ready, and willing to perform ever thereafter until February 1, 1916, the date of the expiration of the contract; that it took no orders from others for this class of goods, but kept itself free and open to carry out the terms of the contract, and would have been glad to have had the order, as it would have made a good profit on it. There was some testimony on behalf of the defendants that they demanded of the plaintiff a part of the goods in the latter part of April, 1915, and could not get them; but this is denied by the plaintiff's manager, upon whom the demand was said to have been made, and who testified that, at the date of the trial, the plaintiff still had on hand some of the goods which were referred to in his letter to the defendants' associates of April 29, 1915.

[20] While the contract required the plaintiff to ship or store the goods, it was relieved of this duty by the refusal of the defendants to accept the sample. It would have been an idle performance for the plaintiff to have manufactured goods which defendants had notified it in advance they would not accept. If after this breach the defendants changed their mind and desired the goods, they should have so notified the plaintiff and given it a reasonable opportunity to perform the contract; but this they failed to do. Obviously the verdict of the jury finding for the plaintiff on this question cannot be set aside.

Did the plaintiff, after February 24, 1915, treat the contract as rescinded, or release the defendants from their liability for its breach? For months after that date the plaintiff was repeatedly demanding of the defendants a check for \$1,800; they had agreed to advance to pay for the machines to make the 76 needle goods. In addition to this, the correspondence between the parties is relied upon to show the continued readiness of the plaintiff to fulfill its contract, and the unwillingness of the defendants to take the goods. On March 27 Hecht wrote Holden:

"I am now very much at unrest on account of the lack of business for export, as I have such a large amount of my finances tied up in this business at this time and I am unable to make any further moves until future business develops."

In reply to this statement, Holden on March 30 wrote to Hecht as follows:

"We, of course, bought these machines with your promise to pay for them and also to take the production for one year. You have apparently disregarded taking the goods as agreed, and we hope you do not think of not paying for the machines."

On April 12 Hecht wrote to Holden:

"So far we have not been able to get the new orders on heavy wool socks, on a satisfactory financial basis, but I haven't any doubt that during the year we will get a great deal of business."

Holden wrote Hecht on April 17:

"You know you told me, if we would buy these machines, you would take our production on them for one year, even if you could not use them during the summer."

Hecht wrote Aetna Hosiery Company on April 21 as follows:

"I am in receipt of yours of the 17th. We have no orders on heavy wool hosiery at this time, but we expect to have very large business later on in the season, at which time, of course, I could readily use the output of your 76 needle machines. Until that time, however, I do not want any of the goods, and I am sure you don't want me to think about taking them unless I can sell them."

On May 17 Hecht wrote Holden:

"It seems to me, also, that there should be an understanding between us that if we desire the product of these machines you will give us the same. We have booked some very large business recently, but it only covered, so far as the 84 needle product is concerned, actual merchandise that we had already made up in stock; but we have every reason to believe that we will have in the very near future some very large business for delivery September, October, and November of this year, in which case I will very probably need your assistance, and will advise with you concerning same later on. There is one point, however, that I might as well speak of at this time, and that is that the day of very long profits on the export hosiery business has passed. * * * It is no longer possible for me to give long profits to the manufacturer or to get long profits for ourselves."

On May 19 Mr. Holden replied to this letter and said in part:

"In letters since, it sounds as though you wanted us to feel you were doing us a kindness in paying for these machines. At the time, you were very anxious to get goods, and make the profit, and you were willing to concede most anything to get the goods. But as soon as business began to slack up you then refused to take the goods."

In reply to this letter Hecht, after acknowledging receipt of the letter of the 19th call-

ing Hecht's attention to the refusal to take the goods, Hecht said:

"Now, as regards the output of these machines, of course, you will operate them, and I did not mean in my previous letter that you should depend upon us for the sale of the output of them. You, of course, will sell all you can, and if I can turn any business over to you that you want on new orders, which we, by the way, have none at this time, certainly I will let you hear from me, but I would say this: I haven't any doubt at all but what there is plenty of business coming this fall on wool socks for these machines."

Upon this and other evidence in the case, the jury found a verdict in favor of the plaintiff, and with this verdict we have no right to interfere. Upon the whole case, we are of opinion to affirm the judgment of the circuit court.

Affirmed.

(124 Va. 354)

PAMPLIN v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Jan. 16, 1919.)

1. RAILROADS §113(1) — HIGHWAYS — LOCATION—CHANGE OF.

The consent of the board of supervisors, under Code 1904, § 1294b, subsec. 3, to a change of location of a public highway by a railroad company, does not shield the company from liability for such damages as the change may cause to the owner or occupants of any land.

2. RAILROADS §113(8,9) — INJURIES TO PROPERTY—RIGHT OF WAY—CONVEYANCES.

Conveyance to a railroad company of a right of way for its proposed railroad vested in the company the same rights as though the land had been acquired by condemnation, and the grantor cannot recover for any damages to remainder of his land resulting from a proper construction, use, and operation of the property conveyed.

3. EMINENT DOMAIN §112 — AWARD — DAMAGES INCLUDED.

Where part of a tract of land is taken by condemnation proceedings for a railroad right of way, the award includes damages to the residue of the tract which are due to the construction and operation of the railroad on a grade different from the natural surface of the land.

4. RAILROADS §113(2) — INJURIES FROM CONSTRUCTION—EMBANKMENT.

Though a railroad company, on condemning a right of way, is required to file a profile showing the cuts and fills, yet, where the company was granted a right of way over land, it was not liable for damages, because its road was constructed on an embankment, where the embankment did not deprive the adjacent land of support, or interfere with the flow of running streams, etc.

5. RAILROADS ⚡113(8,9) — INJURIES FROM CONSTRUCTION—EFFECT OF CONVEYANCE.

A deed to a railroad company for a right of way, though a conveyance in fee, *held* not an ordinary conveyance as to a grantee of land in fee, subject to the maxim "*sic utere tuo ut alienum non lēdas*," but a conveyance of the right of way for railroad purposes, entitling the company to build its road on an embankment.

6. RAILROADS ⚡67(1) — DEEDS — CONSTRUCTION—DRAWING OF DEED.

Where a deed to a railroad company was drawn by the grantee, the rule that any doubt as to the true meaning should be resolved against the draftsman has merely to do with the meaning of ambiguous language, and cannot affect the rules of law applicable to the construction of the deed where there is no ambiguity.

7. NOTICE ⚡5—CONSTRUCTIVE KNOWLEDGE —CONTENTS OF DEED.

Where a deed to a railroad company of a right of way, which was prepared by the company, disclosed the profile of the proposed line on a plan which was made a part of the deed, *held*, that the grantor was charged with constructive notice of what was shown on the plan.

8. RAILROADS ⚡113(8,9) — INJURIES FROM CONSTRUCTION—RIGHT OF WAY DEED—EFFECT.

Where plaintiff granted a railroad company a right of way over a particular parcel, the grant did not operate as a release of plaintiff's right to recover damages due to acts of the company on a different parcel of land, causing additional or different injury from the damages due to the acts of the company on the land granted.

9. RAILROADS ⚡114(4) — DAMAGES — JURY QUESTION.

Where plaintiff, who granted a railroad company a right of way, claimed that the residue of her property was injured by an embankment constructed by the company on other lands, *held*, that the question of the amount was for the jury.

10. RAILROADS ⚡113(8,9)—INJURIES FROM CONSTRUCTION—RELEASE—EFFECT OF DEED.

That a landowner granted a railroad company a right of way over her property did not operate as a release of a claim of damage due to the change by the railroad company of a public road which ran along the residue of the land retained.

11. EMINENT DOMAIN ⚡243(2) — AWARD —CONCLUSIVENESS—DAMAGES INCLUDED.

Where a railroad company condemned a right of way over land in which plaintiff had only a life estate, *held*, under Code 1904, § 1105f, subsec. 23, that the award in such condemnation proceedings did not bar plaintiff's action for the recovery of damages to other property of which she owned the fee, though the requisite notices were given, unless the commissioners considered and passed upon the damage to such land.

12. EMINENT DOMAIN ⚡243(2) — AWARD —CONCLUSIVENESS—MATTERS CONSIDERED.

The commissioners' report, in proceedings by a railroad company to condemn a right of way over land in which plaintiff had a life estate, *held* not to show that damages to other property which plaintiff owned in fee, due to the construction of the railroad, were passed upon and determined, and hence such award of damages did not, under Code 1904, § 1105f, subsec. 23, bar recovery.

Error to Circuit Court, Appomattox County.

Action by Dora E. Pamplin against the Norfolk & Western Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial, with directions.

This is an action at law by the plaintiff in error (hereinafter called plaintiff) against the defendant in error (hereinafter called the railroad company) to recover damages alleged in the declaration to consist of the diminution of the market value and the impairment of the right of use and enjoyment of the occupation of certain land and the dwelling house thereon, due to the construction and operation of the railroad of the defendant railroad company and a change of grade in a county road by the railroad company, near the plaintiff's said property.

The land in question consists of the residue of a tract of 8 or 9 and a fraction acres (which we will designate the "Pamplin home tract"), belonging to the plaintiff, after deducting therefrom a parcel of 1¼ acres which she conveyed to the defendant by deed dated June 2, 1915, which was acknowledged and delivered to the defendant on June 4, 1915. Such deed and the "Plan N-3086" thereto attached and made a part thereof, as provided in the deed, are as follows:

"This deed, made this 2d day of June, 1915, between Dora E. Pamplin (single), party of the first part, and Norfolk & Western Railway Company, party of the second part, witnesseth:

"That for and in consideration of the sum of three thousand dollars (\$3,000.00) cash in hand paid, receipt of which is hereby acknowledged, the party of the first part doth bargain, sell, grant, and convey unto the party of the second part all that certain piece or parcel of land situate in the county of Appomattox, state of Virginia, bounded and described as follows:

"Beginning at a point on the center line of the Burkeville to Pamplin Low Grade connecting line of the Norfolk & Western Railway at station 1949, said point of beginning being also in the dividing line between lands of Mrs. J. Y. Spencer and Miss Dora E. Pamplin; thence along said dividing line, between said lands, following the center of county road S. 16° 34' E. about 168 feet to a point; thence along other lands of Miss Dora E. Pamplin, parallel to and 60 feet distant easterly from aforesaid center line in a northern direction about 562 feet to a point in the dividing line between lands of Miss Dora E. Pamplin and Chas. Hindley; thence along the dividing line between said

lands crossing aforesaid center line at station 1952 plus 64 S. 59° 23' W. 186 feet to a point in the dividing line between lands of Miss Dora E. Pamplin and Mrs. J. Y. Spencer; thence along said dividing line, between said lands, following the center of county road S. 16° 34' E. about 3,195 feet to the place of beginning, containing 1.4 acres, more or less, or as more fully shown on Plan N-3086 Revised May 22, 1915, hereto attached and made a part of this deed, it being a portion of the same property derived by the said Dora E. Pamplin under the will of Eliza T. Pamplin, dated July 14, 1891, and probated at the August term, 1891, in Will Book No. 1 at page 5, to which will reference is here made for a further description of the property hereby conveyed.

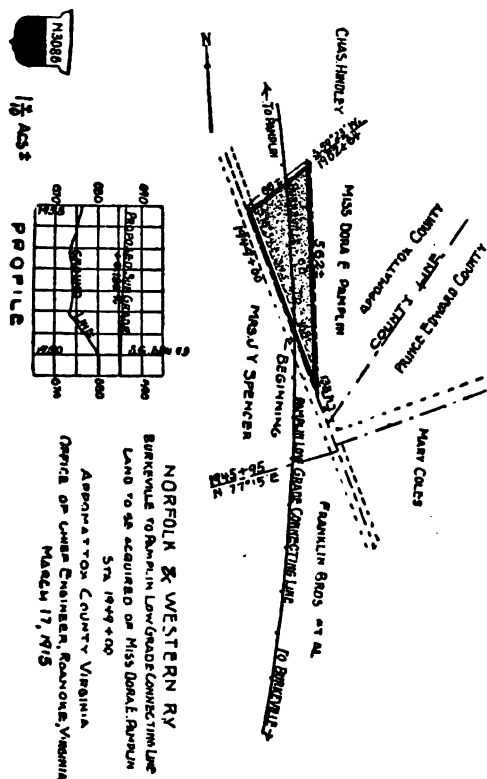
"The party of the first part hereby covenants that she is seized in fee simple of the property described above and has the right to convey the same, that the property is unincumbered, that the grantee shall have quiet and peaceable possession of same, and that she will execute such other and further assurances of title as may be requisite.

"Witness the following signature and seal.

"Dora E. Pamplin. [Seal.]

(Italics supplied.)

This deed was acknowledged by the grantor before a notary on June 4, 1915, and that day delivered to the railroad company.



It will be noted that the "Plan" shows a profile, on which it is shown that the railroad will be constructed above the grade of the surface of the land conveyed by the deed.

The parcel of land thus conveyed to the defendant will be hereinafter referred to as "lot A," and the residue of the said "Pamplin home tract" as the "dwelling house land."

At the time of the execution and delivery of such deed a public road of the county, known as the Darlington Heights road, passed along the whole of the southwestern side of lot A (the southwestern boundary of such lot being the center of such road), and farther along directly in front of the said dwelling house of the plaintiff for some 138 to 150 feet to the intersection or junction therewith of another public road (the Pamplin-Charlotte C. H. road), coming from the east. The dwelling house land of the plaintiff lay to the north of and within the angle formed by the junction of these public roads, and the south side of such dwelling house land lay along the Pamplin-Charlotte C. H. road. At this time the grade of both of such roads was approximately on a level with the surface of lot A, and of the dwelling house land where such lot and land abutted on such roads.

Some time before the conveyance aforesaid to the railroad company, the plaintiff had conveyed to a nephew, Jack Spencer, an infant, in remainder after a life estate retained in herself, a parcel of some — acres of land, which will hereinafter be called the "Spencer tract," which lay immediately on the southwest side of the Darlington Heights road, its northeastern boundary being the center of such road, from the junction of the Pamplin-Charlotte C. H. road therewith, aforesaid, along the boundary line dividing it from the dwelling house tract and from lot A. It appears from the record that after making such conveyance the plaintiff forgot that she had retained a life estate in it, and that Mrs. J. Y. Spencer, mother of said infant, became the tenant of the Spencer tract in right of her said son.

The plaintiff had lived for many years in the dwelling house aforesaid prior to and was living therein at the time of the institution of this action, but did not occupy or use the Spencer tract, as aforesaid, as must be inferred from the evidence for the railroad company in the record.

The railroad company, something over a month before said conveyance to it of lot A, when the situation of the title and the possession of the lot and of the dwelling house land and of the Spencer tract was as aforesaid, proceeded under the statute contained in Acts of 1915 (Extra Sess.) p. 11, to locate and obtain the right of way for a connecting line between two points, Burkeville and Pamplin, on its existing main line for the more efficient and economical transportation of traffic between said two points, which the duty resting upon it as a public service corporation required it to transport. Such right of way as located by the railroad company

took therefor said lot A and a portion of the Spencer tract.

On April 28, 1915, the railroad company, by ex parte proceeding under the statute, subsection 3 of section 1294b of Pollard's Code 1904, obtained from the board of supervisors of the county of Appomattox, in which the same is located, their consent to a change of location of the Darlington Heights public road where it passed along in front of plaintiff's dwelling house land and bounded lot A, such change consisting in the abandonment of that location for such road and the relocation of it so as to extend it from the junction or intersection of the Pamplin-Charlotte C. H. road therewith, aforesaid; thence almost due west, over the Spencer tract of land, across the proposed location of the right of way of the railroad company thereon, by an undergrade crossing; and thence, after reaching the western edge of the proposed right of way aforesaid on the Spencer tract, proceeding along such edge of such right of way until it reached and passed into the former location of said Darlington Heights road where it passed the northwest corner of lot A, thence going in a northerly direction towards Pamplin.

The railroad company in this proceeding, filed before the board of supervisors plats and profiles showing such change of location of the county road; the height of the embankment for its railroad which it proposed to construct at such undergrade crossing (which was some 15 feet in height at that point), and the height of such embankment which it proposed to construct thence along the right of way it proposed to acquire across the Spencer tract and across said lot A (such embankment being from about 15 to 18½ feet high from the natural surface of the ground, as it passed along in front of plaintiff's dwelling house land and dwelling house). Such plats and profiles also showed that the grade of the Pamplin-Charlotte C. H. road, where the south side of the dwelling house land of plaintiff abutted on it, would be lowered about 2 to 4 or 5 feet where this road passed along, about 50 feet south of the said dwelling house, toward the undergrade crossing—being about 2 feet below the former grade and the grade of plaintiff's dwelling house land at a roadway which she had theretofore used as a driveway and side entrance from such Pamplin-Charlotte C. H. road into such land to the dwelling house, and reaching a depth of about 4 or 5 feet below the old county road where that road formerly passed about 50 feet from and in front of said dwelling house.

The railroad company, whether before or after the said proceeding before the board of supervisors does not appear from the record, reached an agreement with the plaintiff to purchase from her lot A, to be conveyed to it for the consideration of \$3,000, which

was some \$2,625 in excess of the market value of such lot of land. This agreement was subsequently executed by the conveyance to the railroad company aforesaid.

The railroad company also reached an agreement with Mrs. Spencer (just when does not appear from the record) for the purchase of the land necessary to be taken for the right of way of the railroad company for its line across the Spencer tract and for the damages to the residue of the Spencer tract not so taken, the total consideration therefor being the sum of \$1,500, Mrs. Spencer at the time supposing that her said son owned a fee-simple estate in such land, and the railroad company, as it seems, not then being aware of the life estate of the plaintiff therein. Owing to the infancy of said son of Mrs. Spencer, the railroad company did not take a deed of conveyance of the part of the Spencer tract sought to be taken, as aforesaid, but on May 10, 1915, instituted a condemnation proceeding under the statute on that subject by notice "to Mrs. J. Y. Spencer and J. Y. Spencer, her husband, and to whom it may concern," which was served on Mrs. J. Y. Spencer and J. Y. Spencer on that day by the sheriff, which notice was to the effect that the railroad company would move the judge of the court below on May 29, 1915, for appointment of commissioners to ascertain what would be a just compensation for the portion of said Spencer tract proposed to be taken for the right of way aforesaid, setting forth the metes and bounds of such portion, and stating that—

"A plan showing the cuts and fills and a description of said property has been filed in the clerk's office of the circuit court of — [the court below] in accordance with the statute in such cases made and provided."

The railroad company accordingly on May 29, 1915, presented its petition under subsection 4, § 1105f, of the eminent domain statute in 3 Pollard's Code 1910, in which it set forth among other things—

"that the owners of the property sought to be condemned are not able to give your petitioner a clear title to this property; * * * that there is filed herewith as 'Exhibit No. 1' which is prayed to be taken as a part of this petition, plat of the survey of the said tract or parcel of land with a profile showing the cuts and fills, trestles and bridges, if any, and a description of the land which is sought to be condemned; that there is also filed herewith a memorandum showing the names and residences of the owners of said property as far as your petitioner has been able to ascertain the same. * * *"

The petition prayed for—

"the appointment of commissioners, as provided by law, to ascertain what will be a just compensation for the land proposed to be condemned for its uses and to award the damages, if any."

resulting to the adjacent or other property owners, or to the property of any other person beyond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of the company's works."

Then followed at the foot of the petition a description of the property sought to be taken as aforesaid, which is the same as in the notice aforesaid, and includes that portion of the Spencer tract which will be hereinafter designated as "lot B."

The memorandum mentioned in said petition was as follows:

"The names and addresses, as far as your petitioner is able to ascertain, of the parties interested in the property sought to be acquired in the foregoing proceedings, are as follows:

"Mrs. J. Y. Spencer, Lynchburg, Va.

"Mr. J. Y. Spencer, Lynchburg, Va."

On May 29, 1915, proceeding under subsection 6 of said section 1105f in 3 Pollard's Code 1910, an order was entered by the judge of the said court below, which recited, among other things, that—

"It appearing to the court that notice has been given by the Norfolk & Western Railway Company to Mrs. J. Y. Spencer and J. Y. Spencer, her husband, that it would on this 29th day of May apply to this court for the appointment of commissioners for the purpose of ascertaining a just compensation for the real estate described in said notice and to award damages, if any, resulting to the adjacent or other property of the owners or others beyond the peculiar benefits that will accrue to any such properties, respectively, from the construction and operation of the company's works; * * * that said notice has been duly published once a week for two consecutive weeks in the Times-Virginian, a paper published in this county, and that the same was posted at the front door of the courthouse of this county on the first day of the rules next preceding this application, and that all the requirements of law preliminary to this application have been duly complied with."

Such order appointed commissioners—

"for the purpose of ascertaining a just compensation for such lands and awarding the damages, if any, resulting to the adjacent or other property of the owners or to the property of any person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. * * *"

The report of the commissioners, under subsection 9 of said section 1105f in 3 Pollard's Code 1910, of their action under subsection 8 of said section 1105f, Pollard's Code 1904, so far as material, sets forth:

That they were appointed by said court, and the purposes of their appointment, viz.:

"To ascertain what will be a just compensation for such part of the land of the freehold

whereof Mrs. J. Y. Spencer et al. are tenants and for such other property as is proposed to be taken by the Norfolk & Western Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenants or owners or to the property of any other person, beyond, * * * etc., as per said order of appointment.

That they met, on the day fixed upon in said order, on the part of said Spencer tract proposed to be taken as aforesaid, setting forth its metes and bounds aforesaid (being lot B aforesaid), and the fact that they were duly sworn, and reported their action as follows:

"* * * Upon a view of the part aforesaid and of the adjacent and other property of said owners and of the property of other persons who will be damaged in their property by the construction and operation of the works of said company, and upon such evidence as was before us, we are of opinion, and do ascertain, that for the said part and for the other property so taken \$1,350 will be a just compensation, and the damages to the adjacent and other property of said tenants or owners and to the property of other persons, who will be damaged in their property by reason of the construction and operation of the works of said company, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of such works are \$150." (The italics in the above quotations are supplied.)

This report was dated June 3, 1915. The plats and profiles filed by the railroad company with such proceeding showed the height above the surface of the ground of the embankment it proposed to construct for its line of railroad along the right of way aforesaid in front of the dwelling house of the plaintiff on the Spencer tract and the proposed undergrade crossing and the lowering of the grade of the Pamplin-Charlotte C. H. road as it passed along the side of plaintiff's dwelling house land as aforesaid.

After the commissioner's report aforesaid was filed, to wit, on June 22, 1915, an order of said judge was entered in vacation appointing a commissioner to inquire and report, among other things, what persons were entitled to the said sum of \$1,500 and in what proportions. Such commissioner issued a notice to the plaintiff and to Mrs. J. Y. Spencer, J. Y. Spencer, her husband, and Jack Spencer, of the pendency of such proceeding before him under such order. Legal service of such notice was accepted by Mr. Franklin, an attorney at law, as attorney for "all the defendants" in such proceeding. The commissioner reported, in substance, that the plaintiff owned a life estate in the said Spencer tract of land, and the commuted value of it, and that Jack Spencer was the owner in fee of such land in remainder after the life estate therein of the plaintiff.

Some time in July, 1915, as it would seem from the contents thereof (the precise date not appearing from the record), an order was entered by said judge of the court below in said Spencer land condemnation proceeding under said subsection 9 of section 1105f, 3 Pollard's Code 1910, reciting among other things, that the railroad company had paid into court the \$1,500 aforesaid, and the order ratified, confirmed, and approved the proceedings and reports of the commissioners in all respects, directed the report to be recorded as provided by law, and dismissed the proceedings from the docket, with provision that the court, however, retain "jurisdiction to direct the distribution of said fund according to law."

By order entered October, 1915, the said judge, after directing the payment of certain costs and expenses, decreed that \$747.78 of said \$1,500 be paid to the plaintiff as the present value of her life estate in such sum of money, which was accordingly paid over to Mr. Franklin, as her attorney, and by him subsequently paid over to her.

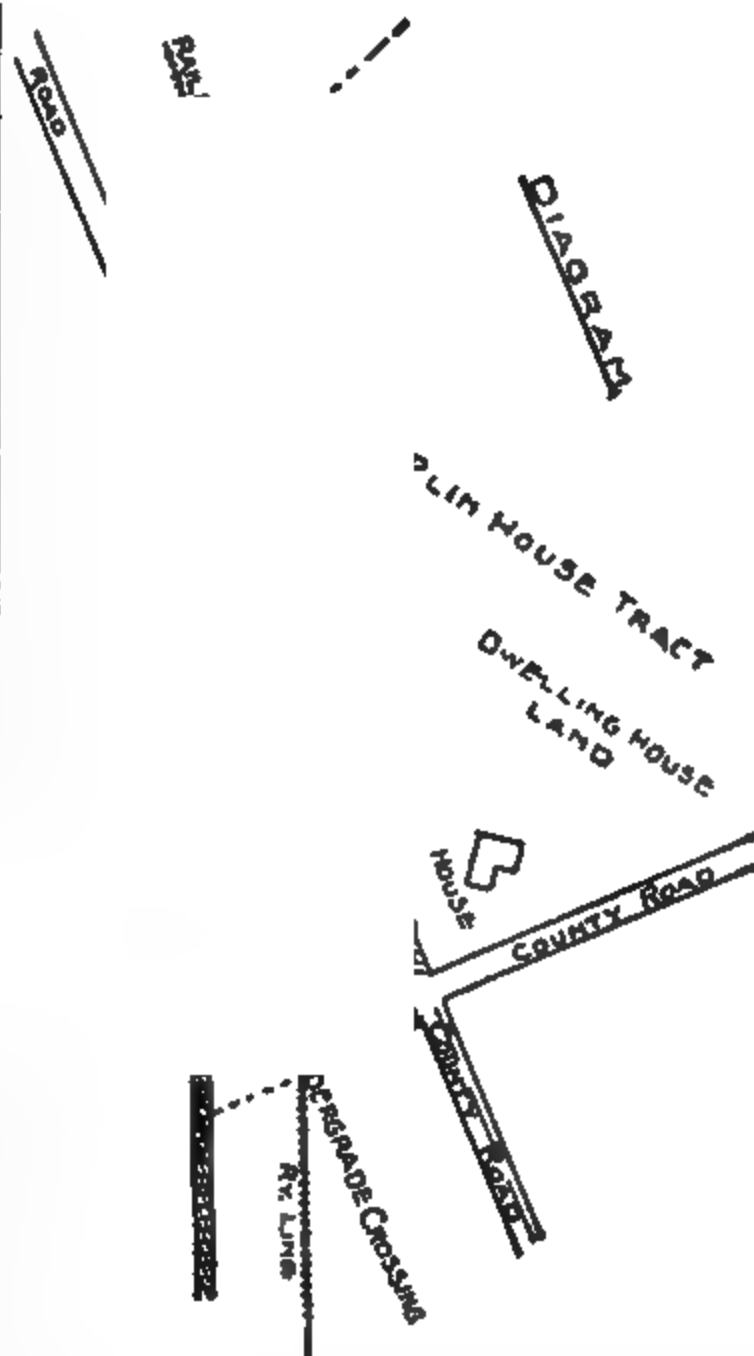
It appears from Mr. Franklin's testimony in the record that he was present at the meeting of the commissioners above mentioned on June 3, 1915, in the Spencer land condemnation proceeding, and that he then represented the plaintiff as her attorney at law, not at her request, but, as he testifies, because the plaintiff had consulted him "time and again, and perhaps nearly every time she has any trouble, for that matter," and that he wrote the deed from plaintiff conveying the Spencer tract of land as aforesaid to Jack Spencer, and "knew that there was a reservation of a life estate in that deed," and, as such witness further testified:

"So when I appeared there * * * I was representing Miss Dora [the plaintiff], because I knew that Miss Dora did not know, and Mrs. Spencer did not seem to know, and I don't reckon she did, that she had a life estate in it. So the commissioners just went through and adopted what you all, you [addressing counsel for the railroad company] and Mrs. Spencer had already agreed on, \$1,500."

This witness also testified that no question was considered by the commissioners in arriving at the \$1,500 damages which they reported as aforesaid in the Spencer land condemnation proceeding—

"with reference to anything except the damage to that particular piece of land of Jack Spencer's, and you had agreed upon that beforehand."

The following diagram will show the respective locations above mentioned:



After the deed aforesaid from the plaintiff to the railroad company was delivered, and the report of the commissioners in the Spencer land condemnation proceedings had been confirmed as above stated, the railroad company commenced the construction of the works aforesaid and subsequently completed same, all in accordance with its plans and profiles aforesaid filed before the board of supervisors, in the Spencer land condemnation proceedings, and with the profile shown on the "plan" recorded with the deed from the plaintiff to the railroad company aforesaid.

The plaintiff was not examined as a witness in the case, and there is no evidence in this record that she had any actual knowledge as to what the construction of the works of the plaintiff on lot A, or lot B, or the operation of its tracks thereon, would be, or that there would be a change of location of the Darlington Heights road, or a change of grade of the Pamplin-Charlotte C. H. road, until the construction work was in progress; nor any constructive knowledge of any of these things, except that given her by the profile on the "plan" with said deed.

After the completion of said works and

the operation for some time of trains of the railroad company over its said newly constructed line, the plaintiff, in October, 1916, instituted this action.

There is an original and amended declaration in the case, and the damages aforesaid sought to be recovered by the allegations thereof are for certain alleged injuries due to certain alleged causes, namely:

(1) To the construction by the railroad company, on lot A, of the embankment aforesaid for its railroad line, and the operation of its trains thereon.

This is alleged, in substance, to have occasioned the following injuries: (a) The depriving of the plaintiff of the front entrance to her dwelling and dwelling house land from the Darlington Heights public road, formerly passing such front, as above noted; (b) the expense to which she has been put in making alterations and repairs to such front entrance; (c) the destruction of the privacy of plaintiff's home; (d) the trash, dust, and dirt finding easy access into said dwelling; (e) the water to be collected and retained upon the dwelling house land, and to soak, percolate, and flow through and into the whole of it, and into and under the dwelling house, causing such house to become and be permanently damp and wet; (f) detraction from the appearance of the dwelling house and dwelling house land; and (g) a nuisance, resulting from the jarring of the ground, shaking the dwelling house, and the noise, smoke, and dust emitted by passing trains on said embankment, whereby the walls, windows, and doors of the dwelling have been cracked, displaced, and broken, and the air in and about the plaintiff's said premises has been so polluted as to sensibly impair the enjoyment thereof, and the ordinary comfort of human existence therein being otherwise materially interfered with.

The first count of the original declaration alleges also the additional injuries of the deprivation of the plaintiff of the use of her front yard and front porch, due to the same cause above mentioned.

(2) The construction by the railroad company of the embankment aforesaid for its railroad on lot B, and the operation by it of its trains thereon.

This is alleged to have caused substantially the same injuries as are alleged to have been caused by the construction of and operation of trains on the embankment on lot A, as aforesaid, except that the additional injuries alleged as aforesaid in the first count of the original declaration are not alleged as to the construction and operation on lot B.

(3) The change by the railroad company of the grade of the Pamplin-Charlotte C. H. public road above mentioned, along the south side of the dwelling house land.

This is alleged to have destroyed "the only road or way to and from the said property

of the plaintiff" (being the side driveway entrance above mentioned to the dwelling house land and dwelling), whereby the plaintiff "was unavoidably and of necessity put to great expense in and about making and causing to be made alterations and repairs to her said property."

There was the following special plea filed by the railroad company, and other pleadings not material to be mentioned specifically:

"Special Plea No. 2.

"And the defendant also says that during the construction of the line known as the 'Burkeville-Pamplin Low Grade Line' it became necessary that it should cross the county highway in front of plaintiff's property, as shown on Exhibit No. 1, which is here again referred to, and that in order to do this certain alterations in the public highway adjoining plaintiff's property became necessary in order to construct an undergrade crossing; that the changes and alterations in said highway were made with the consent of the board of supervisors; that by said alterations an undergrade crossing was constructed by the defendant at great expense, instead of a grade crossing, which would otherwise have been necessary; and that such undergrade crossing is greatly to the safety and convenience of the public, and that if plaintiff suffered any inconvenience by such construction and change in said highways that it resulted through a legal and proper change made by or with the consent of the proper authorities having charge of such matters, and for which the defendant is not liable.

"And this the defendant is ready to verify."

Thereupon there was a trial by jury.

Further reference to the evidence and absence of evidence on certain points will be found in the opinion below.

The following instructions were given to the jury over the objection of the plaintiff:

"A. The court instructs the jury that all the elements of damage claimed by the plaintiff in her evidence in this case could be recovered in the condemnation proceedings under the statute of the state of Virginia, and as it is shown by the plaintiff that she appeared by counsel, in the condemnation proceedings of the lot conveyed by her to Jack Spencer, and subsequently received her proper proportion of the damages allowed therein, the jury must find a verdict for the defendant.

"B. The court further instructs the jury that, when the plaintiff conveyed to defendant the strip of land described in the deed to the Norfolk & Western Railway Company, the ownership of said property was vested in defendant, and that it was permitted to use the same for the purpose of the reconstruction of its railroad.

"C. The court further instructs the jury that in so far as the plaintiff claims to have been damaged by the construction of the undergrade crossing, and the vacation of a portion of the old county road that ran in front of her premises, the law vests in the board of county commissioners authority to authorize railway companies to alter public highways whenever in their judgment an equally convenient road shall

have been provided by the railway company seeking to cross the said highway, and that if the jury believe from the evidence the plans for said undergrade crossing were submitted to the county commissioners, and approved by them, then the defendant was permitted under the law to proceed with said construction, and it is not liable for the damages thereby occasioned, especially in view of the deed and condemnation proceedings above mentioned."

There was a verdict and judgment for the railroad company, and the plaintiff brings error.

A. S. Hester, of Lynchburg, for plaintiff in error.

F. S. Kirkpatrick, of Lynchburg, for defendant in error.

SIMS, J. (after stating the facts as above). The assignments of error present the questions for decision which will be passed upon in their order as stated below.

[1] 1. Does the consent of a board of supervisors under subsection 3 of section 1294b (1 Pollard's Code 1904), to a change of location of a public road by a railroad company, shield the latter from liability for such damages, if any, as such change may cause to the owner or occupant of any lands?

This question must be answered in the negative. Such statute expressly provides that the company exercising such privileges "shall make proper compensation for such damage."

Indeed, we do not understand that the railroad company disputes the correctness of the conclusion just stated, although its plea No. 2 (quoted in the above statement) filed in the case by leave of court over the objection of the plaintiff, raised such question in the trial court, and one of the assignments of error presents it to us for decision.

The positions of the railroad company before us on this subject are, in substance, that while the plaintiff, as an original proposition, was entitled to demand and receive of it just compensation for such damages, that compensation therefor was in fact included (along with compensation for many other claims of damages) in the consideration which the railroad company paid the plaintiff for her deed to it (quoted in the above statement), and that such deed will be construed to have released all claims of the plaintiff for such damages, or that, if this be not so, that such damages were either included in the \$150 item of award of damages made by the commissioners in the Spencer land condemnation proceeding (set forth in the above statement), or that such award operated as an estoppel against any subsequent claim for such damages, and that all claims of the plaintiff therefor are barred by such proceeding by reason of the eminent domain statute law on the subject, hereinbelow more specifically set forth.

These positions will be hereinafter dealt with.

[2, 3] 2. Did the deed above mentioned, when properly construed, operate as a release by the plaintiff of the claims of damages made in her original and amended declaration in this case, which were due to the construction of the railroad company, on lot A, of the embankment for its railroad and the operation of its trains thereon?

This question must be answered in the affirmative.

A summarized statement of such claims of damages will appear from the statement preceding this opinion.

It is well settled that, if it be a fact that the land conveyed by the deed under consideration (which is shown on the diagram above as "lot A") was conveyed to the railroad company as a right of way for its proposed railroad, the deed vested in the railroad company the same rights as though lot A had been acquired for that purpose by condemnation.

"The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned. The grantor therefore cannot recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed." 2 Lewis on Em. Dom. (3d Ed.) § 474, citing numerous authorities; *Cassidy v. Old Colony R. R.*, 141 Mass. 174, 5 N. E. 142; *Roushlang v. Chicago, etc., R. Co.*, 115 Ind. 106, 17 N. E. 198; *Hortman v. Covington, etc., R. Co.*, 18 B. Mon. (Ky.) 219.

This rule covers all damages to the residue of the tract, where a part of a tract is taken by condemnation proceedings, or is conveyed, for a right of way for a railroad, which are due to the construction and operation of the railroad on a grade different from the natural surface of the land, because of the erection of an embankment on the right of way on such part of the land which does not physically impinge upon or upheave the land adjacent to the right of way, or deprive it of lateral soil support, or violate the riparian or surface water rights of the owner thereof, unless the railroad company has limited itself to a particular grade or method of construction and operation, or the damages have been assessed, in the case of condemnation, or paid, in the case of a purchase and conveyance, upon the basis of such limitation. In the absence of such limitation, all damages, past, present, and future, to the residue of such real estate due to such construction and operation, are presumed to have been included in the award of damages in a condemnation proceeding, and in the consideration paid therefor in case of a conveyance. 2 Lewis on Em. Dom. §§ 110-114, 712-714, 818, 820, 821, 824, 830; *Cassidy v. Old Colony R. Co.*, 141 Mass. 174, 5 N. E.

142; *Brainard v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74, in which the opinion of the court was delivered by Chief Justice Shaw; *Tinker v. City of Rockford*, 137 Ill. 123, 28 N. E. 573; *Costigan v. Penn. R. Co.*, 54 N. J. Law, 233, 23 Atl. 810. The case of *Fisher v. Seaboard Air Line Ry.*, 102 Va. 363, 46 S. E. 381, 1 Ann. Cas. 622, rests upon the same presumption.

[4] It is true that for a number of years there has been a general statute in Virginia which in condemnation proceedings requires all companies exercising the right of eminent domain to file with the petition a plat of the survey of the right of way proposed to be taken, with a profile showing the cuts and fills, etc., which enforces upon such companies a fixing of a limitation upon the grade line differing from that of the natural surface of the land to which they propose to construct their works and upon which they propose to operate their trains. Such limitation forms a basis for the assessment of damages by the commissioners in the condemnation proceeding, and such a company, if it afterward desires to change or adopt a substantially different grade, must obtain authority therefor, either by purchase or by further condemnation proceedings; otherwise, it will in subsequent actions therefor be liable for damages occasioned to property owners affected by such change of grade of the construction or operation thereon of its works.

A railroad company, in the absence of such statute or of a similar requirement in its charter, at the time of the location and acquisition of the right of way, on a parcel of land which is a part of a larger tract, having acquired a right of way of a certain width by condemnation proceedings, is, as between it and the owner of the residue of such tract of land, and those in privity of estate with the latter, bound by no limitation upon the height to which it may construct its works thereon and operate the same, and change such height of construction and operation thereon of its trains from time to time, except such limitation as may arise from its duty to keep within the reasonable requirements of the discharge of its duties as a public service corporation and the further requirement of law that such construction and operation shall be done in a reasonably skillful and proper manner.

There being no statute enforcing upon railroad companies a fixing of a limitation upon the construction and operation of its works prior to its purchase of a right of way, unless it voluntarily does so, a conveyance to it of land for its right of way will operate to confer upon it, as between it and the grantor and those in privity of estate with the latter, as aforesaid, the unlimited right of construction and operation of its works upon the land conveyed, at such height from the natural sur-

face of the ground as its requirements aforesaid and reasonably skillful manner of construction and operation from time to time may dictate.

Some of the decisions hold, as indicated above, but not without conflict of authority, that notwithstanding a condemnation or conveyance of a right of way for a railroad company, unlimited as to the right of construction of the railroad thereon at any grade at variance with the natural surface of the ground, there is nevertheless a limitation imposed upon the railroad company's right of construction of its works in certain particulars, which is the same as that upon the rights of ordinary proprietors of land, namely, that the railroad company cannot, any more than an ordinary owner of land, by construction of works upon its right of way, do any actionable injury to an adjacent landowner by depriving the soil of the adjacent land of support, or by interfering with the flow of running streams thereon, or with the surface water rights of the adjacent land owner, without liability to him for damages, in addition to those awarded in the condemnation proceedings, or covered by a consideration for a conveyance. See 2 *Lewis on Em. Dom.*, supra, especially sections 110-114, 818, 820, 824, 826. But since there is no allegation in the pleadings of the plaintiff in the instant case of any injuries caused by deprivation of lateral soil support to her land adjacent to the right of way of the railroad company, nor of interference with any riparian water rights in any flowing stream thereon; and since there is no proof in the case of any violation of surface water rights, although there is, as noted in the above statement of the case, an allegation in the declaration of the violation of the latter rights of the plaintiff on her adjacent land, we are relieved of the duty of entering upon any consideration of the precise limits of such rights as are mentioned in this paragraph, or of how far they may furnish exceptions to the rule we have under consideration as to the effect of a deed to a railroad company conveying to it a right of way for its railroad.

[5] But the plaintiff contends that it cannot be said that the deed in the instant case was for a right of way for the railroad company, that it is but an ordinary conveyance to it as the grantee of land in fee, with a description of the boundaries thereof, and conferred no other rights upon the railroad company with respect to the use thereof than any individual grantee has, namely, to hold and use the land subject to the law applicable to adjoining proprietors of land and of the maxim "*sic utere tuo ut alienum non laedas*," and the following authorities are cited to sustain such position, viz.: *Pettit v. Jamestown*, etc., R. Co., 222 Pa. 490, 71 Atl. 1048, 21 L. R. A. (N. S.) 822, 323; *Lewis on Em. Dom.*, supra, § 820; *Beatty v. Baltimore & Ohio R. R. Co.*, 6 W. Va. 391.

In the Pettit Case cited, the deed was to an individual as "trustee," not stating for whom the grantee was "trustee," so that it did not appear on the face of the deed that the conveyance was to a railroad company. Further, in that case, the injury in question consisted of the removal of the lateral support of the soil of plaintiff's land by work done by defendant on its adjacent right of way conveyed by the deed, as to which subject an exceptional rule applies in some jurisdictions, as above noted. Lateral soil support and interference with riparian rights in running streams of water and with surface water rights of an adjoining landowner, as furnishing exceptions to the general rule applicable to the effect of the award of damages in a condemnation proceeding, and to the construction of deeds of conveyance of land for the right of way aforesaid, are above considered, and are the subject of what is said in section 820 of Lewis on Eminent Domain, cited. In *Beatty v. B. & O. R. R. Co.*, cited, the injury and resultant damage complained of concerned the water rights of the plaintiff, and was caused by the failure of the railroad company to make or provide a sufficient drain to carry off the water through an embankment built on its right of way. As above noted, an exceptional rule obtains in some jurisdictions on that subject, and there are considerations as to when such exceptional rule is operative, or as to whether a given case does or does not fall within such exception, which are immaterial to the instant case and need not be entered into here. However, in that case, itself, the deed conveyed a parcel of land in fee simple without any condition, merely referring to the proposed line of railroad in the designation of the boundaries of the land conveyed (as does the deed in the instant case, if the profile therewith be left out of view), and the court in its opinion said:

"Although no purpose is expressed in the deed, the company acquired this land, it may well be inferred, for the purpose of constructing its road upon it."

So, in the instant case, in view of the fact that the deed is made directly to the railroad company as grantee, in view also of what is stated in the deed on the subject of the line of railroad which was not then in existence, and of what is shown on the "Plan" made a part of the deed (which "Plan" appears in the statement preceding this opinion), even if we left out of consideration the profile shown on such "Plan" which evidenced that the railroad would be constructed on the land conveyed on an embankment, as it was afterwards constructed, we cannot escape the conclusion that it appears on the face of the deed that the conveyance was of a right of way for the proposed railroad of the grantee, especially in view also of the statute law of this state, which requires a railroad company to purchase the land for its right of way, if

it can agree with its owner upon the price and terms therefor (which includes damages to the residue of the land of the owner where only a part of a tract is taken for the right of way), and does not allow the railroad company to proceed by condemnation proceeding, unless it cannot so agree with such owner, or unless title to such land cannot be obtained by conveyance from the owner.

That a conveyance in fee has no significance upon the question of whether it is a right of way for a railroad, since under our eminent domain statute the company obtains title to its right of way in fee by condemnation proceedings.

The general rule applicable to the change of grade of streets, namely, that damages occasioned by such change are not in general presumed to have been included in a prior condemnation proceeding, or to have been released by a prior conveyance of a right of way for a street, is urged upon us for plaintiff as in conflict with the view of the law which we have above taken. The case of *Harman v. City of Bluefield*, 70 W. Va. 129, 73 S. E. 297, is cited and especially relied on for plaintiff upon this point. An examination of such case and of other authorities on this subject (see 2 Lewis on Em. Dom. §§ 712-714, 825, and authorities there cited) discloses that where no limitation is placed upon the grade of the street prior to or at the time of the condemnation of the right of way therefor, by plans establishing a grade line or otherwise, damages will be awarded in the condemnation proceeding, once for all, to cover the right of the municipality to establish any grade it may see fit. And the general rule adverted to in the beginning of this paragraph obtains only where a prior limitation has been placed upon the grade of the street, either by a formal establishment of grade lines, or by the use of a road or street way of a certain grade, which it was not contemplated at the time of such use would ever be changed. Hence such general rule cannot be regarded as at all in conflict with the view which we have above taken of the law.

[6] It should also be noted that it is urged upon our consideration for plaintiff that the deed in the instant case was drawn by the grantee, or its agents, and that the rule as to such a deed is that "any doubt as to its true meaning should be solved adversely to the company," citing *Lockwood v. Ohio R. R. Co.*, 103 Fed. 243, 43 C. C. A. 202. Such rule as applied in that case, however, had to do merely with the meaning of ambiguous language in the deed, and cannot at all affect a rule of law applicable to the proper construction of a deed about the language of which there is no ambiguity. Hence we think there is no merit in such position.

[7] The foregoing has proceeded upon the idea that the profile shown on the "Plan" which is a part of the deed in the instant case, conveyed no meaning to the plaintiff,

which is the position taken for the plaintiff in the case. We cannot concur in this view, however. We think that the plaintiff is as much bound by and affected with constructive knowledge of what is shown on such "Plan" as she is with knowledge of any other contents of the deed. The "Plan" aforesaid is expressly made a part of the deed by the language of the deed itself. This being so, the conclusion above reached, as to the release of damages which the law will imply from the execution and delivery of said deed, is strengthened.

Coming now to the application of the above conclusions of law to the injuries complained of by the plaintiff in the instant case, as due to the construction by the railroad company of the embankment on lot A, and the operation of its trains thereon (which are set forth in detail in the above statement of the case), and resultant damages sought to be recovered in the instant case therefor, we are of opinion that the deed aforesaid operated as a release of all of such claims of damages of which there is any evidence whatever in the record. We will here mention these matters and our conclusions thereon seriatim:

(a) The embankment constructed on lot A occupied the old location of the Darlington Heights road to its center, and its construction, so as to be used as a part of the railroad, necessarily obstructed the whole of that road, and that deprived the plaintiff of the front entrance to her dwelling and dwelling house land from such road.

(b) Any expense to which the plaintiff has been (or may be) put in making alterations and repairs to such front entrance has the same cause.

(c) The destruction of the privacy of the plaintiff's home has the same cause.

The same is true of—

(d) The trash, dust, and dirt finding easy access into said dwelling; (f) the detraction from the appearance of the dwelling house and dwelling house land; and (g) the nuisance, resulting from the jarring of the ground, shaking the dwelling house, and the noise, smoke, and dust emitted by passing trains on said embankment, whereby the walls, windows, and doors of the dwelling are alleged to have been cracked, displaced, and broken, and the air in and about the said premises has been so polluted as to sensibly impair the enjoyment thereof and the ordinary comfort of human existence therein, etc., as alleged—so far as there is any evidence in the case tending to show such injuries, or any of them.

As above noted, there is no evidence in the case tending to prove the allegation mentioned above under the heading (e), with respect to the collection of water and its retention upon the dwelling house land, causing it to soak, percolate, and flow through and into the whole of such land, and into and under the dwelling house, causing it to become and

be permanently damp and wet; hence no further mention need be made of that matter.

As to the allegations of the first count of the original declaration of the additional injuries of the deprivation of the plaintiff of the use of her front yard and front porch:

There is no evidence in the case of any deprivation of use of the front yard or porch. The only evidence of deprivation of use of any entrance to the front of the dwelling house land (except that afforded by the old location of the Darlington Heights road, which was obstructed and necessarily made impassible by the construction of the embankment on lot A and its use as a part of the line of railroad constructed thereon, as aforesaid) is to the effect that a front driveway was obstructed, which entered the dwelling house land from the Darlington Heights road, by a gate located on the north side of the front yard (which gate was on the eastern line of lot A); but that was obstructed, and necessarily so, by the embankment constructed on lot A.

[§] 3. Did the deed above mentioned operate as a release by the plaintiff of her claims of damages which were not due to the construction by the railroad company on lot A of the embankment for its railroad, or to the operation of its trains thereover, but were due to the construction or operation of the works of the railroad company on lot B, of the embankment, undergrade crossing, etc., mentioned in and shown on the diagram with the statement preceding this opinion?

This question must be answered in the negative.

The rule is well settled that, while an award of damages in a condemnation proceeding to take a part of a tract of land will be presumed to include damages to the residue of that tract, due to the construction and operation on the part of the land taken, as above stated, such award will not be presumed to include other damages to such residue of land due to the construction and operation of the company's works on a different, or on part of a different tract of land not involved in such condemnation proceeding. And the same rule applies to deeds of conveyance of a right of way for a railroad. *Lewis on Em. Dom. § 822; Alabama, etc., R. Co. v. Williams, 92 Ala. 277, 9 South. 203; Tinker v. City of Rockford, supra, (137 Ill. 123, 28 N. E. 573); Eaton v. B. C., etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147; Delaware, etc., Canal Co. v. Lee, 22 N. J. Law, 243; St. Louis, etc., R. Co. v. Harris, 47 Ark. 340, 1 S. W. 609.*

On this subject *Lewis on Em. Domain* says, in section 822, cited:

"* * * If parts of black acre and white acre are taken, and if the works as constructed upon black acre produce damage to white acre, then there is no presumption that these were included in the assessment to the proprietor of white acre, and he may recover therefor as though no land of his had been taken for the work"—citing numerous cases.

The same section of this work also states that—

" * * * When parts of certain lots were taken for a railroad and damages assessed therefor, and the parts not taken were damaged by the railroad crossing and obstructing a street upon which the lots abutted at some distance from the lots, it was held that the latter damages were not included in the assessment and that an action would lie to recover the same. * * * Many of the cases which have been cited are where the plaintiff had conveyed or released the part appropriated, but the effect of a conveyance or release as to future damages is the same as a condemnation."

It is said on this subject in the opinion of the court in the case of *Tinker v. City of Rockford*, supra (137 Ill. 123, 28 N. E. 573), that the principle involved is:

"That the deed of land for right of way for a railway company has the same effect, as between the parties, that a condemnation under the law of eminent domain, for that purpose, would have. But it must be obvious that this principle can have no application to anything not included within the grant—as, for instance, to damages caused by acts done by the railroad company upon other lands than those to which the grant relates—for, as between the grant and damages resulting from such acts, it is impossible that there can be the relation of cause and effect."

The case of *Forest View Land Co. v. Atlantic Coast Line R. Co.*, 120 Va. 308, 91 S. E. 198, is relied on for the railroad company as establishing a different rule in this state. In that case the deed involved contained an express release of claims for damages, which was the same in its terms as the release of damages implied by law in a deed to a railroad company for a right of way where the deed is silent on the subject of such release. The landowner in that case did not contest the effect of the release upon any ground in conflict with the views above expressed, but contended that the works of the railroad company were not in fact constructed *on the land conveyed*. We rejected this contention, and held that the works of the railroad company were on the land conveyed, within the meaning of the language of the release, when construed in the light of all the facts and circumstances in the case, including particularly the knowledge with which the grantors in the deed were charged as to the unified and entire plan of the company. It follows, therefore, that the *Forest View Land Company Case* is not controlling as authority in the case now before us.

Of course, the rule last mentioned must be reasonably applied. If the acts of the railroad company done on lot B were inseparably attendant upon those done on lot A, and have not caused any additional injuries to the dwelling house land, or dwelling thereon, than have been caused by the acts of the railroad company on lot A, then, manifestly, the

claim that such injuries were in part caused by acts of the railroad company on lot B would not avail the plaintiff to obviate the aforesaid bar of the deed. Only one satisfaction can be demanded for the same damages, although they may be due to more than one contributing cause. However, the deed does not bar the plaintiff's right to recover damages, due to the acts of the railroad company on lot B, which are additional to or are different from the damages due to the acts of the railroad company on lot A.

[9] It may be true that little, if any, of the injuries complained of in the instant case as due to the construction and operation of the railroad company's works on lot B were different or in addition to those caused by the same character of construction and operation on the adjacent lot A. But this is a question for the jury under proper instructions and cannot be properly decided by us. Such question was not submitted to the jury in the court below, but was withdrawn from the jury as a result of the instructions given as aforesaid.

[10] 4. Did the deed above mentioned operate as a release by the plaintiff of the claim of damage due to the change of grade by the railroad company of the Pamplin-Charlotte C. H. public road, above mentioned, along the south side of the dwelling house land?

The injury and resulting damage which such change of grade is alleged to have occasioned is set out in the above statement of the case.

Such act of the railroad company was not done on the land granted by the deed, but upon other land, and the injury alleged was different from any of those alleged to have been occasioned by the acts of the railroad company upon the land granted. Hence, for the reasons stated and upon the authorities cited in the consideration of the third question above, we are of opinion that this fourth question, now under consideration, must be answered in the negative.

[11, 12] 5. Did the Spencer land condemnation proceedings, set forth in the statement preceding this opinion, operate as an estoppel of, or bar the plaintiff's action in the instant case for the recovery of the alleged damages to her dwelling house land and dwelling thereon alleged to have been occasioned by reason of the construction by the railroad company of its works on the embankment, undergrade crossing, etc., on lot B, and its subsequent operation of its trains thereon, and by reason also of the changing of the grade of the Pamplin-Charlotte C. H. public road, as also set forth in the said statement?

This question will be decided by the determination of whether the statute herein-after quoted purports to bar the plaintiff's action in the instant case. We shall, therefore, confine our consideration of the subject in hand to that question.

The railroad company relies on the statute

contained in subsection 23 of section 1105f (the eminent domain statute, 1 Pollard's Code 1904), as a bar to the plaintiff's action for the damages now in question, which, so far as material, is as follows:

"Who may be a Party to the Proceedings—When Right of Action will Abate.

"(23) Any persons * * * who claims that he will be damaged in his property by reason of the location, construction * * * of the line * * * maintenance, or proper and reasonable operation of any works in this act mentioned * * * for public use, may appear before the commissioners appointed as in this act provided, at the time and place provided for their meeting, make himself a party to the proceedings, and have his rights passed upon by the commissioners, and his damages, if any, ascertained, allowed; and paid as in this act hereinbefore provided for the taking of land, material, water, or other things. But after the notice required by this act, and the judgment of the court upon the report of the commissioners, and the payment to the * * * persons therein named, or into court, for their use, of the sum or sums of money ascertained by such report, no action shall be brought by any person, *whether he appeared or not*, to recover compensation for * * * damages, *considered and passed upon by the commissioners*, resulting * * * from the location, construction * * * of the line, or * * * maintenance, or proper and reasonable operation of any such works." (Italics supplied.)

We are of opinion that under such statute the plaintiff might have appeared in the Spencer land condemnation proceeding and have had her right to the damages now under consideration "passed upon by the commissioners" acting therein. But the test of whether the plaintiff is or is not estopped, or is or is not barred from maintaining a subsequent action for the damages we have under consideration, is not the application of the doctrine of *res adjudicata*, but a test prescribed by the statute just quoted. Under that statute the question is not one of estoppel, but one of whether the action is or is not barred. And the test of the latter is the same, as we shall presently point out in more detail, whether the plaintiff "appeared or not" in such condemnation proceeding. It becomes unnecessary, therefore, to consider the questions raised in the record as to whether the plaintiff, by the appearance of her attorney before the commissioners, became then a party to the proceeding, or as to what was the effect upon her said rights of being a party to the subsequent proceeding making distribution of the damages awarded as aforesaid.

Further: It will be observed from a reading of the statute that it provides, in substance, that if certain prerequisites as to notice, etc., set forth in the statute, are fulfilled, then all persons, whether they have "appeared" in the proceeding "or not," are thereafter barred from bringing any action to recover compensation for the "damages

considered and passed upon by the commissioners" in such proceeding, but only such damages as have been so *considered and passed upon* are thereby barred of future recovery.

The record furnished by the commissioners' report in the Spencer land condemnation proceedings is relied on by the railroad company to evidence the fact that the damages to plaintiff's dwelling house land and dwelling house thereon sought to be recovered in this action, were "considered and passed upon by the commissioners" in such condemnation proceeding.

If the commissioners' report does show this, with the certainty which the law requires in such case, in the absence of fraud (and none is alleged in the instant case) the report is conclusive of that fact in a collateral proceeding (such as this is).

The only portion of the commissioners' report aforesaid which can be relied on to establish the fact aforesaid is the following:

"We are of opinion, and do ascertain, that for the said part [of the Spencer land] and for other property so taken, \$1,350 will be a just compensation, and the damages to the adjacent and other property of said tenants or owners [of the Spencer land] and to the other property of other persons, who will be damaged in their property by reason of the construction and operation of the works of said company * * * are \$150."

It will be observed that this on its face presents a case of a report awarding, and not denying, damages. First, so considering the report—

The precise question before us is: Does it appear from such language of such report with any reasonable degree of certainty that a part of the \$150 damages awarded was awarded as damages to the plaintiff's property last above mentioned?

It is apparent that some of the language employed in reporting the damages considered and passed upon by the commissioners was unquestionably copied, and did not report an actual consideration of and passing upon damages. For instance, the report states that the \$1,350 was ascertained as a just compensation not alone for the "said part" of the Spencer tract "so taken," which was the fact as disclosed by the record of the proceeding set forth in the above statement, but that such \$1,350 was also "for the other property so taken." There was no such other property taken. The proceedings being statutory, the plain mandate of subsections 4 and 8 of said eminent domain statute, requiring a description of any "other property" proposed to be taken to be contained in the petition and report, could not be ignored as a prerequisite to such taking. No such description was contained in such proceedings under consideration, and no such property was even sought to be taken in such

proceeding. Again: The report states that the commissioners ascertained that—

*"The damages to the adjacent and other property of said tenants or owners, and to the property of other persons who will be damaged in their property * * * are \$150."*

Now there was no *"other property of said tenants or owners"* (meaning the tenants or owners of the Spencer land), as to which damages could have been *"considered and passed upon"* by the commissioners, except the residue of the Spencer tract adjacent to the part of that tract *"taken,"* as shown by the record. This being so, it seems manifest to us that the commissioners were using some form for their report which, in the particulars mentioned, probably copied the language of the eminent domain statute, or of the petition of the railroad company in the proceedings, or of the order of court appointing them, quoted in the statement preceding this opinion, and that such language was inapplicable to and did not report the actual action of the commissioners in such particulars. That no such action occurred is disclosed by the face of the record, such report notwithstanding, when the report is read in the light of the whole record in the condemnation proceeding.

How, then, stands the question of whether the commissioners, as a matter of fact, did consider and pass upon the damages to the dwelling house land and dwelling thereon of the plaintiff? The only language in the report which can be relied on to show such fact is the sentence, included in the above quotation, in which the commissioners report \$150 as the—

*"damages to the adjacent and other property of said tenants and owners, and to the property of other persons who will be damaged in their property. * * *"*

As we have pointed out, no portion of the \$150 was in fact awarded as damages to *"other property of said tenants or owners."* Can it be said from the report with any reasonable certainty that any portion of the \$150 was awarded as damages *"to the property of other persons?"* Is it not equally probable that the language of the report which is relied on by the railroad company to have the effect of making the commissioners so report, was copied, as aforesaid, and no more reported or was intended to report actual action of the commissioners than did the other language in the same sentence which, as we have just seen, was merely formal and was probably so copied. To say the least of the language under consideration, as was in part said in the case of *C. & O. Canal Co. v. Hoyer*, 2 Gratt. (43 Va.) 514, of a similar ambiguity in a report of commissioners in a condemnation proceeding:

*"It is probable the words * * * were copied from the terms of the act," or from the*

*papers in the condemnation proceeding aforesaid, "and that no damages were allowed for this reason. * * * Their finding is uncertain. * * *"*

It is true that the case last cited is not one in which the report of the commissioners was drawn in question in a collateral proceeding, as in the instant case, but it is helpful as disclosing the view taken by this court of the definiteness and certainty which should characterize such reports and of the principle involved.

But wholly aside from the matters of uncertainty aforementioned, the report of the commissioners in the instant case, in the language above quoted, relating to the award of the \$150 damages, contains another serious, and as we shall presently see fatal, ambiguity, even if the view be taken of it that the commissioners meant to report any damages to *"other property of other persons,"* or that they had *"considered and passed upon"* the damages now sought to be recovered by the plaintiff, and had allowed or denied an award of anything as such damages. The report upon such view of it, either awards the \$150 damages to three separate, different, and distinct properties, to wit: (1) The adjacent Spencer land, being the residue of the Spencer tract not taken; (2) other property of the tenants or owners of the Spencer land; and (3) *"to the other property of other persons"*—or it awards such damages to the adjacent Spencer land and denies any damages to the other property of the tenants or owners of the Spencer land and *"to the other property of other persons."*

What *"other property"* and what *"other persons"* are meant? It is impossible to determine these questions from the report. It does not say *all* other property, or *all* other persons. (We should perhaps say in passing, however, that we do not mean to hold that the use of the word *"all"* in this connection would have removed the ambiguity under consideration.) For aught that the report contains, the commissioners may have considered and passed upon the damages to the property of A. and B., or any other two or more persons, and never considered the damages to the property of the plaintiff last above mentioned. The only fact which it could be claimed that the report evidences as to what damages *"to other property of other persons"* the commissioners considered and passed upon is that they awarded a part of the \$150 as damages, or denied the award of any damages, to the property of other persons (in the plural number), the persons being unnamed and the property otherwise unidentified. Such a report, manifestly, supplies no record evidencing that damages to any particular property of any person, other than the Spencer property, were considered and passed upon by the commissioners, favorably or unfavorably, by being awarded or denied; and clearly it

does not show that the damages to the plaintiff's property under consideration were considered and passed upon by the commissioners by being awarded or denied; that is to say, the commissioners' report furnishes no evidence whatever on that subject.

It would be easy enough in all cases of condemnation for the commissioners to state in their report specifically what cases they in fact consider on the question of damages and the results of their action, whether in awarding or denying the award of damages, in each case considered, so that when any subsequent suit for damages is instituted the report may be turned to for evidence upon the question of whether such damages have or have not been considered and passed upon in the condemnation proceeding. Such a procedure would be but fair alike to companies exercising the right of eminent domain and to property owners affected. And that the report of the commissioners should measure up to such requirement is, we think, the true intent and meaning of the eminent domain statute aforesaid. Only by such a procedure can such companies be freed from the danger of being vexed with suits for damages which have been awarded and paid, and property owners be relieved from the danger of the effort being made to deprive them of their right to have their bona fide claims of damages in fact passed upon and adjudicated, so that such property right may not be taken away without due process of law by some constructive adjudication which never in truth occurred.

The general rules prevailing on this subject are considered in chapter XXI of Lewis on Eminent Domain (3d Ed.), especially in sections 764, 766, and 767. We refrain, however, at this time from a more specific holding in the premises than that made in the next preceding paragraph, since the decision of the case before us does not require it.

6. There were rulings of the trial court on questions of the admission or exclusion of testimony which are made the subject of assignments of error Nos. II and III, on pages 2 and 3 of the printed petition for writ of error in the instant case; but, as they raise no novel questions, we deem it unnecessary to say more of them than that we are of opinion that there was no error in such rulings of the court below.

7. There were instructions asked for by the plaintiff which were refused by the trial court, which are not set forth in the statement of the case preceding this opinion, as they do not raise any questions upon the facts of this case not otherwise raised in the record. It is deemed sufficient to say of such instructions that some of them are in conflict with the views above expressed, and as a whole they are not so framed as to be ap-

plicable on a new trial of the case in accordance with this opinion.

For the reasons stated above, we are of opinion to set aside the verdict and judgment under review and award the plaintiff a new trial, to be had, if she is so advised, not in conflict with the views expressed in this opinion.

Reversed.

(83 W. Va. 156)

HANCOCK v. MITCHELL. (C. C. No. 70.)

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER §48(2)—CONDITIONAL PRIVILEGE—STATEMENTS IN PETITION TO REMOVE PUBLIC OFFICER.

A citizen having an interest in the due and proper performance of the duties of a public officer or agent may petition the tribunal appointing such officer or agent and having power to remove him, for his removal, without liability for false or erroneous representations made therein as ground for removal, provided they were made in good faith for the purpose aforesaid and without malice and knowledge of their untruthfulness, even though he has no right to prosecute the removal proceeding as a party litigant, and he may set up such right as a qualified or conditional privilege by way of defense in an action against him for libel, based upon allegations of false and malicious representations contained in his petition.

2. LIBEL AND SLANDER §36, 101(4)—PETITION FOR REMOVAL OF PUBLIC OFFICER—STATEMENTS IN GOOD FAITH—PRESUMPTION—ABSOLUTE PRIVILEGE.

Such right raises a presumption of good faith in the preparation, circulation, and presentation of the petition, which precludes right of recovery, in the absence of allegation and proof of express malice therein; but it does not constitute an absolute privilege, absolving the petitioner from liability without regard to his motives and conduct.

3. LIBEL AND SLANDER §83, 100(5)—QUALIFIED OR CONDITIONAL PRIVILEGE—PLEADING.

Though such qualified or conditional privilege may be established by proof under the general issue, it may be pleaded specially, since the plea setting it up is in the nature of a confession and avoidance.

4. LIBEL AND SLANDER §9(1), 10(1)—IMPROPER CONDUCT OF PUBLIC OFFICER—RIGHT OF ACTION—DEFENSES—INCAPACITY IN TRADE OR PROFESSION.

A writing which imputes to an officer improper conduct in his office or incompetence to discharge the duties thereof properly, or charges a person with incapacity in his trade or profession, is actionable without allegation or proof of special damages, in the absence of proof of legal excuse therefor or justification thereof.

Certified Questions from Circuit Court, Monroe County.

Suit for libel by Jack W. Hancock against C. C. Mitchell. Demurrer to declaration overruled, and plaintiff's demurrers to two special pleas of privilege overruled, and rulings certified. Action of Circuit Court sustained.

R. L. Clark, of Union, and Morton & Mohler, of Charleston, for plaintiff.

Jno. L. Rowan, of Union, and T. N. Read, of Hinton, for defendant.

POFFENBARGER, J. The rulings certified for review in this case adversely disposed of the defendant's demurrer to a declaration charging libel of the plaintiff and the plaintiff's demurrers to two special pleas of privilege.

All of the questions so raised and disposed of depend largely upon the relative rights of a public officer or agent and a citizen and taxpayer, respecting a written or printed petition or memorial to the tribunal appointing the officer and having power to remove him for cause, charging incompetence and misconduct, circulated among citizens and taxpayers for signatures and afterward adopted by such tribunal, as charges of misconduct in its unsuccessful proceeding for removal of the officer. Claiming absolute privilege for such a publication by a citizen and taxpayer, the defendant denied the legal sufficiency of the declaration charging libel in the writing, circulation, and filing of the petition. On the overruling of his demurrer, he filed two special pleas, in one of which he claimed absolute privilege to write and use the paper in the manner complained of, and in the other a qualified or conditional privilege to do so.

The plaintiff, a civil engineer by profession, held the office of county road engineer of Monroe county, by appointment of the county court of that county. While supervising the grading of a certain portion of one of the main roads of the county, he became involved in controversies with some of the citizens respecting the use of it and means of travel between the town of Union and another place called Salt Sulphur Springs, which culminated in the circulation and filing of the petition to the county court. It sought the establishment of a temporary road for the use of the public in lieu of the existing road, while the latter was undergoing improvement, and removal of the road engineer from office for "incompetency and for misfeasance and malfeasance in office."

Right in the defendant to seek the establishment of a temporary road, by means of a petition to the county court, seems to be admitted, and the charge is that, in the exercise of such right and under cover thereof, he maliciously and wrongfully sought removal of the officer, specifying in the petition

several instances of alleged misconduct. This basic proposition is asserted under the impression that the law does not permit a citizen to invoke a proceeding for removal of a county road engineer, notwithstanding the authority conferred upon county courts to remove such officers, by the statute (chapter 43, § 37, Barnes' Code of 1918), and that, therefore, the defendant had no right to compose and circulate the petition for signatures and present it to the county court. Though the statute does not prescribe nor expressly authorize such procedure, it confers the power of removal upon county courts, saying such a court may exercise it "upon its own volition or upon complaint by the state road commission."

[1] Under the right of petition guaranteed by Const. art. 3, § 16, any citizen or body of citizens may petition public officers and tribunals for redress of grievances. A citizen and taxpayer has such interest in the public roads of his county and the control, management, and improvement thereof as makes incompetence, misfeasance, or malfeasance on the part of officers and agents in control thereof work an injury and grievance to him. He may therefore rightfully complain of it to the tribunal appointing such officers and agents, and having power to direct and govern their action and to remove them. *White v. Nicholls*, 3 How. 206, 11 L. Ed. 591; *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295; *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870; *Gray v. Pentland*, 2 Serg. & R. (Pa.) 23; *Decker v. Gaylord*, 85 Hun (N. Y.) 584; *Thorn v. Blanchard*, 5 Johns. (N. Y.) 508; *Blakeslee v. Carroll*, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; 18 Am. & Eng. Ency. L. 1040; 25 Cyc. 389, citing numerous authorities.

But the privilege thus allowed is not an absolute one, as contended by the attorney for the defendant. It raises a presumption of good faith and lack of malice in the representations made, in consequence of which express malice must be established by allegation and proof, to warrant a recovery. See the authorities just referred to. This declaration expressly alleges malice in all the charges made. The petition was not a pleading filed in a judicial proceeding. The statute confers no right upon citizens to initiate or prosecute a removal proceeding by the suing out of process and filing of pleadings. In the circulation and filing of such a memorial, they exercise only the right of assembly and petition for the redress of grievances, and are not deemed to be, in any sense, litigants. *County Court v. Armstrong*, 34 W. Va. 326, 12 S. E. 488; *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. 747; *City of Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353. The spreading of the petition on the record or the filing thereof as for charges and specifica-

tions of grounds of removal was the act of the county court, and did not legally make the petitioners parties to the proceeding. Hence the principles announced and applied in *Johnson v. Brown*, 13 W. Va. 71, and according absolute privilege in some instances, do not apply here.

[2-4] Although the charges of accusation of criminal offenses, made by way of innuendo in the declaration, are not sustained by the terms alleged to have been used in the petition, the language used there was libelous, if false, for it branded the plaintiff with incompetence in his profession and office, neglect of duty and misconduct. For this reason, it is actionable, and an allegation of special damage was not essential to the right of action asserted. *Odgers, Lib. & Sl.* 2, 17, 25, 32; 26 Cyc. 344, 345; 18 Am. & Eng. Ency. L. 942, 949; *Hoyle v. Young*, 1 Wash. (Va.) 150, 1 Am. Dec. 446.

Though privilege, whether absolute or conditional, may be proved in actions for libel, under the general issue, the defense may be set up by special pleas, since they are in the nature of a confession and avoidance. *Johnson v. Brown*, cited; 1 Chitty, Pl. (11th Am. Ed.) 493.

The court overruled several motions to strike out words, phrases, and clauses of the plea. Some of the matter thus excepted to constitutes mere surplusage, and the residue of it may not be essential. Under the statute authorizing this form of review, the appellate court is required and empowered only to determine the legal sufficiency of pleadings, process, and service. The consumption of time necessary to correction of pleadings as regards form only cannot be deemed to have been within the legislative purpose. We have statutes dispensing with matters of mere form. Surplusage in pleadings is not substantially harmful. If more is claimed than the facts set up confer, the trial court has ample power to limit the parties to their actual rights by its rulings in the course of the trial. For reasons already stated, both the declaration and the pleas are found to be sufficient in law, and we are under no obligation to conduct any further inquiries upon this certificate.

(33 W. Va. 160)

FISHER v. SOMMERVILLE, Judge, et al.
(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE — 308 — ABANDONMENT — PENAL STATUTE — CONSTITUTIONALITY.

In so far as the provisions of chapter 51 of the Acts of the Legislature of 1917, sections

16c(1) to 16c(8) of chapter 144 of Barnes' Code of 1918 (Code Supp. 1918, §§ 5179a-5179h), provide for enforcement of the duty of a husband to provide for the support of his destitute wife and children, pending a criminal proceeding against him for his failure to support them, without just cause, they are constitutional and valid.

2. COURTS — 43 — EQUITY JURISDICTION — POWER OF LEGISLATURE.

The Legislature is not inhibited by anything in the Constitution from extending the powers and jurisdiction of the law courts to subjects of equity cognizance.

3. JURY — 14(1) — RIGHT TO JURY TRIAL — ABANDONMENT OF WIFE.

The Constitution does not guarantee to a husband right of trial by jury on a charge of inexcusable failure to support and maintain his wife and children, nor on an issue as to what amount he should pay for such purpose.

4. HUSBAND AND WIFE — 316 — CRIMINAL PROCEEDING FOR ABANDONMENT — PROCEEDING FOR SUPPORT — MERGER.

Although said statute authorizes initiation of the proceeding for support and a criminal prosecution at the same time, in the same court and on a single complaint, it does not merge or consolidate the two proceedings into one, nor make the former an aid to the latter.

5. HUSBAND AND WIFE — 316 — ABANDONMENT — PROCEEDINGS — STATUTE.

The complaint and the warrant issued thereon, under it, confer jurisdiction to enforce payment of money for temporary support and to recognize or commit the accused pending an inquest by the grand jury, as to his probable guilt of the criminal offense charged therein.

6. INDICTMENT AND INFORMATION — 2(4) — JURY — 31(11) — INDICTMENT — NECESSITY.

Properly construed, said statute accords to the accused the benefit of the constitutional guaranties against trial without an indictment and otherwise than by a jury, in respect of the criminal offense it creates.

Prohibition by George E. Fisher against J. B. Sommerville, Judge, and others. Writ refused.

Martin Brown, of Moundsville, for petitioner.

E. T. England, Atty. Gen., Henry Nolte, Asst. Atty. Gen., and James D. Parriott, of Moundsville, for respondents.

POFFENBARGER, J. Upon the assumption that the provisions of chapter 51 of the Acts of the Legislature of 1917, section 18c (1) to section 16c(8), c. 144, Barnes' Code 1918 (Code Supp. 1918, §§ 5179a-5179h), authorizing the juvenile, circuit, intermediate, and criminal courts to convict any husband who shall, without just cause, desert or willfully neglect or refuse to provide for the support and maintenance of his wife in des-

stitute or necessitous circumstances, or any parent who shall, without lawful excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate child or children under the age of 16 years, in like circumstances, of a misdemeanor punishable by a fine or imprisonment or both, and to substitute for such punishment, in its discretion, an order requiring payment of money for the support and maintenance of the neglected person, is unconstitutional because it fails to provide for inquiry and indictment by a grand jury, as a condition precedent to right of trial and punishment, the plaintiff seeks a writ of prohibition to inhibit and restrain the circuit court of Marshall county from proceeding against him under said statute.

The statute provides for the making of an order of arrest by the court or the judge thereof, founded upon a complaint to be filed by the wife, child, children, or any other person. Under this order, a warrant is issued, commanding the apprehension of the accused and his production in court or before the judge thereof in vacation, to answer the complaint and to be further dealt with according to law. As to any inquiry or indictment by a grand jury, the act is silent.

The proceeding against the plaintiff, instituted by his wife under this statute, has not progressed to final judgment. Being advised of the issuance of the warrant, he voluntarily appeared and resisted it, denying the validity of the statute and also his liability under it, in case of the overruling of his contention as to its validity, on the ground of desertion on the part of the complainant. His motion to quash the complaint and warrant having been overruled, he pleaded not guilty and caused to be entered upon the record a declaration of his willingness at all times to support his wife, the actual provision of such support, her rejection thereof through the influence of her parents, and his offer to take her back to his home. Thereafter, the court, on the hearing of testimony, required him to enter into a recognizance to appear on the first day of the next regular term of the court to answer an indictment in the event of the finding thereof by the grand jury. A few days later, the wife, after notice, filed a petition in the cause praying an order requiring him to pay her money for her support, under the provision of the statute empowering the court to "enter such temporary order as may seem just, providing for the support of the deserted wife or children, or both, pendente lite." A motion to quash the petition and a demurrer thereto having been overruled, the court, after considering the evidence previously taken on the return of the warrant, and the offer made by the husband, entered an order requiring him to pay the wife \$30 per month during the pendency of the proceeding. It is to prevent the enforcement of

this order that he seeks a writ of prohibition.

[1] The primary and ultimate purpose of the statute is coercion of provision for support of deserted wives and children by those upon whom the law places the burden of their support, when they, being able to provide it, refuse to do so. Jurisdiction for such purpose, as between husband and wife, has been held and exercised by the courts of equity for centuries. They alone, under the common-law and equity principles, were competent to enforce matrimonial obligations. The legal unity of husband and wife, and their inability to make contracts with one another that courts of law could take cognizance of or enforce, made the equity court the only forum in which their rights against one another could be asserted. The policy of the law committed the delicate relations of husband and wife, in so far as they were judicially cognizable, to the enlightened conscience and judgment of the chancellor, not the inflexible rules of law. But this method of procedure, like all others, had its defects which the Legislature has endeavored to remedy by the passage of the act in question. It gives a summary and cumulative remedy and a harsher one than that afforded by the equity courts and, to restrain and, if possible, suppress the evil of dereliction of marital and parental duty, as well as to provide a more efficacious means of enforcing performance of such duties, it has made willful neglect thereof criminal. In view of the necessity of vesting the jurisdiction of the criminal procedure in the law courts and the undesirability of distributing the two branches of the subject to the two recognized classes of courts of general jurisdiction, the Legislature has conferred upon the law courts, to a limited extent, a jurisdiction formerly exercised by the courts of equity. This is not unusual in legislation. There are a great many cumulative legal remedies, and the acts creating them are everywhere held to be valid and constitutional.

[2-4] The extension of the jurisdiction of the law courts to the enforcement of performance of the husband's duty to support and maintain his wife does not alter the character of the duty, nor enlarge the rights of the husband. In the equity courts, he was not entitled to have a jury determine whether he had neglected performance of the duty or what sum of money the wife was entitled to have for her maintenance. Having no such constitutional right under equity procedure, he could not have had it at all, for the duty was enforceable only in equity. Extension of the jurisdiction of the law courts to a case formerly cognizable only in equity, without provision for a jury trial, involves no more than the difference between a judge of a law court and a chancellor, and nothing in the Constitution either expressly or impliedly withholds power from the Legisla-

ture to make such an extension. As it involves no alteration of the substantive right constituting the subject-matter, whether it shall be done or not is a question of mere expediency or public policy falling clearly within the domain of legislative power. There are many exceptions to the constitutional rule inhibiting trial without a jury (*Ex parte Jones et al.*, 71 W. Va. 537, 596, 77 S. E. 1029, 45 L. R. A. [N. S.] 1030, *Ann. Cas.* 1914C, 31), and this is one of them.

The exercise of this power by the law courts is not an incident of the procedure for enforcement of criminal liability authorized by the act, to be conducted at the same time and initiated by the same complaint. Nor is it an aid to such procedure. The two authorized proceedings start at the same time and on the same complaint, but they are clearly separable in character, progress, and operation. The complaint makes out a *prima facie* case for a temporary allowance or award of support, as the verified bill or answer or petition and affidavit did in equity. It continues until the final hearing, when a permanent allowance or award is made or refused agreeably to the determination of the controversy on its merits. In equity, that was effected by the decree on the merits. Here, it is to be effected by the trial of the indictment, if one is returned, and, in the event of a failure to indict, by the discharge of the accused. In either event, the temporary allowance ends. The criminal prosecution could go on without the award of money for support, and maintenance could be enforced without the criminal prosecution. An amalgamation of the two subjects is not a necessary incident of their contemporaneous cognizance in the same court. Since the Legislature could have authorized either of the proceedings without the other, it is obvious that it could authorize simultaneous prosecution thereof in the same court on the same complaint, without intention to merge one of them in the other. No terms indicative of intent to merge them are found anywhere in the statute.

[5, 6] After having provided for the arrest of the accused and production of his body in court to answer the complaint, the statute prescribes procedure for enforcement of the duty of support, with the consent of the accused before trial, or in the discretion of the court, on a plea of guilty or a conviction, in lieu of a judgment imposing a fine or imprisonment or both, or in addition to the penalty. Trial is mentioned, but the mode thereof is not prescribed. Without disregarding or contravening any of the words of the act, the complaint may be used as the basis of a commitment to await an indictment or a recognizance to appear and answer it, as well as the foundation of an order requiring payment of money for support.

Resort to the Constitution, the common law, and general statutes relating to criminal procedure for the method of trial for the criminal offense created by the act, does not imply or involve any addition to its terms. When the Legislature makes an act a criminal offense and prescribes the punishment, the general laws relating to procedure in criminal cases become applicable to it, without incorporation thereof into the creating act by words of reference or otherwise. To prescribe the procedure in a statute creating a new offense would be both unusual and unnecessary, unless the Legislature contemplated something different from the ordinary procedure. If, in this act, it had expressly required the trial to be had on the complaint, intention to dispense with an indictment would have been expressed, and the statute would not have been susceptible of the interpretation the trial court has given it. As it did not do so and is silent as to the mode of trial, the court properly construed it as it would have construed and applied any other statute creating an offense and prescribing the punishment. It correctly regarded the support proceeding and the criminal proceeding as separable and dealt with them separately.

Perceiving no constitutional infirmity in the statute nor any lack of jurisdiction in the circuit court, we decline to award the writ prayed for.

(83 W. Va. 166)

POCCARDI, Royal Consul of Italy, v. OTT,
State Compensation Com'r.

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION LAW — PARTICIPATION IN FUND—APPLICATION.

To entitle an applicant to participate in the Workmen's Compensation Fund he must have filed his application with the compensation commissioner within six months after the date of death or injury of the person on whose account the claim is made, as required by section 39 of the Workmen's Compensation Act (Code Supp. 1918, § 695).

2. MASTER AND SERVANT §398—WORKMEN'S COMPENSATION ACT—APPLICATION FOR RELIEF—DATE OF FILING.

Neither the date of the mailing or posting of such application nor the date when by due course it should have reached the compensation commissioner can be treated as the date of the filing of such application in order to bring it within the provision of the statute, although such delay may have been due to the existence of a state of war not between the United States and the country in which such application was posted, the statute not in terms suspending the

operation of the statute of limitations in such cases.

Appeal from order of State Compensation Commissioner.

Proceeding by Gaetano Poccardi, Royal Consul, of Italy, etc., against Lee Ott, State Compensation Commissioner, to vacate an order, refusing to consider a claim of the alleged dependents of Pietro Garufi, deceased, or to allow compensation to them, and to require the commissioner to award them compensation. Order of commissioner affirmed, and petition denied.

Jos. W. Henderson, of Philadelphia, Pa., for appellant.

El. T. England, Atty. Gen., and Frank Lively, Asst. Atty. Gen., for appellee.

MILLER, P. Petitioner on behalf of the alleged dependents of Pietro Garufi, deceased, seeks by this proceeding to vacate the order of the State Compensation Commissioner, made on May 13, 1918, refusing to file or consider their claim and to allow compensation to said dependents, being the widow and daughter of said decedent, and to require said commissioner to receive, award and allow them compensation pursuant to the statute creating the Workmen's Compensation Fund.

[1] The sole ground for the commissioner's action as shown by his opinion and report was that the claim for such compensation was not made in due form or in any form within six months from and after the death of the decedent as required by section 39 of the Workmen's Compensation Act (Code Supp. 1918, § 696), citing and relying upon the construction and application of said section in the recent case of Culurides v. Ott, Commissioner, 78 W. Va. 696, 90 S. E. 270.

In the case cited there had been a bona fide though defective application made for compensation within the limitation prescribed by the statute. We decided that by giving the statute the liberal construction required by the provisions thereof, the defective application supplemented as it was by other proceedings, constituted a valid application for such compensation, warranting payment. But, we said in that case, what the statute plainly prescribes, that where no attempt is made to prepare and file an application within the required six months, the claim cannot be allowed, holding the statute in this respect to be imperative.

The only answer made to this proposition and the order of the commissioner is: First, that as the formal application, mailed at Flumedinisi, Messina, November 6, 1917, was

delayed in transmission on account of the existence of a state of war, not between the United States of America and the Kingdom of Italy, but between them and the Central Powers of Europe, did not reach and was not filed with the commissioner until December 13, 1917, the application should be considered made as of the date of posting or at least as of the date when according to the usual time required for transmission, about twelve days, the same should have been received and filed with the commissioner. Second, that to deprive the applicants of compensation under the facts assumed in the first proposition is opposed to all theories of constitutional and private international law suspending the operation of the statute of limitations during the existence of war delaying or preventing intercommunication between citizens of the belligerent powers.

On the first proposition it is sufficient to answer that the statute makes no exception in favor of delayed applications; it is imperative. To entitle the applicant to participate in the compensation fund, he must substantially comply with the statute. *Luckie v. Merry*, 9 N. C. C. A. 895, note 906, and cases cited. The English act of 1906, section 2, as shown in the *Luckie Case*, suspends the operation of the statute of limitations under certain circumstances such as mistake, absence and other causes. But our statute contains no such provision, and such provision cannot be interpolated under the most liberal rules of construction. *Lewis' Sutherland Statutory Construction*, section 367. The record shows that petitioner was promptly notified of the death of decedent a very few days after it occurred, and if anything could excuse the delay, it has not been sufficiently shown so as to justify any exception to the limitation of the statute.

[2] On the other proposition, involving the existence of a state of war, it is sufficient to answer that the rule or principle invoked is not applicable except as between citizens of opposing belligerent states, and when the courts of the one are closed to the citizens of the other. As the Kingdom of Italy and the Government of the United States of America were not at war between themselves, but were united against a common enemy, the rules of international law so appeared to have no application. Besides, no sufficient excuse is offered by any proof why the application could not have been made on time. *Wood on Limitations*, section 6; *Buswell on Limitations*, section 129.

For the foregoing reasons we must affirm the order of the commissioner and deny the petitioner the relief prayed for.

(83 W. Va. 153)

STATE v. COWGER. (C. C. No. 72)

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. BREACH OF THE PEACE §20—WARRANT—COMPLAINANT.

A peace warrant alleging no facts or circumstances from which the justice, or the court on appeal, can determine whether the fear of the complainant is well founded, should be quashed.

2. BREACH OF THE PEACE §21—REVIEW—MOOT QUESTION.

The validity of a warrant on which a defendant has been required to give bond to keep the peace for a period of six months, being certified to this court under the provisions of section 1, c. 135, Barnes' Code of West Virginia (Code Supp. 1913, § 4981), does not become a moot question because the period covered by the bond expires before the question can be decided by this court in view of the power under section 6, c. 153 (Code 1913, § 5497), to require appellant to give a new recognizance.

Certified questions from Circuit Court, Webster County.

Hyson H. Cowger was arrested on a peace warrant issued by a justice of the peace and required to give bond to keep the peace, and after giving the bond, he appealed to the circuit court, and moved to quash the warrant. Motion overruled and validity of warrant certified. Order overruling the motion to quash reversed and cause remanded.

J. M. Hoover and W. S. Wysong, both of Webster Springs, for the State.

W. T. Talbott, of Webster Springs, for defendant.

WILLIAMS, J. Defendant was arrested on a peace warrant issued by a justice of the peace and required to give bond to keep the peace for a period of six months from the 9th of July, 1918. He gave the bond, and appealed to the circuit court, and then moved to quash the warrant on the ground that it failed to show any facts or circumstances from which the justice could determine that defendant intended to commit an offense. The court overruled his motion, and certified the question of the validity of the warrant to this court for its determination.

The warrant sets forth the following complaint made before the justice:

"Whereas, S. S. Degarmo has this day made complaint and information on oath before me, H. F. Hines, a justice of said county, that there is good cause to fear that Hyson H. Cowger, within the county and state aforesaid, intends to commit an offense against the person and property of another, to wit, the person and property of S. S. Degarmo and against the person and property of Ina F. Degarmo."

Then follows the warrant, commanding that the defendant be arrested and brought before the justice to answer the complaint.

[1] This proceeding is had under chapter 153 of the Code of West Virginia, designed for the prevention of crime. Section 2 of that chapter (sec. 5493) reads as follows:

"If complaint be made to any justice, that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complainant and any witnesses who may be produced, reduce the complaint to writing and cause it to be signed by the complainant."

Although the statute does not prescribe any form for such complaint, it should, nevertheless, state sufficient facts or circumstances to enable the justice to determine whether or not complainant had any reason to fear that some particular offense is about to be committed; it is not enough to say that he fears an "offense" will be committed. That is a mere conclusion. The facts and circumstances on which his apprehension is based should be stated in order that the justice may see whether or not the fear is justified, and whether or not the design of the defendant, if carried into execution, would constitute an offense in law. It is the common right of every one, against whom complaint is made, to be fully apprised of the matter with which he is charged, in order that he may prepare to combat the charges and make his defense. If he is not informed of the charges, how can he be prepared to meet them? That he should thus be fully informed is clearly indicated by the language of the statute. It requires the justice to examine the complainant and his witnesses on oath, reduce the complaint to writing and have it signed by the complainant. Section 3 (sec. 5494) then requires him, "if it appear proper," to issue his warrant, reciting therein the complaint, evidently for the purpose of informing the defendant of the matter with which he is charged.

"The warrant should show that some threat was made, or should state circumstances from which the court can determine whether or not the fear expressed is well founded." 5 Cyc. 1031. *Bradstreet v. Ferguson*, 23 Wend. (N. Y.) 638.

"A peace warrant in which is alleged no threat, fact, or circumstance from which the court can determine whether the fear of the prosecutor is well founded should be quashed." *State v. Goram*, 83 N. O. 664, citing *State v. Cooley*, 78 N. C. 538. See, also, *State v. Coughlin*, 19 Kan. 537.

[2] Having given a bond to keep the peace for a period of six months, and that time having expired on the 10th of January, 1919, the attorney for the state makes the point that the question presented to this court is now moot. We do not think so, for the rea-

son that, on appeal from a justice, the court is authorized by section 6 of said chapter (sec. 5497), either to dismiss the complaint or affirm the judgment of the justice and make such order as it sees fit as to the costs; or the court may require the appellant to give a new recognizance, if it sees fit. The court has the power to require the appellant to enter into a new recognizance for an extended period. He is therefore vitally interested in having the question of the validity of the warrant passed on by this court.

The order, overruling defendant's motion to quash the warrant, will be reversed, and the cause remanded.

(83 W. Va. 149)

CLIFTON v. CLIFTON. (No. 71.)

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE §4, 289—OBLIGATION TO SUPPORT—ENFORCEMENT—EQUITY JURISDICTION.

There is an obligation upon a husband to support and maintain his wife, and unless by her conduct, or for some other reason, he is discharged therefrom, a court of equity has jurisdiction to enforce the performance of such duty, as well upon the ground of the wife's disability to maintain an action at law against him, because of the relationship, as upon the ground of inadequacy of any remedy which courts of law are competent to afford.

2. EQUITY §44—JURISDICTION — LEGISLATION.

Courts of equity are not deprived of the jurisdiction theretofore possessed and exercised by them by an act of the Legislature conferring jurisdiction upon courts of law to grant similar relief, unless such act evinces a plain intent to take away the jurisdiction of equity; otherwise such jurisdiction will thereafter be exercised concurrently by both courts of law and equity.

3. HUSBAND AND WIFE §289—SUPPORT OF WIFE — ENFORCEMENT—EQUITY JURISDICTION—STATUTE.

Chapter 51 of the Acts of the Legislature of 1917 (Code Supp. 1918, §§ 5179a-5179h), in relation to the desertion and nonsupport of wife and children, and providing punishment therefor, does not deprive courts of equity of the jurisdiction theretofore possessed to entertain a suit by a wife to compel her husband, who refuses to do so, to make proper provision for her support and maintenance.

Certified Questions from Circuit Court, Webster County.

Bill by Elizabeth Clifton against John Z. Clifton seeking maintenance and support from defendant, her husband, independent

of any relief by way of divorce. Demurrer to bill overruled; and ruling certified from the circuit court. Ruling of circuit court sustained.

W. T. Talbott, of Webster Springs, for plaintiff.

W. S. Wysong, of Webster Springs, for defendant.

RITZ, J. Plaintiff's bill alleges her marriage to the defendant some 14 or 15 years prior to the institution of the suit. It alleges his subsequent desertion and abandonment of her, that he otherwise maltreated her, and charges his failure and refusal to make provision for her proper maintenance and support. Facts are averred showing the defendant's ability to make such provision, and the court is asked to enter a decree requiring him to pay such reasonable amount as may be determined to be proper and sufficient for the support of the plaintiff. It will be observed that this is a pure bill by the plaintiff to secure her maintenance and support from her husband independent of any relief by way of divorce. A demurrer to the bill was overruled by the circuit court, and the propriety of that ruling certified to this court for its decision.

[1] It is insisted by the defendant that the court is without jurisdiction to entertain a bill by a wife against her husband seeking only maintenance and support, and not praying for divorce. The contention made is that the court only has jurisdiction to grant such relief as an incident to divorce. It is quite true that the statute conferring jurisdiction upon courts of equity to hear and determine divorce cases also confers jurisdiction to award alimony, both temporary and permanent, as incident thereto; but does this provision mark the limits of the jurisdiction of a court of equity in this regard? It cannot be doubted that there is a legal and binding obligation upon every husband to support his wife, unless she, by her conduct, relieves him thereof, and can it be said that where such an obligation exists there is no remedy for its enforcement, that the aggrieved party must depend entirely upon the will and pleasure of the one from whom the obligation is due? It is a familiar maxim of the law that there is no wrong without a remedy, and surely a wife who is denied support by her husband is wronged, and it is the duty of the properly constituted authorities to provide her a remedy for the redress of that wrong. It will not do to say that she may bring suit for divorce and get support and maintenance as an incident to any relief granted in such suit. She may not desire a divorce; in fact, the grounds may not be sufficient to justify the awarding of a divorce. It would be unjust and inequitable to force her to accept

relief which she does not want in order to secure the relief which she does desire, and to which she is justly entitled. Because of the relation of husband and wife, this obligation cannot be enforced in a court of law. As we held in *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529, L. R. A. 1917D, 440, courts of law have no jurisdiction to entertain a suit by a wife against her husband. While she is laboring under the disability of coverture, a court of equity alone has the power to grant her relief. There is another reason why resort to equity is proper in such case, even though the disability because of relationship did not exist, and that is that any remedy which a court of law is competent to give would be entirely inadequate. The neglected wife might bring an action at law on the obligation which her husband owes to her, but because of the uncertainties of human life, the liability of the fortunes of the parties to change either for the better or for the worse, any judgment which such a court might render would likely not even approximate a just determination of the rights involved; while, on the other hand, a court of equity can grant relief exactly commensurate with the obligation imposed upon the husband, and to which the wife is entitled. This question, however, is not an open one in this state. It was before this court in the case of *Lang v. Lang*, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129. In that case the jurisdiction was sustained, and upon a review of the authorities there cited we are of opinion that the conclusion reached is a sound one.

[2, 3] The defendant insists, however, that chapter 51 of the Acts of 1917 (Code Supp. 1918, §§ 5179a-5179h), being an act relating to the desertion and nonsupport of wife and children, and providing punishment therefor, furnishes the deserted wife a means of complete and adequate redress, and that therefore a court of equity will not entertain a bill for that purpose. Even though that act does furnish a means by which a court of law can grant relief in such cases, does that deprive courts of equity of the jurisdiction which they theretofore possessed? It seems to be quite well settled that, where equity has jurisdiction of a subject-matter, the fact that the Legislature by a statute gives a remedy at law therefor does not deprive the equity courts of their jurisdiction, unless the statute so expressly declares. The jurisdiction thereafter will be exercised concurrently. *Corrothers v. Board of Education*, 16 W. Va. 527; 1 Story's Equity Jurisprudence, § 80; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22.

But is the remedy provided by chapter 51 of the Acts of 1917 adequate to afford relief? That statute makes it a criminal offense for a husband to desert and fail to provide for

his destitute wife and children. The primary purpose of the act was to prevent such deserted and abandoned persons from becoming charges upon the public. It is the protection of the public that is sought by the act. This obligation of a husband to support and maintain his wife exists whether she is destitute or whether she is not, while the act referred to only gives the remedy in case of destitution. Then it only provides for convicting the husband of a criminal offense, putting him in jail, and working him on the road. There is no means provided in it for sequestering any of his estate, in case he has any, and applying it to the maintenance of the wife. This power is possessed by courts of equity. Should he fail or refuse to comply with the court's decree, and his ability to perform it is shown, not only may his person be seized and he be punished for disobedience of the order, but his property may likewise be seized and applied to satisfy the decree in favor of the deserted wife. So we say that the remedy provided by chapter 51 of the Acts of 1917 is primarily for the benefit of the state. It does not look so much to the protection of the deserted wife, and is entirely inadequate and insufficient to confer that complete and full relief which can be afforded by a court of equity.

We are of opinion that the demurrer to the bill was properly overruled, and answer the question certified accordingly.

(83 W. Va. 143)

STATE ex rel. TESTERMAN v. LAMBERT,
Mayor, et al. (No. 3782.)

(Supreme Court of Appeals of West Virginia.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. MANDAMUS ¶74(1) — APPOINTMENT OF
ELECTION OFFICERS—MUNICIPAL COUNCIL.

Mandamus lies to compel a municipal council to appoint election officers recommended by the proper officer of a political party which, under the provisions of law, is entitled to representation on the election board, and where there is a disputed succession in the official personnel of such party, and there is no higher authority within the party to which such controversy can be submitted for determination, the court will, upon the application for the writ of mandamus, decide which of the two claimants is entitled to nominate such election officers.

2. ELECTIONS ¶51—APPOINTMENT OF COM-
MISSIONERS — CHALLENGERS AND POLL
CLERKS.

Under the General Election Law, upon the municipal council, in a municipal election, devolves the duty to appoint commissioners of election and challengers upon the recommendation of the chairman of the two leading political

parties, but such council has no authority to appoint poll clerks.

Original mandamus by the State, on relation of C. C. Testerman, against S. T. Lambert, Mayor, and others. Peremptory writ of mandamus awarded.

B. Randolph Bias, of Williamson, for relator.

Goodykoontz & Scherr, of Williamson, for respondents.

RITZ, J. The relator applied for a writ of mandamus to compel the respondents composing the common council of the town of Matewan to appoint certain election officers as representatives of the party whose candidate for mayor he claims to be.

Prior to December, 1917, there were two parties in the town of Matewan, one known as the "Citizens Party" and the other as the "Independent League Party." It is admitted that a convention of the Citizens party was held early in December, 1917, and that at this convention candidates were nominated to be voted for at the election to be held in the January following, and it is contended by the relator that said convention also selected an executive committee to represent said party until the holding of the next convention of the party. The respondents, on the other hand, contend that no such action was taken, and that R. W. Buskirk, who it is conceded was the chairman of the party prior to this convention, held over. The committee, which relator contends was selected at this convention, subsequently met and elected a chairman and secretary, and relator contends took charge of the campaign for the election of the candidates nominated by the Citizens party. Buskirk also attempted to exercise the duties of chairman of the party during this campaign. The election resulted in the defeat of the candidates of the Citizens party. Subsequently Buskirk died, and by his death, according to the contention of the respondents, the Citizens party was left without officers, while the relator claims that this only made a vacancy on the committee of that party, Buskirk being one of the committee named at the convention in December, 1917. Subsequently another member of the committee died, making two vacancies thereon. The chairman thereupon called a meeting for the purpose of filling these vacancies, which meeting was held and the vacancies filled, and the committee then called a convention to nominate candidates of the Citizens party for the election to be held in January, 1919. The respondent Lambert and some others, claiming that the Citizens party had no organization after the death of Buskirk, called a mass meeting of that party for the purpose of selecting a chairman to succeed Buskirk, which meeting was held and such a chairman chosen. The man so chosen

chairman then called a convention of the Citizens party to nominate candidates to be voted for at the election to be held in January, 1919. It will thus be seen that two conventions of this party were called for the same purpose. The convention first above referred to met and nominated the relator as its candidate for mayor, and also nominated a candidate for the office of recorder, and candidates for councilmen. It also selected an executive committee, and this committee subsequently met and elected a chairman and secretary. The chairman thus selected certified to the town council the names of certain parties whom he desired appointed as commissioner, clerk, and challenger to represent his party in the January, 1919, election. The convention of the Citizens party called by the chairman selected by the respondent Lambert and his associates also met and nominated candidates to be voted for in the municipal election, and the chairman selected by this convention also certified to the common council the names of certain parties to be appointed as election officers to represent the Citizens party in the election. Immediately upon the adjournment of this latter convention, a convention of the Independent League party was held in the same hall, and the same candidates nominated that had been selected by the last-named convention of the Citizens party. At a meeting of the council held to appoint election officers, that body declined to recognize the relator's party as the Citizens party, and appointed the election officers certified by the chairman selected at the convention at which the relator, Lambert, was nominated.

It may be observed that it appears without contradiction that Buskirk, who was undisputed chairman of the Citizens party until the convention of that party held in December, 1917, had at that time transferred his allegiance to the Independent League party. It is shown without contradiction that before the holding of the convention of the Citizens party in December, 1917, Buskirk certified to the council the names of parties to be appointed as election officers to represent the Citizens party, all of whom were in sympathy with and supporters of the opposing party. The respondents contend that members of the Citizens party called the mass meeting to select a successor to Buskirk, its deceased chairman. The record discloses the names of only two of the parties who called this meeting, one of them the respondent Lambert, who was elected by an opposition council to fill a vacancy in the office of mayor, and who is the candidate of that opposition party for that office in the coming election, and the other, who is openly co-operating in removing any opposition to the Independent League candidates. Can these men be classed as belonging to the Citizens party? The executive officers of any political party must be members of it, and it may be said that only those

voters who believe in its principles and support its candidates are members of a particular political party. The fact that a voter at one time affiliated with a certain party does not prove that he is a member of it when, at the particular time at which his party affiliations are brought in question, he is devoting his energies to an effort to compass the defeat of the candidates of the party to which he professes to belong. The real spirit of our election law seeks to have elections conducted by officers representing the parties opposed to each other. It was never intended that one party in a community, where its members are more than double that of the opposition, can divide itself into two parties, each nominate the same candidates, and, because it polls more votes in each of its branches than the opposition, exclude such opposition entirely from official participation in the election.

[1] It is contended here that, inasmuch as the common council has decided this question, this court will not take cognizance of it, and the cases of *Smith v. County Court*, 78 W. Va. 163 and 259, 88 S. E. 662, 793, *Bogges v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289, *Republican Executive Committee v. County Court*, 68 W. Va. 113, 69 S. E. 522, and *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 909, are relied upon. Those cases hold that when a dispute arises in a political party which has a tribunal of its own to which appeal can be made, this must be done, and the decision of such tribunal is final. In this case the only decision made as to who is entitled to represent the Citizens party was by the common council, admittedly composed of members of the Independent League party, whose political interest is in the destruction of its adversary. It does not appear that there exists in the Citizens party any superior authority to whom this question of disputed succession can be submitted, and for that reason the authorities referred to are inapplicable.

But it is insisted that, even though the persons recognized by the respondents as the officers of the Citizens party do not properly represent that party, this would not give the relator the relief he asks, unless he shows that the persons he contends are the officers of that party are such in fact; and this is true. The relator must show his right. The fact that the persons recognized by respondents may be getting something to which they are not entitled can make no difference to the relator, unless he is prejudiced thereby. Unless the committee claiming to have been selected by the Citizens party at the December, 1917, convention was in fact so selected, then it had no more authority to act for that party than had the committee recognized by respondents. As to what happened at the December, 1917, convention, there is some conflict. Those best in a position to know say this committee was selected as an

executive committee for the party, while a number of others say it was simply a nominating committee. The officers of that convention it is shown made a minute of what transpired a very few days thereafter, and this original paper is introduced. It bears the earmarks of genuineness upon its face, and its authenticity is vouched for by the secretary of the convention who made it. It shows that the party at that time did select an executive committee as contended by the relator, and we think, supported as it is, it is evidence of such a character as to conclude this question, especially when considered with the fact, well known at the time to the Citizens party, that Buskirk, who claimed to be chairman of it, was acting with the opposition.

[2] The respondents, at the request of the chairman recognized by them, undertook to appoint a commissioner of election, a poll clerk, and a challenger to represent the Citizens party, and the writ is asked to compel them to appoint the nominees of relator's committee to these offices. The council under the provision of section 85 of chapter 3 of the Code (Code 1913, § 107) is required, in case of a municipal election, to perform the duties devolving upon the county court in a general election, and unquestionably the appointment of commissioners of election is such duty. But how about the appointment of poll clerks and challengers? Section 8 of chapter 3 (sec. 24) provides for the appointment of poll clerks by the election commissioners. It is true section 26a4 of chapter 3, Barnes' Code 1918 (Code Supp. 1918, § 50d), provides for the appointment of both commissioners of election and poll clerks by the county court in a primary election, but this does not purport to change the law then in existence, providing for the appointment of such officers in other elections. We are therefore of the opinion that the action of the council in appointing poll clerks was without authority and is void. Provision was made for the appointment of challengers by act of the Legislature now contained in section 48 of chapter 3 of the Code (Code 1913, § 70). Under this section such challengers were appointed by the chairmen of the respective parties. In 1905 the Legislature revised the election law, and in a provision now contained in section 93 of chapter 3 (sec. 115) provided for the appointment of such challengers by the county court, upon the nomination of the chairmen of the two leading political parties. This act did not expressly amend section 48, but it was a general revision of the election law, and provided for the repeal of all acts or parts of acts inconsistent with it. It is therefore clear that so much of section 48 as provides for the appointment of challengers is superseded by the provisions of section 93 in regard thereto.

The writ is therefore awarded, requiring respondents to appoint the persons named in

relator's petition to the offices of commissioner and challenger, to represent the Citizens party in the municipal election to be held in January, 1919.

MILLER, J., absent.

(148 Ga. 652)

NORTON et al. v. R. C. NEELY CO. (No. 887.)

(Supreme Court of Georgia. Jan. 15, 1919.)

(Syllabus by the Court.)

STATEMENT OF CASE.

Easter Norton died testate in December, 1912, having appointed Jenette Norton executrix, who qualified as such. In 1909 the testatrix became indebted to R. C. Neely Company for the purchase of two mules, giving her note therefor in the sum of \$470, only \$69 of which was paid. In 1912 she also obtained from R. C. Neely Company advances and supplies for certain of her croppers and tenants to the amount of \$246.95, which was not paid. At the time of obtaining the credits she was solvent, having a certain interest in lands in Burke county. In July, 1911, she purchased a half interest in 45 acres of land in Screven county for \$1,528, which she conveyed by deed, on October 11, 1912, to Jenette Norton and Lila Norton Bryan for a named consideration of \$50. During the fall of 1912, in the lifetime of Easter Norton, her tenants delivered at her yard in Waynesboro 15 bales of cotton valued at \$900. This cotton was sold by Jenette Norton a few days before Easter Norton's death, for a sum in excess of \$900. After the death of Easter Norton the R. C. Neely Company filed a claim for the sum of \$851.95 principal, and \$228.08 interest, with Jenette Norton as executrix, who refused payment, and suit was brought and judgment obtained in the city court of Waynesboro for the amount sued for. The execution issued upon the judgment was levied on the lot of land in Waynesboro, and a claim thereto was filed by Jenette Norton and Lila Norton Bryan. It was alleged that there were no other assets of the estate of Easter Norton to be found. The present suit was brought for the purpose of canceling the deeds to the defendants as void, and as made, with the knowledge of both parties thereto, to delay, hinder, and defraud the creditors of Easter Norton, especially R. C. Neely Company; also to consolidate this case and the claim case, and to obtain a judgment against Jenette Norton individually and against Lila Norton Bryan for the full amount of the proceeds of the 15 bales of cotton alleged to have been received by them or either of them; also that the interest of Easter Norton in the Screven county land be declared subject to the lien of plaintiff's judgment and a sufficiency thereof be sold to satisfy the *fi. fa.* The defendants demurred to the petition, on various grounds. The demurrer was overruled, and the defendants excepted *pendente lite*. The sixth ground of the de-

murrer raised the issue that Lila Norton Bryan did not, according to the petition, take charge of or dispose of any of the cotton, and that so much of the petition as asked for a personal judgment against her should be stricken. The case proceeded to trial, and resulted in a verdict for the plaintiff. A motion for new trial was overruled, and the defendants excepted.

1. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 443(1) — PETITION.

Relatively to all the property, the petition set forth a cause of action against Jenette Norton individually and as executrix. It also set forth a cause of action against Lila Norton Bryan individually, except as to the cotton. The sixth ground of the demurrer should have been sustained as to her; and whatever further was done in the case with reference to her, so far as the cotton was concerned, was nugatory.

2. FRAUDULENT CONVEYANCES \Leftrightarrow 286(1) — CONSOLIDATION OF CLAIM SUIT — OMISSION OF *FI. FA.*

The first special ground of the motion for a new trial complains of admission in evidence of the *fi. fa.*, over objection that it did not follow the judgment upon which it was based. Upon comparison it appears that the *fi. fa.* did not follow the judgment in the respect as contended in the motion; but, the case being one to set aside fraudulent sales and to subject the property to the payment of the plaintiff's debt, so far as the judgment was valid, it was unimportant, for the purposes of this case, for the execution to follow the judgment technically, and the admission of the evidence furnishes no cause for a new trial.

8. WITNESSES \Leftrightarrow 140(2) — COMPETENCY — INTERESTS.

The second, third, and fourth grounds relate to the admission of evidence over the objection that the witnesses, on account of interest, were prohibited by the statute from testifying in the suit against the executrix. If the sales which it was sought to set aside were void on the ground of having been made to hinder, delay, and defeat creditors, they were void only as to the Neely Company, and neither of the witnesses could gain anything by the sales being set aside only in so far as to enable the Neely Company to subject the property to the payment of its debt. Under these circumstances the witnesses were not incompetent to testify, under Civil Code 1910, § 5858, para. 2, 4.

4. FRAUDULENT CONVEYANCES \Leftrightarrow 309(2) — INSTRUCTION — LIABILITY.

The fifth and sixth grounds assign error upon the following charges of the court: "Is the plaintiff, R. C. Neely Company, entitled to recover any amount against the defendants for the proceeds of the cotton alleged to have been sold by the defendants or their agents just prior to the death of Easter Norton in January, 1913? If so, how much against either or both? Then you write under it, 'Yes,' and the amount that you find the cotton to be worth, and the amount that you find from the evidence either or both of them liable in having misappropriated under this fraudulent scheme, if you believe such

to have existed." And "as far as the cotton is concerned they [referring to movants] sold the cotton and the proceeds of it never went to them, they contend, but went in extinguishment of the debts of their mother; anyhow it was turned over to her." The charge thus excepted to was erroneous in so far as it affected Lila Norton Bryan, against whom the petition had not set out a cause of action relatively to the cotton. What is here said also disposes of the ninth ground relative to Lila Norton Bryan on account of the conversion of the cotton, on complaint that said charge was without evidence to support it.

5. FRAUDULENT CONVEYANCES \Leftarrow 309(12)—CHARGE.

The seventh ground complains of the charge by the court: "However, if the consideration of this property was altogether inadequate, if they took it in good faith with no suspicion even of the purpose of their mother to defraud, if there was no such purpose, then they would be protected, and your verdict should be for the defendants." This charge was an attempt to apply the principle of Civil Code 1910, § 3224 (2), but it did not employ the language of the statute. It was charging too strongly against the defendants to use the expression "no suspicion even," as employed by the judge in the charge excepted to.

6. FRAUDULENT CONVEYANCES \Leftarrow 310—CONVERSION OF COTTON BY DEFENDANT—INDIVIDUAL LIABILITY.

The eighth ground complains of the form of the verdict in so far as it related to the cotton, on the ground that it was too indefinite. One object of the suit, and one object of the question propounded to the jury, was to ascertain the amount in money for which Jenette Norton would be individually liable on account of the conversion of the cotton, and for the jury to find that the plaintiff was "entitled to recover the value of ten bales of cotton against both defendants equally" was not to find the value of the cotton in money. Such a verdict was too indefinite to authorize a decree for any specific money value of the cotton, irrespective of what the uncontradicted evidence might have shown. If the evidence demanded a verdict on this question, the verdict should have expressed it, and not left to the court in formulating the decree to go back and review the evidence in order to see what it was.

7. ASSIGNMENT OF ERROR.

The tenth ground is too indefinite to present any question for consideration.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Suit by the R. O. Neely Company against Jenette Norton, executrix of Easter Norton, deceased, and another, to cancel a debtor's deed to defendants as void and as made to defraud creditors, and to consolidate such suit with a claim case arising on execution on a

judgment against Jenette Norton, executrix. Demurrer overruled and verdict for plaintiff, motion for new trial denied, and defendants except and bring error. Reversed.

A. B. Lovett, of Sylvania, and F. S. Burney, H. J. Fullbright, and C. B. Garlick, all of Waynesboro, for plaintiffs in error.

Callaway & Howard, of Augusta, and E. V. Heath, of Waynesboro, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur, except GILBERT, J., disqualified.

(148 Ga. 650)

GEORGIA VITRIFIED BRICK & CLAY CO. v. GEORGIA R. & BANKING CO. (No. 1006.)

(Supreme Court of Georgia. Jan. 14, 1919.)

(Syllabus by the Court.)

DEEDS \Leftarrow 140—QUIETING TITLE \Leftarrow 10(1)—EXCEPTIONS—EFFECT.

A plaintiff must recover on the strength of his own title, not on the weakness of the title of his adversary. Powell on Actions for Land, § 130, and citations. Where a deed excepts from its provisions certain land as conveyed in a specified deed recited to have been formerly executed by the grantor to another person, such grantee does not thereby acquire the land so excepted; and in a suit by such grantee against such other person, to cancel the former deed and have the title to the land conveyed thereby decreed to be in the plaintiff, where the petition with the exhibits made a part thereof showed upon its face the existence of facts as indicated above, the case was properly dismissed upon general demurrer. (a) It would not affect the case even if the former deed had not been delivered, or if the witnesses thereto were incompetent, or if it was not upon a valuable consideration, or if the plaintiff exercised adverse possession for 15 or 16 years, or if the grantee in the senior deed (a corporation) did not have charter power to own land.

Error from Superior Court, Richmond County; J. O. C. Black, Jr., Judge.

Action by the Georgia Vitrified Brick & Clay Company against the Georgia Railroad & Banking Company. From a judgment of dismissal, plaintiff brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error.

Cumming & Harper, of Augusta, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(148 Ga. 656)

JOHNSON et al. v. LASTINGER, County Clerk, et al. (No. 890.)

(Supreme Court of Georgia. Jan. 15, 1919.)

*(Syllabus by the Court.)***FINES — PROCEEDS — DISTRIBUTION — STATUTE.**

The city court of Valdosta was created by an act of the Legislature in 1901. Acts 1901, pp. 176-188. Section 44 of the act provides as follows: "Be it further enacted, that on the second Monday of each quarter, or any day previous to said second Monday he may see proper to do so, the judge of said court shall distribute the money received from the proceeds of the labor of convicts convicted in said court, and the fines and forfeitures arising from cases tried in said court. Said money shall be distributed as follows: All bills for insolvent cost due the solicitor of said court, the sheriff, the county and the clerk, shall be approved by the judge of said court and entered on the minutes thereof, and shall be a lien upon all the fines and forfeitures raised in said city court and money derived from convicts as aforesaid, superior to all other claims for insolvent cost; and when the judge distributes such fines and forfeitures he shall pay the same to the solicitor of said court, the sheriff, the county, and the clerk pro rata on their bills for insolvent costs, for fees in cases in said city court, and when said bill of insolvent costs of the solicitor of said court, sheriff, the county and clerk are fully paid, the judge shall order the surplus paid to the person who by law acts as the treasurer of Lowndes county, which surplus shall be by him placed to the credit of the fine and forfeiture fund of said county and distributed as now provided by law." In 1917 the Legislature amended the act of 1901, by abolishing fees for criminal business in the city court and providing salaries instead. Acts 1917, p. 275. Section 5 provided that the act should not go into effect until January 1, 1918. Section 8 of the act of 1917 is as follows: "Be it further enacted by the authority aforesaid, that all cost, fines and forfeitures arising through cases in the criminal side of the city court of Valdosta shall be collected by the clerk of said court and shall be paid into the treasury of Lowndes county and to the treasurer of said county, save and except such costs, fines and forfeitures or parts thereof which are legally due and payable to other officers; and any and all fees, emoluments, perquisites of office and insolvent cost which under any laws heretofore or now existing, or which may hereafter be enacted, shall become due and payable to said officers or shall

appertain to said offices, shall become the property of said county of Lowndes and the said county of Lowndes shall be subrogated to, and shall stand in the place and stead of said officers as regards any and all such fees, emoluments or perquisites of office derived from the criminal business of the said court: Provided, that nothing in this act shall be construed to affect the fees now allowed by law to solicitor of said court for services in the Supreme Court and Court of Appeals and said last-named fees shall be the property of the solicitor as heretofore." At the time the last-named act went into effect the plaintiffs in this case, Johnson, as solicitor, and Gornto, as sheriff, held insolvent cost bills for costs, which were approved by the judge of the city court. After January 1, 1918, the defendant Lastinger, as clerk of the court, collected certain fines which he declared his purpose of turning into the treasury of Lowndes county on authority of the act of 1917, supra, instead of to the plaintiffs and those entitled thereto as formerly. The plaintiffs brought a petition praying for a rule against the clerk, treasurer, and the county of Lowndes, with a prayer to require the clerk to pay over to the plaintiffs the amounts of their respective insolvent cost bills which had been approved by the judge of the city court. The defendants filed demurrers to the petition, which upon consideration the court sustained, and dismissed the case. The plaintiffs excepted. *Held*, irrespective of the constitutional question raised in this proceeding, the treasurer of the county is entitled to receive and disburse the money arising from fines and forfeitures, and the remedy, if any, of the former officers of the court is against the treasurer after he has received the fund. Acts 1901, p. 176; Acts 1917, p. 275; *Gamble v. Clark*, 92 Ga. 695, 19 S. E. 54; *Bartlett v. Brunson*, 115 Ga. 459, 41 S. E. 601; *Ball v. Wright*, 115 Ga. 729, 42 S. E. 32.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Suit by J. M. Johnson and others against B. G. Lastinger, Clerk of the County of Lowndes, and others. Demurrer to petition sustained, and cause dismissed, and plaintiffs except and bring error. Affirmed.

Greene F. Johnson, of Monticello, and Jas. M. Johnson, of Valdosta, for plaintiffs in error.

E. K. Wilcox, of Valdosta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(148 Ga. 651)

BROSSEAU v. JACOBS' PHARMACY CO.
et al. (No. 781.)

(Supreme Court of Georgia. Jan. 15, 1919.)

*(Syllabus by the Court.)***1. EVIDENCE** \S 413, 443(1) — **PAROL EVIDENCE VARYING WRITTEN CONTRACT—MOTIVE—DEED.**

The court erred in admitting parol evidence to show a verbal collateral agreement which added to and varied a written contract which was unambiguous and complete, and in admitting evidence to show motive for the execution of the contracts; and the judgment refusing a new trial must be reversed in so far as it applies to the cancellation of the contract for the purchase of stock in the corporation.

2. EMPLOYMENT CONTRACT—FAILURE.

The evidence authorized the finding that the contract of employment had failed; and the court did not err in rendering the judgment of cancellation in regard to that contract.

Error from Superior Court, Fulton County;
Geo. L. Bell, Judge.

Suit by the Jacobs' Pharmacy Company and others against D. I. Brosseau. From the judgment, defendant brings error. Reversed in part and affirmed in part.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

John L. Hopkins and Chas. F. & L. C. Hopkins, all of Atlanta, for defendants in error.

GILBERT, J. [1] When this case was last before us the facts, as they then appeared, were fully reported. *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 98 S. E. 293. Because of the admission of parol testimony varying the terms of the written contracts, the judgment refusing a new trial was set aside. The contracts sought to be canceled were then held to be separate contracts, and not dependent one upon the other. It was held that they were unambiguous and complete, and that the evidence on the admission of which error was assigned did vary the written contracts. Before the return of the remittitur the plaintiffs amended their petition by alleging, among other things, that the two written instruments were obtained by fraud on the part of Brosseau; that they were parts of one contract; that neither was in itself a complete contract; and that the contract for the sale of stock in the Jacobs' Pharmacy Company was dependent upon the faithful performance of the contract for personal services to that company. Over objection, parol testimony was admitted for the purpose of proving these allegations, and also to show the motive which moved Dr. Jacobs to execute the contracts. A judgment annulling both contracts was rendered by

the court, to whom the cause was submitted without the intervention of a jury. The amendment offers no reason or basis for the admission of the testimony which did not already exist. The allegations of fraud and the evidence offered in support thereof are insufficient to afford cancellation. The contracts speak for themselves; and mere allegations that either of them was ambiguous or incomplete cannot change the facts which have already been adjudicated. The former decision is the law of the case; and, in view of what was then said by Presiding Justice Evans, it is unnecessary to enter into another discussion of the principles of law involved.

[2] 2. The evidence on this, as on the former trial, authorized the finding that the contract of employment between Brosseau and the Jacobs' Pharmacy Company had failed; and the judgment cancelling that contract will not be set aside.

Other matters pleaded in the amendment are not herein stated. There was no judgment concerning them by the trial court. The judgment rendered was for the cancellation of both contracts. It is ordered that the judgment be reversed in so far as it undertakes to cancel the contract between Brosseau and Dr. Joseph Jacobs for the purchase of certain shares of stock in the Jacobs' Pharmacy Company, and affirmed in so far as it cancels the contract of employment between Brosseau and Jacobs' Pharmacy Company.

Judgment reversed in part, and affirmed in part.

All the Justices concur.

(148 Ga. 677)

VADA NAVAL STORES CO. v. SAPP.
(No. 987.)

(Supreme Court of Georgia. Jan. 15, 1919.)

*(Syllabus by the Court.)***1. LANDLORD AND TENANT** \S 285(3)—**ACTION AGAINST PURCHASER FROM TENANT—SUFFICIENCY OF PETITION.**

The petition as amended set forth a cause of action, and there was no error in overruling the general and special demurrers.

2. LANDLORD AND TENANT \S 64—**PURCHASERS FROM TENANT—RIGHTS.**

The vendee of a tenant, who has an apparent legal title and from whom the purchase was made, with or without notice of the tenancy, cannot dispute the title of the landlord, in an action of complaint for land, until he has restored the possession to the latter.

3. COMPLAINT FOR LAND—EVIDENCE—VERDICT.

Without regard to the special assignments of error upon the admissibility of testimony

and upon certain instructions given by the court to the jury, the verdict for the plaintiff was demanded, and the court did not err in overruling the motion for new trial.

(Additional Syllabus by Editorial Staff.)

4. LANDLORD AND TENANT §64—RELATION—SUCCEEDING POSSESSORS.

As a general rule, when the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession through or under the tenant, either immediately or remotely, and the fact that the tenant's assignment is in the form of a fee-simple conveyance is immaterial.

5. LANDLORD AND TENANT §66(1)—PURCHASE FROM TENANT—PRESCRIPTION.

A purchaser from a tenant having apparent legal title, without knowledge of the tenancy, may assert his adverse possession as a basis of prescriptive title.

6. LANDLORD AND TENANT §280—EJECTMENT BY LANDLORD—RIGHT OF POSSESSION.

An action of ejectment by the landlord against the tenant, where the landlord relies for recovery upon the privity existing between the parties, involves only the right to possession.

7. JUDGMENT §739—CONCLUSIVENESS—ACTS BY DEFENDANT.

In ejectment, a judgment for the landlord against a tenant, where landlord relies for recovery upon privity existing between the parties, involving only right of possession, is not conclusive in a subsequent action by tenant, as he cannot be concluded by a judgment as to matters which he could not litigate in an action in which judgment was rendered.

8. EQUITY §60—MAXIMS—PRIORITY OF RIGHT.

As between a purchaser from a tenant, who has an apparent title and from whom the purchase was made without notice of the tenancy, the equities between the purchaser and the lessor are equal, and in such case the landlord, having the prior equity, should prevail.

Error from Superior Court, Decatur County; W. C. Worrill, Judge.

Suit by Mrs. H. T. Sapp against the Vada Naval Stores Company. Verdict for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

The following is a condensed statement of the facts necessary to an understanding of the rulings made in this case:

In July, 1904, H. H. Sapp purchased from the Troxwell heirs the west half of lot of land No. 382, containing 125 acres, more or less, in the Sixteenth district of Decatur county. The deed was not recorded. Shortly after his purchase Sapp conveyed the land, for a valuable consideration, to Mrs. H. H. Sapp, his wife. Thereafter she leased the land to him, to be used as a location, as long as needed, for the purpose of manufacturing tur-

pentine. The lease did not specify any particular part of the land, nor restrict the lessee to the use of any particular number of acres. In November, 1904, H. H. Sapp sold a half interest in the turpentine location to J. L. Peebles, executing to him a lease, which was recorded on November 9, 1904, containing the following recital:

"The land on which said still is located belongs to Mrs. H. H. Sapp. The said H. H. Sapp hereby conveys to said Peebles a lease which he holds to said land, to be used as a location as long as it is needed for the purpose of manufacturing turpentine."

Thereafter Sapp sold his remaining half interest in the turpentine location to M. A. Bethune; and the lease from Sapp to Bethune, also recorded on November 9, 1904, contained in substance the same recital. Peebles and Bethune were, at the time, members of the copartnership of J. L. Peebles & Co., or shortly thereafter formed said copartnership, of which D. A. Autry also was a member. In 1905 Emma H. Wright and Columbia H. Lewis, two of the Troxwell heirs, conveyed said west half of lot of land to J. E. Harrell by deed recorded on August 10, 1905. Harrell conveyed the land to J. L. Peebles & Co. on September 6, 1905, by deed recorded on the following day. At or about the time of this last purchase Peebles & Co. notified Mrs. Sapp, by letter, that they no longer held under her, but that they were the owners of the true title to the half lot of land upon which the still site was located. Neither Mr. nor Mrs. Sapp, according to their contentions, received this notice. Peebles & Co. did not surrender or offer to surrender the possession of the still or any part of the land to Mrs. Sapp. On October 25, 1906, Bethune conveyed to his copartners his interest in the copartnership and turpentine site, and on January 18, 1910, by deed recorded on March 12, 1910, the copartnership conveyed the property to D. A. Autry & Son.

On February 14, 1911, Mrs. Sapp filed suit against Autry & Son, alleging that she was the owner in fee simple of said west half of said lot of land and had a perfect paper title thereto; that the defendants were in possession of the timber on said land and were turpentineing it under some pretended claim of right, to her injury and damage; and she prayed for injunction against the defendants, for damages in a sum stated, and for process. By amendment she alleged, in substance, that Autry & Son were her tenants; that they procured possession of the premises in the manner hereinbefore detailed, and, after the purchase from Harrell, attempted to set up an adverse claim of title, in disregard of plaintiff's title; that the turpentine site was located on said half lot of land; that the defendants had the right to use the same, so long as needed, for the purpose of manufac-

turing turpentine, but that the boxing of the timber on the land was a trespass; and that, inasmuch as defendants occupied the relation of tenants to the plaintiff, the trespass was willful. She therefore prayed for damages in an increased amount. The defendants filed an answer in which they denied the trespass, and set up title in themselves to the half lot of land. On May 13, 1913, the plaintiff recovered a verdict against Autry & Son in the sum of \$65. In 1911, after the filing of the suit aforesaid and before its termination, Autry & Son sold the half lot in dispute to the Vada Naval Stores Company, a copartnership, and delivered the possession to them. The purchase was negotiated by one Ball, a member of said copartnership.

Mrs. Sapp filed suit to the May term, 1914, of the superior court, against the Vada Naval Stores Company, for the recovery of the land with mesne profits. In addition to the foregoing, she alleged that Ball had actual notice and knowledge of the suit against Autry & Son at the time of the purchase, and that whatever claim of title "defendants had to said land is void as against plaintiff." Before the trial she amended by praying that "she recover possession of the property described in the petition, and that judgment be rendered directing the defendants to restore said property to the possession of the plaintiff," and that she recover rents only from the filing of the petition. The defendants demurred generally and specially. The verdict was for the plaintiff for the premises and \$100 rents. The defendants filed a motion for new trial, which was overruled, and they excepted to that ruling, and to the overruling of the demurrer.

M. E. O'Neal and Hartsfield & Conger, all of Bainbridge, for plaintiff in error.

T. S. Hawes, of Bainbridge, for defendant in error.

GEORGE, J. (after stating the facts as above). [1-3] The petition set forth a cause of action, and the court did not err in overruling the general demurrer. In so far as any of the grounds of special demurrer were meritorious they were fully met by timely amendment. In our opinion the verdict in favor of the plaintiff in the court below for the premises in dispute was demanded by the evidence. The special assignments of error, complaining of rulings of the court upon the admissibility of evidence and of instructions by the court to the jury, do not relate to the question of mesne profits, or, if they do relate to that issue, no reason appears from any of them why the verdict for mesne profits should be disturbed.

The relation of landlord and tenant existed between Mrs. Sapp and her husband, H. H. Sapp, as well as those holding the possession of the premises under him. In the assignment of his lease to Peebles & Co., or to

Peebles and Bethune, it was recited that Mrs. Sapp was the owner of the half lot of land in controversy, but that the assignees of Sapp should have the right to use the land so long as needed for the purpose of manufacturing turpentine. The elder Autry was a member of the firm of Peebles & Co., and his possession of the premises was acquired with full knowledge of the tenancy of Sapp and of Peebles & Co. The relation of landlord and tenant, therefore, existed between Mrs. Sapp and Autry & Son. Autry & Son sold the land in controversy to the Vada Naval Stores Company. The evidence in the record does not require a finding that the Vada Naval Stores Company knew of the tenancy of Autry & Son at the time of the purchase from the latter. In the view we take of the case, it is immaterial whether the Vada Naval Stores Company knew of the relation between Mrs. Sapp and Autry & Son before or at the time of the purchase. The tenant is estopped, as against the landlord, to deny the lessor's title. As otherwise stated, the tenant cannot dispute the title of his landlord. The tenant can neither dispute the title of his landlord nor attorn to another while in possession acquired by his contract or lease; and if after the expiration of his term he desires to contest the title of his landlord, he must first surrender the possession acquired from him. Civil Code, § 3698; Williams v. Garrison, 29 Ga. 503; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291 (2). This rule of the common law, as well as of our Code, will not be controverted.

[4] It is, however, insisted that the rule has no application here, since the Vada Naval Stores Company had no knowledge of the tenancy of Autry & Son at the time of the purchase. As a general rule, when the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession through or under the tenant either immediately or remotely. Were this not so, the general principle above discussed would be of little benefit to the landlord. The fact that the assignment by the tenant is in the form of a fee-simple conveyance is immaterial. The fact that the tenant exhibited to the purchaser an independent title is, in our view of the matter, likewise immaterial. We are aware that the Supreme Court of Pennsylvania, in the case of Thompson v. Clark, 7 Pa. 62, has reached a contrary conclusion, but, as we think, erroneously. In that case it was held:

"The vendee of a tenant, who has an apparent legal title, and from whom the purchase was made, without notice of the tenancy, is not bound to deliver up possession to the landlord, but may defend in ejectment."

In 2 Herman on Estoppel, § 861, it is said that the same estoppel which prevents a tenant from disputing his landlord's title likewise extends to all persons who enter upon

premises under a contract of lease, and to all persons who by purchase, fraud, or otherwise, obtain possession from such tenant. It is there, however, added:

"But if one, not knowing that the tenant holds a lease, purchases the estate by an absolute deed from the tenant, who has an apparent legal title other than his lease, such purchaser may contest the title of the lessor."

The text is based upon *Thompson v. Clark*, supra, and upon intimations contained in *Cooper v. Smith*, 8 Watts (Pa.) 536, and *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451. In *White v. Barlow*, 72 Ga. 887, the second headnote is as follows:

"A tenant cannot dispute his landlord's title, and the title of the landlord is good against such tenant, or one holding under him with notice."

In the course of the opinion by Chief Justice Jackson it was observed that the proof in that case positively showed notice in the assignee or purchaser from the tenant. The apparent intimation contained in the decision must therefore be taken in connection with the facts of the case.

[6] It is, of course, true that a purchaser from such tenant, without knowledge of the tenancy, may assert his adverse possession as a basis of prescriptive title. This principle is recognized in *McDougald v. Reedy*, 71 Ga. 750. These two distinct principles must not, however, be confused. A clear statement of what we believe to be the sound rule upon the question presented in this case is found in *Lane's Lessee v. Osment*, 17 Tenn. (9 Yerg.) 86:

Neither the tenant himself, nor a purchaser of the land under him, whether with or without notice of the landlord's right, can dispute the title of the landlord within the period necessary to form the bar of the statute of limitations.

In *Jackson v. Harsen*, 7 Cow. (N. Y.) 323, 17 Am. Dec. 517, it was held:

A "purchaser from the tenant, entering under an absolute conveyance in fee, is deemed to enter as the lessor's tenant, though he may not have known that his grantor derived possession from the lessor."

So, also, in *Reed v. Shepley*, 6 Vt. 602, it was ruled:

"One holding land under another cannot set up an adverse claim until he has first surrendered up the possession; and all who claim under him are tenants subject to the same rule, whether they knew of that relationship or not."

See, also, *Jackson v. Scissam*, 3 Johns. (N. Y.) 499; *Emerick v. Tavener*, 9 Grat. (Va.) 220, 58 Am. Dec. 217; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; *Phillips v. Rothwell*, 7 Ky. (4 Bibb) 33.

Prior to the Code of 1863 a judgment in ejectment was not conclusive as to the title between the parties thereto. *Parker v. Stambaugh*, 71 Ga. 735. By section 3275 of the Code of 1863 (Code of 1910, § 5583) it is declared that—

"A judgment in ejectment shall be conclusive as to the title between the parties thereto, unless the jury find for the plaintiff less than the fee."

[6] The action of ejectment by the landlord against the tenant, where the landlord relies for recovery upon the privity existing between the parties, involves only the right of possession. Cases may be found to the contrary. *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690; *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422; *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576.

[7] But the true rule is that such a judgment in favor of the landlord is not conclusive in a subsequent action by the tenant, because the tenant cannot be concluded by a judgment as to matters which he could not litigate in the action in which the judgment was rendered. If the judgment in ejectment in favor of the landlord against the tenant is conclusive as to the title, equity, under proper pleadings, would certainly enable the tenant to formally admit the possession of the landlord and to assert that his title is in fact paramount, thereby assuming the same burden that he would be required to assume and carry in a separate action. But in actions for rent and for use and occupation, the reason of the rule which estops the tenant from disputing the title of the landlord is plainly apparent. It is not apparent if the judgment in an action of ejectment by the landlord against the tenant is conclusive as to the title between the parties. Of course the tenant, in such an action, cannot set up want of title in the landlord, nor can he set up paramount title in another; but if the judgment is conclusive as to the title, or the suit against the tenant is so framed in any case as to adjudicate the question of title, the English rule, which permits the tenant to set up paramount title in himself, is sound in principle. *Accident Ins. Co. v. Mackenzie*, 5 Law T. (N. S.) 20, 10 C. B. N. S., Am. Reprint, 870. We are bound, under our decisions, to apply the estoppel in actions of ejectment, or of complaint for land, by the landlord against the tenant; but our conclusion is that the effect of the judgment against the tenant, unless the suit be so framed as to adjudicate the title, is to force the tenant to a separate action for the purpose of asserting his title.

In the case at bar we are not embarrassed in applying the estoppel for any of the reasons suggested above, because the petition, as finally amended, prayed only for the recovery of the possession of the land, together with the rents from the time of the filing of

the petition. While some of the allegations in the petition may have been broad enough to call for an adjudication of the title, the landlord expressly alleged that the tenant's claim of title was "void as against plaintiff," and upon the trial she relied only upon the privity existing between the parties. The evidence, without dispute, shows that Sapp had acquired the possession of the premises from the plaintiff under and by virtue of the lease. Sapp's possession, thus acquired, passed by successive assignments into the Vada Naval Stores Company. The possession of Sapp and of those who held under him, including the possession of that company, was therefore the possession of the original lessor. Her possession was notice, under our Code, of whatever rights she had in the premises. It is this possession that must be restored before the tenant can assert title adverse to the landlord.

[8] In our opinion the most that can be said in favor of a vendee of a tenant, who has an apparent legal title, and from whom the purchase was made without notice of the tenancy, is that as between such vendee and the lessor the equities are equal. In such case the landlord, having the prior equity, should prevail. We deem it unnecessary to say that the letter from Peebles & Co. to Mrs. Sapp, conceding that it was received by Mrs. Sapp, did not amount to a surrender of the premises to Mrs. Sapp. We also think it unimportant that only a small part of the half lot of land involved was actually used by Sapp and those holding under him as a site for the manufacture of turpentine. The whole tract was leased for that purpose, and, so far as the record discloses, there was no restriction, express or implied, in the lease as to the quantity of land that might be so used. The possession of the whole tract was therefore acquired under and by virtue of the lease, and the possession thereof must be restored to the lessor.

In view of the ruling made upon the controlling question in this case, it is unnecessary to decide whether the suit for trespass brought by Mrs. Sapp against Autry & Son, which was pending at the time of the sale by Autry & Son to the Vada Naval Stores Company, was *lis pendens*, and whether this doctrine is to be applied in this case. We call attention, in passing, to the New York case of *Halley v. Ano*, 136 N. Y. 569, 32 N. E. 1038, 32 Am. St. Rep. 764, where it was ruled that in such an action, the land itself not being the subject-matter of the suit, and there being nothing in the pleadings to show that title thereto is involved, the purchaser of the land *pendente lite* is not bound by the judgment in a subsequent action involving title to the same land.

Judgment affirmed. All the Justices concur.

(148 Ga. 635)

CITY OF ATLANTA v. GEORGIA R. & BANKING CO. (No. 762.)

(Supreme Court of Georgia. Jan. 14, 1919.)

*(Syllabus by the Court.)*1. MUNICIPAL CORPORATIONS \S 648, 654 — PRESCRIPTION—RIGHT OF WAY OVER RAILROAD TRACKS.

Although for a period of time longer than 20 years a crossing over the tracks of a railroad company is used by persons and vehicles, the public will not acquire an easement by prescription unless the use has been adverse, exclusive, and under a claim of right, and not by permission of the owner. *Mayor, etc., of Savannah v. Standard Fuel Supply Co.*, 140 Ga. 353, 358, 78 S. E. 906, 48 L. R. A. (N. S.) 469, and authorities cited. Under the facts of this case, the use of the crossing was neither exclusive nor adverse.

2. DEDICATION \S 15, 31, 44—PUBLIC STREET—INTENT.

"Dedication to the public of a use of land for a street rests upon the intent of the owner to make such dedication. Where the dedication is not express, the acts of the owner relied upon to imply a dedication must be such as to clearly indicate an intent to exclusively devote the property to use as a street." *Swift v. Lithonia*, 101 Ga. 706, 29 S. E. 12; *Savannah v. Fuel Co.*, supra. There must also be an acceptance. The facts of this case are not sufficient to show a dedication for public use.

3. DEDICATION \S 44—MUNICIPAL CORPORATIONS \S 654—RAILROAD PROPERTY—PUBLIC RIGHTS—VERDICT—EVIDENCE.

Whether or not the charge of the court on the subject of equitable estoppel was a correct statement of the law, and whether that doctrine was applicable to the issues on trial, the charge was not error requiring the grant of a new trial. The verdict was demanded by the evidence. None of the assignments of error show cause for the grant of a new trial.

*(Additional Syllabus by Editorial Staff.)*4. EASEMENTS \S 36(1)—PRESCRIPTION—BURDEN OF PROOF.

Title by prescription rests upon strict law, and the burden of proof is upon the prescriber to show affirmatively his right to maintain his adverse possession, and this is true when the prescription claimed is only an easement.

5. DEDICATION \S 15—DEDICATION BY RAILROAD—REQUISITES.

In view of limitations on railroad's disposition of its lands, so that it may not interfere with its public duties, the facts as to its intention necessary to imply dedication must be clear and unequivocal, and, if intention is determined by acts, they must be inconsistent and irreconcilable with any construction, except its assent to dedication.

6. DEDICATION \S 13—RAILROAD CROSSING—POWER OF RAILROAD COMPANY.

A railroad may by express dedication create an easement in the nature of the crossing,

where it is not prohibited by its charter, and will not materially interfere with the proper performance of its charter duties.

Atkinson and George, JJ., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Petition by the Georgia Railroad & Banking Company against the City of Atlanta to have title to certain land decreed to be in it and for an injunction, with cross-bill by defendant. Verdict for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

Georgia Railroad & Banking Company brought a petition against the city of Atlanta, in which it was alleged that the railroad company owned a right of way from the eastern boundary of the city to Pryor street, and across the particular strip of land lying between the point at which Yonge street opens into Decatur street and the boundary line between the right of way of the railroad company and what is known as Oakland Cemetery; that it was entitled to the exclusive use of this strip of land; and that this use was being interfered with by reason of the fact that the city was claiming the location in question to be a street, was prosecuting and threatening to prosecute its employes for failure to maintain an opening across its tracks at said point, and had passed an ordinance requiring the keeping of a watchman at said crossing. It prayed that title to the strip of land named be decreed to be in it, and for injunction against the prosecution of its employes and against the enforcement of the ordinance requiring the keeping of a watchman. The defendant filed a cross-bill setting up its claim to the crossing based on dedication and prescription, and prayed for injunction against the railroad. The case has had the attention of this court on two previous occasions. 131 Ga. 94, 61 S. E. 1035; 134 Ga. 871, 68 S. E. 703. The final trial resulted in a verdict for the plaintiff. A motion for new trial was overruled, and the defendant excepted.

J. L. Mayson and S. D. Hewlett, both of Atlanta, for plaintiff in error.

McDaniel & Black, of Atlanta, for defendant in error.

GILBERT, J. (after stating the facts as above). [1, 2] 1, 2. The first and second headnotes require no discussion. The authorities cited are sufficiently elaborate upon the rulings therein made.

[3-6] 3. The railroad company showed title to the land by deed, and there was no evidence to show any reservation or qualification in the grant. The city set up an affirmative equitable plea based both upon prescription and dedication. These two principles are closely analogous, but not identical. For a discussion, see 8 R. C. L. 904, § 30.

The city of Atlanta makes no claim that it has obtained the right to keep open the contested crossing by deed from the railroad company, or by express dedication and acceptance. It is not contended that the right has been acquired by condemnation under legislative authority, nor is it suggested that a street was laid out in pursuance of a municipal ordinance. Title by prescription rests upon strict law, and the burden of proof rests upon the prescriber to show affirmatively his right to maintain his adverse possession. And this is true when the prescription claimed is only to an easement. *McCullough v. East Tenn., etc., Ry. Co.*, 97 Ga. 373, 23 S. E. 838. This is especially true when the land is already used for public purposes, acquired under legislative authority. The power of disposition by a railroad company of its lands is limited, so that it may not disable itself from performing its public duties. It is a well-established rule that the requirements are much more stringent in the case of railroads than in the case of property not used for public purposes. In the case of railroads the facts in regard to intention, necessary to imply dedication, must be clear and unequivocal. 8 R. C. L. 890, § 14. Mr. Jones, in his work on Easements (section 425), says that the intention to dedicate must be made clearly to appear, and, if determined by acts, "they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner of such dedication." Of course, no such easement can be acquired, either by prescription or by dedication, where possession is exercised by the express or implied permission, or by the passive acquiescence or mere nonaction of the owner. A railroad may, by grant or express dedication, create an easement in the nature of a crossing across its tracks, where it is not prohibited by its charter, and where such action will not materially interfere with the proper performance of its charter duties, and the second use may be reasonably consistent with the first. A municipality may acquire such an easement by condemnation where the law has conferred express or implied authority. In the case of *City Council of Augusta v. Ga. R., etc., Co.*, 98 Ga. 161, 166, 26 S. E. 499, 500, it is said:

"A different result follows, however, when the enjoyment of the second use involves the practical extinguishment of the former, or renders its exercise so extremely inconvenient and hazardous as practically to destroy its value. In such a case, the right to enjoy the second use must rest upon express legislative authority, and will not be implied. The exercise of the second use, under such circumstances, would amount to a forfeiture of the first. Forfeitures, as a general rule, are not favored, will never be implied, and least of all where the effect would be to deprive one of a substantial right which he enjoyed under a valid subsisting legislative enactment."

See, also, *Central Railroad v. Brinson*, 70 Ga. 207, 240; *Town of Poulan v. Atlantic R. Co.*, 123 Ga. 611, 51 S. E. 657; *Louisville & Nashville R. Co. v. Louisville*, 24 L. R. A. (N. S.) 1215, 1219, notes; 9 R. C. L. 773, note 19. Surely the easement could not be acquired indirectly by prescription or implied dedication under circumstances which would not permit acquirement directly by condemnation. A railroad company cannot do, or permit to be done, by nonaction that which cannot be done expressly.

In the present case it is sought to establish a crossing over a right of way 110 feet in width, every available inch of which is occupied by railroad tracks, including two main-line tracks, constituting a part of the "railroad yard" constantly used for the passage of trains and engines. Prescription or implied dedication in such a case could only be established where the right is clear and unequivocal, under a rule no less strict than that stated in the authority last cited. It appears from the evidence that a system of "railroad yards" begins at Central avenue at the end of the old Union Station and extends to the roundhouse at or near Inman Park. The yard system as a whole is composed of several units, each connected with and dependent upon the others. There is evidence showing that these tracks are connected with all of the yards and were so constructed as to make use of every available inch of ground. To maintain the crossing would cripple the yards about one-third, and would require a total reconstruction of the yards, costing several hundreds of thousands of dollars. It would diminish the car room, interfere with the building and arranging of trains, continuously add to the expense thereof, and cause delay. The impairment would be substantial and for all time. The railroad has, from its inception, continuously exercised control and use of the right of way inconsistent with the intent to dedicate a street to permanent public use. The city introduced evidence sufficient to show that for many years the public did cross at the point in question, that at times a watchman was stationed there to protect the public from accident, that at one time accommodation trains stopped there to discharge passengers, and other facts of similar character. The evidence of the city as a whole was not sufficient to measure up to the rule above stated, as to prescription, or as to a clear and unequivocal intention to dedicate, and to negative the theory of permission or passive acquiescence on the part of the railroad. Taken altogether, the evidence demanded a verdict for the plaintiff.

In a populous city, near its center, through a railroad yard where trains are constantly moving and shifting, where the entire width

of the right of way is covered with tracks, a grade crossing must grossly impair the efficient use of the property as a railroad, and is necessarily dangerous and inconvenient to the public. Courts, as well as all persons of ordinary powers of observation, are obliged to take cognizance of these self-evident facts.

From a casual reading the decision in *B. & W. R. Co. v. Waycross*, 91 Ga. 573, 17 S. E. 674, might appear to conflict somewhat with the views above stated. In that case the railroad filed a petition for injunction, very much as in the present case. The city of Waycross also filed a cross-petition asking for an injunction against the railroad. It appears in that case that the railroad was built prior to the building of the city, and the roadway crossed a single track. The city, after its incorporation, laid out one of its principal streets across the track at the point occupied by the crossing. The railroad desired to build one additional track on its right of way, and the city, through its officers, interfered. Injunction was sought to prevent this interference. The injunction sought by the city was to prevent the building of the additional track. This court reversed the judgment, holding that the two uses were inconsistent. A reference to the pleadings will show that the petition filed by the railroad specifically alleged that its purpose and intention was not to obstruct the passage of persons and vehicles and property, nor to block up the avenue with cars, but was solely to furnish a connection for the passage of cars and engines running from its yards to the main line of the railway; and that the city was entitled to an easement across the railroad for a street, because it had laid out at that point a street according to the plans of the city, and that the public actually had a right of crossing the tracks by an acquiescence amounting to a dedication. Thus it is obvious that the decision proceeded from the premise of an established easement, and was not concerned with whether such an easement could be established under the pleadings and evidence in that case.

Judgment affirmed.

All the Justices concur, except ATKINSON and GEORGE, JJ., dissenting.

BECK, P. J. I concur in the judgment of affirmance.

ATKINSON and GEORGE, JJ. (dissenting). Applying the principles in *B. & W. R. Co. v. Waycross*, 91 Ga. 573, 17 S. E. 674, and *Southern Ry. Co. v. Combs*, 124 Ga. 1004, 53 S. E. 508, to the facts in this case, the judgment should be reversed.

(148 Ga. 663)

HARRIS v. TAYLOR et al. (No. 938.)

(Supreme Court of Georgia. Jan. 15, 1919.)

*(Syllabus by the Court.)***1. PROCESS \S 153—DEFECT IN COPY—SIGNATURE OF CLERK.**

The failure of the clerk to attach his signature to the copy process, regular in other respects, served upon the defendant in an equitable suit, is not cause for abatement of the suit; the original process attached to the original petition of file in the office of the clerk being regular in all respects, and the copy petition served upon the defendant, as required by statute, along with the defective process, being a true copy of the original petition, including entry of filing thereon under the signature of the clerk.

2. BANKS AND BANKING \S 77(4)—INSOLVENCY—LIABILITY OF STOCKHOLDERS.

Under the ruling in *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085 (3), the individual liability of stockholders of the Exchange Bank of Macon, under its charter, to depositors for all moneys deposited by them therein, is, upon its insolvency, an asset of the bank and enforceable in a suit or suits brought by its receivers. Civ. Code 1910, \S 2249.

3. CONSTITUTIONAL LAW \S 169, 191—CORPORATIONS \S 217—INSOLVENCY—LIABILITY OF STOCKHOLDER—RETROACTIVE LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.

Section 2249 of the Civil Code 1910 (Acts 1894, p. 76), which makes the statutory individual liability of a stockholder in an insolvent corporation an asset of such corporation, "to be enforced by the assignee, receiver, or other officer having the legal right to collect, marshal, and distribute the assets of such failed corporation," is not unconstitutional because, as applied to the Exchange Bank of Macon, chartered before the passage of the act of 1894, supra, it is retroactive and impairs the obligation of contracts. The act is purely remedial, by it, and the statutory liability of the stockholder is neither extended nor restricted, increased nor diminished. *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647(2); *Lamar v. Taylor*, supra.

4. BANKS AND BANKING \S 49(6)—INSOLVENCY—ACTION BY RECEIVER—MISJOINDER OF ACTION—MISJOINDER OF PARTIES.

Where a banking corporation has been shown to be insolvent and its assets placed in the hands of receivers, and in pursuance of an order of court the receivers undertake to enforce by suit in equity the individual liability of the stockholders as fixed by the charter in favor of depositors in such corporation, all the stockholders so liable may be joined in one action. There is no misjoinder of causes of action or of parties defendant. *Moore v. Ripley*, supra.

5. BANKS AND BANKING \S 47(1, 2)—LIMITATION OF ACTIONS \S 34(5)—INSOLVENCY—RECEIVERS' SUIT AGAINST STOCKHOLDERS.

In a suit of the character just indicated: (a) No demand by depositors as a condition prece-

dent to suit is necessary; (b) the liability of the stockholder need not be actually fixed and determined; (c) the assets, legal and equitable, of the corporation, need not have been first completely exhausted; and (d) the action to enforce the statutory liability of the stockholder may be brought at any time within 20 years after the right of action accrues. Civ. Code 1910, \S 4360; *Wheatley v. Glover*, 125 Ga. 719, 54 S. E. 626 (19).

6. BANKS AND BANKING \S 48(1/2)—INSOLVENCY—RECEIVERS' ACTION AGAINST STOCKHOLDERS—STATUTES.

In such action, the receiver may sue the stockholder in whose name the capital stock stands upon the books of the corporation at the time of its failure (Civ. Code 1910, \S 2248), or he may sue the real owner of the shares of the capital stock in such failed corporation, although such shares stand on the books of the bank in the name of another who in fact has no interest therein.

7. LIMITATION OF ACTIONS \S 127(3)—AMENDMENT—NEW CAUSE OF ACTION.

The amendment to the petition did not set forth a new cause of action.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Suit by R. J. Taylor and others, receivers of the Exchange Bank of Macon, against E. G. Harris and others. Demurrer of defendant Harris to petition overruled and his traverse to return of service and his plea in abatement stricken, and he excepts and brings error. Affirmed.

On July 8, 1907, upon the petition of a majority of its directors, the Exchange Bank of Macon was placed in the hands of receivers. The petition was against the bank, the stockholders thereof, and certain creditors. As to the creditors the prayers were for injunctive relief only. As to the bank and its stockholders, the prayers were for the general equitable winding up of the affairs of the bank, the distributing of its assets, etc. The Exchange Bank was chartered by a special act of the Legislature. Its charter provided:

"That said corporation shall be responsible to its creditors to the extent of its capital and its assets, and each stockholder shall be individually liable for all the debts of said corporation to the extent of his or her unpaid shares of stock, and said stockholder shall be further and additionally individually liable equally and ratably, and not one for another, as sureties, to depositors of said corporation for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock; it being the true intent and purpose of this section of this act, that, as to depositors, for all moneys deposited with said corporation, there shall be an individual liability upon such stockholder in such corporation over and beyond the par value of his or her original shares of stock, equal in amount to the face value of said share

of stock; provided, that said liability of the stockholders shall not prevent depositors from having equal rank with all other creditors upon the capital property and assets of said bank." Acts 1890-91, vol. 2, p. 130.

The receivers claimed the right to enforce the statutory liability of the stockholders under the charter for the benefit of the depositors. On June 29, 1912, the receivers were, by order of the court, authorized and directed to prosecute this suit to enforce such statutory liability of the stockholders and to collect from the stockholders an amount sufficient to pay the depositors for all moneys deposited in said bank, "not heretofore paid out of the other assets of said bank." The petition alleged that the undistributed assets amounted to \$21,498.58; the unpaid deposits, according to the books of the bank, amounted to \$146,832.60, besides interest. A list of the stockholders and of the number of shares owned by each was set out; and the petition prayed, among other things, for judgment and decree against the "said stockholders of said bank whose names have been set forth herein as defendants in this case, and against such other stockholders as may hereafter, by proper order of the court, be made parties defendant hereto, according to their several liabilities under the terms of the charter of said bank for such amounts as may be ascertained, upon the final accounting herein, to be necessary to pay the depositors of said bank as set forth herein in full." Among the stockholders named as defendants were E. G. Harris, plaintiff in error, who was alleged to be the owner of eleven shares, and W. G. Solomon, trading as W. G. Solomon & Co., who was alleged to be the owner of 106 shares. The petition was filed in Bibb superior court on August 28, 1912, and made returnable to the November term, 1912, of said court. Certain of the stockholders were duly served, and filed pleas to the suit; among other defenses, they prayed that the suit against them be enjoined for the reasons set out in the report of the case of *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085. Certain of the defendant stockholders were not served 15 days before the return term. Among these was the plaintiff in error. Such stockholders moved that the suit, for the reasons stated, be dismissed as to them. The court denied this prayer, and allowed the plaintiffs to amend the process by making it returnable to the February term, 1913, of the court. This ruling was affirmed by the Supreme Court in the case of *Turpin v. Taylor*, 143 Ga. 224, 84 S. E. 547, but with the direction that the court provide for service anew of the suit with the amended process attached.

Accordingly, the plaintiffs, on January 11, 1916, filed and had allowed an amendment to the original suit, requiring service anew on said defendant stockholders. In this amendment it was set out that Harris had settled

his liability on the eleven shares of stock standing in his name; but that 100 of the 106 shares, alleged in the original petition to be owned by W. G. Solomon trading as W. G. Solomon & Co., and standing on the books of the bank in the name of Solomon & Company, were in fact owned by Harris; and that Solomon merely purchased said shares for E. G. Harris, the actual owner thereof. It was also alleged that 6 of said shares standing in the name of Solomon & Co. were in fact the property of another named person; and the amendment asked for the right to strike Solomon as a defendant, and to make Harris and the other alleged stockholder parties defendants; and prayed judgment against each of them. Harris was served, as directed by order of the court, with copy of the original petition and all amendments allowed, including the amendment of January 11, 1916; but the copy of the amended process attached, regular in all other respects, was not signed by the clerk or other officer of the court. Harris traversed the return of service made by the sheriff, and filed a plea in abatement to the suit as to him, upon the grounds stated. He also demurred to the petition as amended, upon the grounds: That no cause of action is set out; there is a misjoinder of causes of action and parties defendant; the receivers are not proper parties to bring the suit; the statute under which the suit is brought (Civ. Code, § 2249) is unconstitutional; particularly, the receivers are not authorized to sue thereunder, the bank having been chartered prior to that act; the petition fails to allege a demand by depositors; the stockholders' liability is not fixed and determined; the cause of action is barred by the statute of limitations; as to the 100 shares of stock standing in the name of Solomon, trading in the name of W. G. Solomon & Co., only Solomon is liable to the plaintiffs; as to the 106 shares of stock, the amendment to the petition set up a new cause of action, and Harris, having settled his liability on the 11 shares originally alleged to stand in his name on the books of the bank, is entitled to be discharged. The court overruled the demurrer, and upon motion struck the traverse to the return of service and the plea in abatement. Harris excepted.

Harris, Harris & Witman, of Macon, for plaintiff in error.

Miller & Jones and Hardeman, Jones, Park & Johnston, all of Macon, for defendants in error.

GEORGE, J. (after stating the facts as above). [1] 1. It is conceded that the copy process served upon the plaintiff in error was not signed by the clerk. The motion, in the nature of a general demurrer, to strike the plea in abatement, admits this. The original process was in all respects regular, and was signed by the clerk. True and correct copies of the original petition and the amendment of

January 11, 1916, to which was attached a copy of the judge's order allowing the amendment, making Harris a party defendant to the suit, and requiring the clerk to issue process directed to him, "returnable to the next term of this court" (February term, 1916), and providing for service upon him of the petition and process as amended, were served upon the plaintiff in error, along with the unsigned copy process. Both the petition and the amendment, according to the copy entries of the clerk appearing upon the copy petition and copy amendment served upon plaintiff in error, were regularly filed in the office of the clerk of the court. The plaintiff in error appeared at the court and at the term thereafter at which he was required by the original process to appear and plead. He was therefore not actually misled. The amended petition was addressed to the court; it set out in detail the demand or cause of action, named the plaintiff and the defendant, and prayed for process and judgment against the latter. Under these circumstances, was the plea in abatement properly stricken? The question appears not to have been directly passed on by this court. In *Cochran v. Davis*, 20 Ga. 581, the question was directly made, and the decision in that case apparently rules that defects in the copy are immaterial if the original is correct. However, the decision was controlled by the failure of the defendant in that case to except in time to an order of the court allowing the copy process to be amended by affixing the signature of the clerk thereto. In *Ga. So. & Fla. Ry. Co. v. Pritchard*, 123 Ga. 320, 323, 51 S. E. 424, the statement in the opinion of Lumpkin, J., in *Cochran v. Davis*, supra, was declared to be obiter. In *Myers v. Griner*, 120 Ga. 723, 48 S. E. 113, the original process, which had not been signed by the clerk, was allowed to be amended nunc pro tunc by adding the clerk's signature. It was there said, obiter, that if the copy served upon the defendant had not been signed by the clerk or his deputy, or if neither the copy nor the original had been signed by the clerk, a different question would have been presented to the court. Section 5551 of the Civil Code requires the clerk to indorse the date of filing in office upon every petition. Section 5552 is as follows:

"To every petition the clerk shall annex a process (unless the same be waived), signed by the clerk or his deputy, and bearing test in the name of a judge of the court, and directed to the sheriff or his deputy, requiring the appearance of the defendant at the return term of the court."

Section 5563 requires the clerk to deliver the original petition, with process annexed, together with a copy of the petition and process for each defendant, to the sheriff or his deputy, who shall serve "such copy" upon each defendant residing in the county.

Under section 5572:

"No technical or formal objections shall invalidate any petition or process; but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded."

Our Code is liberal in the allowance of amendments, both as to pleadings and process, and section 5709 provides that—

"The mistake or misprision of a clerk or other ministerial officer shall in no case work to the injury of a party, where by amendment justice may be promoted."

Cases from outside jurisdictions on the point presented are few in number. Owing to the variety of statutes and rules of procedure, such cases are of little service beyond the jurisdiction where they were decided. However, it has been held that the omission in a copy of a copy of the court clerk's signature to the original writ is not material. *Clutterbuck v. Wildman*, 2 Tyrw. (Eng.) 276; *Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. In *Lyon v. Baldwin*, supra, it was held:

"The service of a writ of garnishment" is not void "because the copy delivered to the garnishee" is not dated and does not contain "the signature of the clerk."

The omission from the copy delivered of a copy of the judge's signature does not render the service insufficient. *Greenleaf v. Mumford*, 30 How. Prac. (N. Y.) 30 (warrant of attachment). In *Collins v. Merriam*, 81 Vt. 622, the defendant was sued in a justice's court. He moved to set aside the judgment rendered against him, upon the ground that the copy writ served upon him was not signed by a justice or other officer. The decision was against him, and, while other reasons may have required the decision, it was said, in the course of the opinion in the case:

"Suppose there was an omission to annex the name of the magistrate who signed the writ to the copy. I apprehend this would not defeat the effect of the service as a notice, and under our decisions would not constitute matter of abatement."

However, the contrary view of the question was taken by the New Jersey Supreme Court in *Steedle v. Woolston*, 83 N. J. Law, 91, 85 Atl. 737. It is to be noted that the New Jersey case arose in a "small cause court," and the statute, so far as appears from the decision, did not require a copy of the petition or declaration to be served upon the defendant along with the writ. It has been noticed that our statute requires service on the defendant of a copy of the petition or declaration. This copy should in reason be considered as a "part of the notice" to him. We are disposed to agree with the line of decisions to the effect that the copy petition served upon the defendant may aid the defective process served with it. *First National*

Bank v. Rusk, 64 Or. 35, 127 Pac. 780, 129 Pac. 121, 44 L. R. A. (N. S.) 138, 145; *Harvey v. Chicago & N. W. R. Co.*, 148 Wis. 391, 134 N. W. 839; *Lee v. Clark*, 53 Minn. 315, 55 N. W. 127; *Messervy v. Beckwith*, 41 Ill. 452. See, also, *Williams v. Buchanan*, 75 Ga. 789. The defect in the copy process did not wholly defeat the effect of the service as a notice, and the plea in abatement was properly dismissed.

[2-5] 2-5. The rulings made in the second, third, fourth, and fifth headnotes require no elaboration.

[6] 6. As to the 100 shares of stock standing in the name of Solomon & Co., it is insisted that there was no contractual relation between the bank and plaintiff in error. To this we are not prepared to assent. It is said that section 2248 of the Civil Code, which in part provides that "the stockholder in whose name the capital stock stands upon the books of such corporation at the date of its failure shall be primarily liable to respond upon such individual liability," fixes the liability under the charter of the Exchange Bank upon Solomon. Solomon is liable to the bank. His liability does not depend upon section 2248, *supra*. That section did not create such liability as to him. One who knowingly allows his name to appear upon the books of a corporation as the owner of capital stock therein, with the right to receive dividends, vote the stock, and to have the advantage of the apparent ownership, is estopped to deny that he is also subject to the burdens, statutory or contractual, imposed upon him as a stockholder in the corporation. He deals with the corporation as a stockholder. He holds himself out to the public as a stockholder. As to the former he is estopped to deny, and as to the latter it would be inequitable to permit him to deny, the existence of the apparent relationship. This is according to all the authorities. Section 2248, *supra*, merely prescribes the statutory rule for locating the burden of liability among the successive owners of stock. It is not applicable here. Solomon is liable to the receivers in this case. It by no means follows that the actual owner of the stock is not also liable and primarily liable in the suit. The decided cases seem to support this view. *Welles v. Larrabee* (C. C. Iowa) 36 Fed. 868, 2 L. R. A. 471; *Foster v. Brow*, 120 Mich. 1, 79 N. W. 696, 701, 702, 77 Am. St. Rep. 565; *Hubbell v. Houghton* (C. C. Mass.) 86 Fed. 547, affirmed 91 Fed. 453, 33 C. C. A. 574; *Dunn v. Howe* (1 C. C. A.) 107 Fed. 849, 47 C. C. A. 13; *Ohio Valley Bank v. Hullitt*, 204 U. S. 167, 168, 27 Sup. Ct. 179, 51 L. Ed. 427. See, also, 1 *Michie on Banks and Banking*, 170.

[7] 7. If we are correct in the foregoing, we do not think it can be said that the amendment set up a new cause of action. Relatively to the plaintiff in error he never

became a party defendant to the suit, and the suit never became a live action as to him, until the service upon him of the amended petition. It is therefore not a question of adding a new cause of action by amendment. The suit as to him stands just as if in the original action it had been charged that he was the owner of 11 shares of the capital stock which stood in his own name upon the books of the bank, and 100 shares of the capital stock which stood in the name of Solomon & Co., but that Solomon & Co. were mere brokers or agents for him and had no interest in said 100 shares. But the amendment to the petition, treating it as such, did not set out a new and different cause of action. The cause of action as to the 11 shares of stock standing in the name of the plaintiff in error, and the 100 shares in fact owned by him (according to the allegations of the amendment) but standing on the books of the bank in the name of Solomon & Co., is the same, ultimately one—the individual liability of the plaintiff in error as a stockholder in the Exchange Bank of Macon under its charter.

The judgment of the court below, dismissing the plea in abatement and overruling the demurrer to the petition is affirmed.

All the Justices concur.

(23 Ga. App. 146)

BAILEY v. STATE. (No. 10135.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 9, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §768(1) — REMINDING JURY OF OATH—STATEMENT OF COURT.

It was not error for the judge in his charge to remind the jury of the oath they had taken, that they would well and truly try the case, and to read the oath to them. The statement of the court, in this connection, that the jury had "sworn to try the case 'according to the opinion you entertain of the evidence as adduced on the trial of the case,'" while slightly inaccurate, was not materially erroneous.

2. CHARGE OF COURT.

Under the facts of the case, there was no error in the charge of the court as complained of in the second special ground of the motion for a new trial.

3. CRIMINAL LAW §922(2)—OFFENSE—BURDEN OF PROOF—CHARGE.

The venue was properly laid in the indictment, and clearly and undisputedly proved by the evidence, and the court instructed the jury that the burden was on the state to prove every material fact alleged in the indictment. There was no contention whatever as to the venue during the trial of the case. Under such circumstances, it affords no ground for a new trial that the judge failed to charge the jury specifically

that it was incumbent on the state to prove that the defendant had the whisky in his possession, custody, or control in the county of Cherokee.

4. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Hardy Bailey was convicted of an offense under the liquor law, his motion for new trial was overruled, and he brings error. Affirmed.

Howell Brooke, of Canton, for plaintiff in error.

Herbert Clay and Jno. T. Dorsey, Sols. Gen., both of Marietta, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(28 Ga. App. 276)

PARKS v. STATE. (No. 9625.)

(Court of Appeals of Georgia, Division No. 2. Jan. 15, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1110(2, 9)—TRANSCRIPT OF EVIDENCE—DIRECTION TO CLERK—ALTERATION OF BRIEF OF EVIDENCE.

In a case where it appears that the transcript of the brief of evidence sent to this court is not a correct copy of the brief of evidence approved by the trial judge and of file in the office of the clerk of the court below, this court will order the clerk to send up a correct copy of such record. *Smith v. State*, 118 Ga. 83, 44 S. E. 827. Where, however, it appears that the brief of evidence sent to this court in the transcript of the record is a correct copy of the brief of evidence approved by the trial judge, and where it further appears that he has signed the bill of exceptions, it will be held that he has exhausted his powers with respect to the testimony, and cannot subsequently alter the brief of evidence. *Jones v. State*, 64 Ga. 698; *Minhinnett v. State*, 106 Ga. 141, 32 S. E. 19; *Milton v. City of Savannah*, 121 Ga. 89, 48 S. E. 684.

2. CORRECTION OF BRIEF OF EVIDENCE.

Under the ruling in the preceding note, and the facts of the instant case, the trial judge was without authority to correct the brief of evidence, and this court will not order the corrected brief of evidence sent up.

3. CRIMINAL LAW §934—COMMISSION OF OFFENSE BEFORE PRESENTMENT—CONVICTION.

It appearing from the brief of evidence in the record transmitted to this court that if any offense was committed by the accused, it was subsequent to the finding of the presentment

upon which he was tried, his conviction was contrary to law (*Minhinnett v. State*, supra), and the court erred in overruling his motion for a new trial.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Lester Parks was convicted of an offense, his motion for a new trial was overruled, and he brings error. Reversed.

Everett C. Brannon, of Dawsonville, and H. B. Moss, of Marietta, for plaintiff in error.

Herbert Clay and Jno. T. Dorsey, Sols. Gen., both of Marietta, and Wm. Butt, of Blue Ridge, for the State.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

(28 Ga. App. 198)

ATLANTA, B. & A. RY. CO. v. SMITH.
(No. 9777.)

(Court of Appeals of Georgia, Division No. 1. Jan. 14, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §258(20), 265(12) —SELECTION OF SERVANTS — PRESUMPTION OF ORDINARY CARE.

Even if the injury to the plaintiff resulted from the carelessness and negligence of inexperienced and incompetent servants, the petition was nevertheless subject to general demurrer, since the law presumes that the master exercised ordinary care in the selection of his servants (*Georgia Railroad Co. v. Nelms*, 83 Ga. 70, 74, 9 S. E. 1049, 20 Am. St. Rep. 308; *Baxley v. Satilla Mfg. Co.*, 114 Ga. 720, 40 S. E. 730; *Gunn v. Willingham*, 111 Ga. 427, 434, 36 S. E. 804; *Kilgo v. Rome Soil Pipe Mfg. Co.*, 16 Ga. App. 737, 86 S. E. 82 [2]), and nowhere is it therein alleged that the master knew of such incompetency, or that by the exercise of due diligence could or should have known of their incompetency at the time of employment; or else that it negligently retained such servants with knowledge of their incompetency (*Gunn v. Willingham*, supra).

2. MASTER AND SERVANT §217(3)—INCOMPETENCY OF FELLOW SERVANTS—LIABILITY OF MASTER.

The petition was likewise subject to general demurrer for the reason that it affirmatively appears therefrom that the plaintiff was at the time of his injury a foreman in charge of a gang of laborers, whose negligence he alleges caused his injury, and he had at least equal opportunity with the master of discovering, or in the exercise of ordinary care should have known, their negligent propensities. "A servant cannot recover for injuries resulting from a fellow servant's incompetency, if he had equal opportunity with the master of discovering it,

or in the exercise of ordinary care should have known of it." *Kilgo v. Rome Soil Pipe Mfg. Co.*, supra. See, also, Civ. Code 1910, § 3131; *R. & D. Railroad Co. v. Worley*, 92 Ga. 84, 18 S. E. 361; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 38, 51 S. E. 13.

3. OVERRULING GENERAL DEMURRER.

The court erred in overruling the general demurrer.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Action by J. Q. Smith against the Atlanta, Birmingham & Atlantic Railway Company. General demurrer to petition overruled and judgment for plaintiff, and defendant brings error. Reversed.

Bolling Whitfield, of Brunswick, for plaintiff in error.

F. H. Harris, of Brunswick, for defendant in error.

WADE, C. J. Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 241)

CITY OF WARRENTON v. SMITH. (No. 9698.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS — §857 — PERSONAL INJURY—SUFFICIENCY OF PETITION.

The court did not err in overruling the demurrers to the plaintiff's petition.

(*Additional Syllabus by Editorial Staff.*)

2. PLEADING — §214(1) — DEMURRER — CONSTRUCTION OF PETITION.

As against a general demurrer to a petition, the Court of Appeals must necessarily take the allegations of the petition to be true.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Suit by O. M. Smith, Jr., by next friend, C. M. Smith, Sr., against the City of Warrenton. Demurrers to petition overruled, and defendant brings error. Affirmed.

E. P. Davis, of Warrenton, for plaintiff in error.

E. T. Shurley, of Warrenton, and Horace & Frank Holden, of Athens, for defendant in error.

LUKE, J. O. M. Smith, Jr., by next friend, O. M. Smith, Sr., brought suit for damages

against the city of Warrenton, alleging in substance that the plaintiff, who was four years of age, was injured by the fall of an iron shaft, round in shape, 2 inches in diameter, and about 20 feet long, one end of which was lying on a slab at the edge of the courthouse steps, and the other on a pier made of brick, covered with cement plaster, located at the edge of a public street in the city of Warrenton; that the plaintiff and other boys were playing on it, when it fell to the ground, injuring him severely; that by the slightest movement it was liable to fall; that it was placed there by the authorities of the city of Warrenton, who, by the consent of the county commissioners, had charge of the courthouse square; that many people, including adults and children, for many years frequented the courthouse square at the place where the injury occurred; that the city of Warrenton had both actual and constructive notice of the dangerousness of the said iron shaft, and had actual notice that children played upon and around it, and had notice for many years that children frequented the place, and played at and near the place where the plaintiff was injured. The defendant demurred, upon the ground that the petition disclosed that the injury occurred on the courthouse property, belonging to the county, and not on one of the streets or sidewalks of the city, but at a place over which the city of Warrenton had no jurisdiction, and further upon the ground that the dangerous bar of iron, which fell upon the plaintiff, causing his injury, could be reached by him only upon his voluntarily going upon the courthouse property, etc. The court overruled the demurrers to the petition, and the defendant excepts to that judgment.

[1, 2] The petition alleges that the city of Warrenton had charge of the courthouse square for many years, and had a walk across the courthouse square from one public street to another, and that the shaft of iron which injured the plaintiff was placed there by the city, in order to stop travel over a certain walkway. The petition is clear that the city of Warrenton maintained this agency, which, because of its unsafeness, was liable to injure children who played upon or around it. As against the demurrer, this court, of necessity, must take the allegations of the petition to be true. Under the rulings of the Supreme Court in *American Telephone & Telegraph Co. v. Murden*, 141 Ga. 208, 80 S. E. 788, and *Mayor, etc., of Umadilla v. Felder*, 145 Ga. 440, 89 S. E. 423, and cases there cited, the petition sets forth a cause of action. The court did not err in overruling the demurrers.

Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 284)

COOK v. BROWN et al. (No. 9670.)(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919. Rehearing Denied Jan.
28, 1919.)*(Syllabus by the Court.)***1. EVIDENCE — 265(15) — LANDLORD AND TENANT — 330(1), 332 — DAMAGE FROM FIRE SET BY CROPPER—LIABILITY OF LANDLORD—PETITION—RATIFICATION.**

The petition as amended alleged that "the relation of master and servant existed between Ida Brown and Gus King, in that the former had employed the latter as a cropper to work the farm on which fire started, * * * the former to furnish the land and stock, and the latter was to furnish himself and his family to work the crop on said place [italics ours]; said work was to be done under the direction and control of the former; such contract and relation existed at the time said fire occurred." The petition further alleged that the fire, which destroyed property belonging to the plaintiff for, which damages were sought against the cropper, King, and his landlord, Ida Brown, "was put out by defendant Gus King and his children, and the putting out of same was under authority of Gus King"; and that, "after said tortious act complained of, it was ratified by defendant Ida Brown, in not repudiating said acts and discharging defendant Gus King and his children, and further in admitting liability for same and offering to pay damages." *Held:*

(a) Notwithstanding the allegations that in preparing the land for cultivation it became necessary to burn off certain rubbish and trash, and that said King in carrying out his farming operations "put out" fire at different points on the lands of his master, and that these acts were within the scope of the business which King was employed to do, no cause of action was set forth against the landlord, since it did not appear that the fire was set out under her express direction, and the allegation that the acts of the cropper were within the scope of his employment is expressly negatived by the precise stipulations of the contract itself, which provides that the cropper was to "furnish himself and his family to work the crop on said place," and this work "was to be done under the direction and control" of the landlord. By the terms of the contract, the acts complained of were excluded from within the scope of the cropper's or servant's authority and duties.

(b) The allegations that the landlord failed to discharge the servant, Gus King, and admitted liability for the injury caused by King, and offered to pay damages, did not show ratification of the unauthorized acts of the cropper. Generally, an admission of liability where none in fact exists, and an offer to adjust a demand not legally enforceable, could not of itself create legal liability.

2. LANDLORD AND TENANT — 332—INJURY FROM FIRE SET BY CROPPER—NONSUIT.

The questions as to negligence was peculiarly a question for the jury (International Cotton Mills v. Webb, 22 Ga. App. 309, 96 S. E. 16 [4]), and there being sufficient evidence to authorize the jury to find for the plaintiff,

though it may not require such a verdict, the court erred in granting a nonsuit as to the defendant cropper (Moore v. Dixie Fire Insurance Co., 19 Ga. App. 804, 92 S. E. 302).

Error from City Court of Waynesboro; W. H. Davis, Judge.

Action by E. B. Cook, executrix, against Ida Brown, Gus King, and others. Judgment for defendants, and plaintiff brings error. Affirmed in part, and reversed in part.

M. O. Barwick, of Louisville, for plaintiff in error.

E. M. Price, of Waynesboro, for defendants in error.

PER CURIAM. Judgment affirmed in part, and reversed in part.

(23 Ga. App. 255)

**HEATH v. SANDERSVILLE R. CO.
SANDERSVILLE R. CO. v. HEATH.**

(Nos. 9781, 9782.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. CARRIERS — 227(1) — PLEADING — 35 — SURPLUSAGE — LIVE STOCK — ACTION FOR DAMAGES—PETITION.**

In an action instituted against a common carrier for a failure to safely transport and deliver live stock committed to it in good order by a shipper, particular acts of negligence need not be alleged, and when alleged may be treated as surplusage. Louisville & Nashville R. Co. v. Warfield, 129 Ga. 473, 59 S. E. 234; Louisville & Nashville R. Co. v. McHan, 144 Ga. 683, 87 S. E. 889 (1); Southern Express Co. v. Bailey, 7 Ga. App. 331, 66 S. E. 960; Central of Georgia Ry. Co. v. Stamps, 17 Ga. App. 453, 87 S. E. 702 (1).

2. CARRIERS — 215(1)—LIVE STOCK—NEGLECT—LIABILITY.

"When a carrier fails to deliver the goods intrusted to his care, or delivers them in a damaged condition, no excuse avails him, unless it was occasioned by the act of God, the public enemy, an inherent vice or natural deterioration of the object carried, or, in case of live stock, the viciousness of the animals, or that he is excused by special contract made with the shipper, by statute, or by negligence of the shipper." Louisville & Nashville R. Co. v. Warfield, supra.

3. CARRIERS — 218(11) — INTRASTATE SHIPMENT OF LIVE STOCK—CONTRACTS—NOTICE OF CLAIM FOR DAMAGES.

This being an intrastate shipment (the principle here announced being apparently different in interstate shipments, G. & A. Ry. v. Blish Milling Co., 241 U. S. 191, 38 Sup. Ct. 541, 60 L. Ed. 948), a stipulation in the contract of affreightment for the transportation of live stock, that before the animals are removed from

the place of destination and mingled with other animals, written notice of claim for damage shall be given to the agent of the carrier, may be waived by the carrier. *Louisville & Nashville R. Co. v. Tharpe*, 11 Ga. App. 485, 75 S. E. 677 (3). "The agent was not bound to recognize an oral demand. But if he did so, making no objection to it on the ground that it was not in writing, we think it was sufficient." *Hill v. Telegraph Co.*, 85 Ga. 425, 430, 11 S. E. 874, 875 (21 Am. St. Rep. 166). The allegations of the petition under consideration were sufficient to show oral notice to the agent of the delivering carrier of the damaged condition of the cattle, and that written notice was waived.

4. CARRIERS ⇐227(1)—LIVE STOCK—NOTICE OF DAMAGE—SUFFICIENCY.

The allegation that notice of the damaged condition of the cattle was given to the agent of the delivering carrier was not subject to special demurrer raising the objection that his name was not set forth in the petition. See, in this connection, *Angusta Ry. Co. v. Andrews*, 92 Ga. 706, 710, 712, 19 S. E. 713; *Pierce v. Seaboard Air Line Ry.*, 122 Ga. 664, 50 S. E. 468; *Atlantic Coast Line R. Co. v. Burroughs*, 20 Ga. App. 197, 92 S. E. 1010 (1); *Haynie v. Central of Georgia Ry. Co.*, 20 Ga. App. 599, 93 S. E. 258 (1).

5. CARRIERS ⇐219(8) — INTRASTATE SHIPMENT OF LIVE STOCK—LIABILITY OF INITIAL CARRIER—STATUTE.

Prior to the enactment of the Georgia law (Acts 1906, p. 102) relative to intrastate shipments, in conformity to what is known as the Carmack Amendment to the Hepburn Interstate Commerce Act (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 84 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]), it was the rule that a common carrier was not bound to issue a bill of lading for transportation of freight beyond its own terminus, and, if it did so, it might stipulate, as a condition to the undertaking, that its liability should extend only to injuries occurring on its own line (*Central R. Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *R. & D. R. Co. v. Shomo*, 90 Ga. 496, 500, 18 S. E. 220; *Kavanaugh v. Southern Ry. Co.*, 120 Ga. 62 [2], 65, 47 S. E. 526, 1 Ann. Cas. 705); but since the passage of that act (codified as section 2777 of the Civil Code of 1910) the initial carrier is liable for loss occasioned anywhere en route, whether on its own lines or not, where it voluntarily receives the shipment, notwithstanding an agreement or stipulation in a bill of lading limiting liability to loss, damage, or injury occurring on its own lines. See, in this connection, *Atlanta & West Point R. Co. v. Fairburn Marble Co.*, 145 Ga. 706, 89 S. E. 817.

6. ACTION FOR DAMAGE TO SHIPMENT OF LIVE STOCK—PETITION.

Applying the foregoing rulings, the petition as amended was not subject to any of the demurrers interposed, and the cross-bill of exception raising the several points made by the demurrers is affirmed.

7. CARRIERS ⇐218(3), 227(3) — INTRASTATE SHIPMENT OF LIVE STOCK—NOTICE OF CLAIM FOR DAMAGES—VALIDITY.

The special live stock contract having been signed by both the shipper and the carrier, and

this being an intrastate shipment, the stipulation in the contract of affreightment requiring that written notice of a claim for damages be given before the animals were removed or mingled with other stock is reasonable and valid, and is a condition precedent to the right of recovery. *Southern Ry. Co. v. Adams*, 115 Ga. 705, 42 S. E. 85; *Southern Ry. Co. v. Toller-son*, 129 Ga. 647, 59 S. E. 799; *Roberts v. G. S. & F. Ry.*, 10 Ga. App. 100, 72 S. E. 942; *Mitchell & Co. v. A. C. L.*, 15 Ga. App. 797, 84 S. E. 227. Such contract stipulation, being a condition precedent to a recovery, must not only be averred, but proved; and although it is held above (paragraph 3) that the averments as to notice were sufficient to meet the demurrer interposed, there is a total lack of proof that any notice, either oral or written, was given before the stock were removed from the car, nor was there any proof whatever to support a waiver of written notice as set out in the petition. The nonsuit was therefore proper.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by A. P. Heath against the Sandersville Railroad Company. Judgment of nonsuit, and plaintiff brings error, and defendant takes a cross-bill of exceptions. Affirmed on both main bill of exceptions and cross-bill.

Evans & Evans, of Sandersville, for plaintiff in error.

A. B. Lovett, of Sylvania, and J. J. Harris, of Sandersville, for defendant in error.

WADE, C. J. Judgment affirmed, on both the main bill of exceptions and the cross-bill.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 309)

SUTTLES v. PARRISH et al. (No. 9646.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)

(Syllabus by the Court.)

1. CHARGE OF COURT.

Under the facts of the case, the excerpts from the charge of the court, complained of in the special grounds of the motion for a new trial, contain no error.

2. SUFFICIENCY OF EVIDENCE.

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between A. L. Suttles and H. J. and I. M. Parrish and others. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

Joseph W. & John D. Humphries, of Atlanta, for plaintiff in error.

Bachman & Simmons and Douglas & Douglas, all of Atlanta, for defendants in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(22 Ga. App. 181)

WATKINS et al. v. STULB & VORHAUER.
(No. 9603.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. INSANE PERSONS ⇐66, 67, 72, 73—CONTRACTS—CONTRACT BY GUARDIAN.

A person actually insane has no power to contract so as to bind himself or his personal representative merely by virtue of the obligation imposed by the agreement. Contracts on his behalf, in order to be binding as such, must be entered into by his guardian legally appointed after commission sued out. If one who is actually insane, but who has not been legally so adjudged, proceeds to execute a contract, the agreement thus made, when taken by itself alone, while not absolutely void, becomes voidable at the option of his personal representative upon such state of insanity being shown. The mere fact that the other party to the contract was ignorant that the person with whom he was dealing was in fact insane, or even that the existence of such insanity could not have been discovered by the exercise of ordinary and reasonable prudence, will not of itself operate to prevent the exercise of such option and privilege on the part of the personal representative. But the contract of one who was insane at the time of the agreement, but who had never been legally so adjudged, ceases to be voidable, and becomes valid and binding whenever it is shown that the obligation has been subsequently ratified, either by the words or the conduct of the contracting party himself during a lucid interval, or by virtue of what amounts to a confirmation on the part of his personal representative. Civ. Code 1910, § 4237; Bunn v. Postell, 107 Ga. 490, 33 S. E. 707; Orr v. Equitable Mortgage Co., 107 Ga. 499, 33 S. E. 706; Weeks v. Reliance Fertilizer Co., 20 Ga. App. 498, 93 S. E. 152 (2). And even where there has been no such actual ratification of a contract thus made, but where there had not only been no adjudication of such fact of insanity, but where the opposite party to the contract was ignorant of the other's disability, and had no reasonable cause to suspect it; and where it is also shown that the contract, fair and reasonable in its terms, was entered upon in all good faith, without fraud or undue influence, and was founded upon a valuable and adequate consideration; and where it is shown that the insane party has actually received the full benefit of the contract, and that the parties cannot be restored to the status quo

—the liability under the contract will be upheld, not so much upon the theory of enforcing the promise because it was made in the agreement as upon the idea that the insane party ought not to enjoy the full, adequate, and irrestorable benefit of a contract ordinarily merely voidable, without himself complying with the terms thereof. Wooley v. Gaines, 114 Ga. 122, 124, 39 S. E. 892, 88 Am. St. Rep. 22; 16 Am. & Eng. Ency. of Law (2d Ed.) 625; Flach v. Gottschalk Co., 88 Md. 363, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; Memphis National Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788; National Metal Edge Box Co. v. Vanderveer, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343, Ann. Cas. 1914D, 865.

2. QUESTION OF FACT—INSANITY.

Under the evidence submitted, it was an issue of fact whether the defendant was sane or insane at the time he entered upon the original lease, as well as whether he was sane or insane at the time of its subsequent ratification. And under the additional proof submitted and the rulings made in the first headnote, the court did not err in charging the jury as complained of in the fifth ground of the motion for a new trial, nor in refusing the written requests to charge set out in the tenth and fourteenth grounds.

3. LANDLORD AND TENANT ⇐127, 185—IMPLIED WARRANTY.

In a lease contract, where there is no stipulation to the contrary, the lessor impliedly warrants that the leased premises shall be open to entry by the lessee at the time fixed for taking possession; and, while the lease takes effect upon its execution, and the right of possession and enjoyment of the leased property is a condition precedent to the right of the lessor to recover the rent, yet, before the lessee can repudiate the contract on the ground that possession was wrongfully withheld from him, he must do something to show that he desires possession. He cannot remain wholly inactive in reference to possession and justly claim that he is wrongfully excluded therefrom by the lessor. The law does not impose upon the lessor the duty of putting the lessee in possession of the leased premises. It demands only that the possession shall not be withheld when the lessee seeks it under the contract. Browder-Manget Co. v. Edmondson, 7 Ga. App. 843, 68 S. E. 453.

4. TRIAL ⇐192—INSTRUCTION—ASSUMPTION OF FACT.

Where in a civil case the undisputed evidence clearly establishes a particular fact, it is not error for the judge, in his charge to the jury, to assume or indicate that the fact has been proved. To do so is not a violation of section 4863 of the Civil Code of 1910. Georgia Railway & Electric Co. v. Cole, 1 Ga. App. 33, 57 S. E. 1028; Dexter Banking Co. v. McCook, 7 Ga. App. 436, 67 S. E. 113; Jones v. Wall, 22 Ga. App. 513, 93 S. E. 344.

5. CHARGE OF COURT.

Under the rulings made in the third and fourth headnotes, the court did not err in charging the jury as complained of in the

fourth, sixth, and seventh grounds of the motion for a new trial, for any of the reasons therein stated; nor did the court err in refusing the written requests to charge set out in the ninth, eleventh, and twelfth grounds.

6. TRIAL \Leftrightarrow 260(1)—REQUESTED CHARGES—GIVEN CHARGES.

The thirteenth ground of the motion for a new trial, assigning error upon the alleged refusal of the written request to charge set out in that ground, is without merit, since the principle of law stated therein was given in charge to the jury in almost the identical language of the request. The request to charge set out in the eighth ground was sufficiently covered by the charge of the court.

7. CHARGE OF COURT—APPLICABILITY.

Nor did the court err in refusing the written requests to charge set out in the fifteenth to eighteenth grounds, inclusive, of the motion for a new trial, since the principles of law contained in sections 3576, 4301, 4302, 4303, Civil Code 1910, are not applicable to the facts in this case.

8. WITNESSES \Leftrightarrow 158—COMPETENCY.

The evidence act does not provide that when a suit is defended by the personal representative of a deceased person, the opposite party is an incompetent witness as to independent facts, knowledge of which was not derived from transactions or communications with the deceased. The admission of the testimony objected to in the nineteenth to twenty-fourth grounds, inclusive, of the motion for a new trial was therefore without error. *Gomez v. Johnson*, 106 Ga. 513, 515, 32 S. E. 600; *Parker v. Salmons*, 113 Ga. 1167, 39 S. E. 475; *Hall v. Hilley*, 139 Ga. 13, 76 S. E. 566; *Nugent v. Watkins*, 129 Ga. 882, 58 S. E. 888; *Cato v. Hunt*, 112 Ga. 139, 37 S. E. 183.

9. CONTRACTS \Leftrightarrow 11—CAPACITY—STANDARD.

Complaint is made because the court permitted the plaintiffs to introduce in evidence the will of the defendants' decedent, over the objection that it was irrelevant and was not admissible to show mental capacity to contract. *Held*, the standard of intelligence required to constitute mental capacity to make a will and the amount of mental capacity required to make a contract are not the same, since "an incapacity to contract may coexist with a capacity to make a will." Civil Code 1910, § 3842. But since the judge in his charge explained such distinction by giving in charge this section of the Code, the admission of the evidence, if error, will be treated as harmless. See *Neel v. Powell*, 130 Ga. 756, 61 S. E. 729.

10. SUFFICIENCY OF EVIDENCE.

There was sufficient evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

Error from City Court of Richmond County; J. C. O. Black, Jr., Judge.

Action by Stulb & Vorhauer against Bryan Lawrence, continued after his death, against J. S. Watkins and others, executors.

Verdict and judgment for plaintiffs, motion for new trial overruled, and defendants bring error. Affirmed.

Sam L. Olive and J. S. Watkins, both of Augusta, for plaintiffs in error.

Callaway & Howard, of Augusta, for defendants in error.

JENKINS, J. Stulb & Vorhauer, plaintiffs in the court below, were the holders of a lease contract from the Glenn Springs Company, of Spartanburg, S. C., of the Glenn Springs Hotel property (which was a summer hotel) for the season of 1915, at a rental of \$3,500. On April 1, 1915, this lease was transferred to Bryan Lawrence by a written contract signed by the plaintiffs and by Lawrence, which provided that the lease was to begin on that date and end November 1, 1915. About May 20, 1915, J. H. Milligan, who testified that he had been requested by Bryan Lawrence, prior to April 1st, to operate the hotel for him during the season of 1915, went with Watkins, attorney for Bryan Lawrence, to Glenn Springs, and went over the hotel to ascertain its condition, for the purpose of opening the hotel in June. On their return to Augusta, they notified the plaintiffs that the president of the Glenn Springs Company informed them that the company had never consented to the transfer of the lease to Bryan Lawrence. Thereupon Vorhauer, one of the plaintiffs, and the plaintiffs' attorney, went to Glenn Springs, and on May 28, 1915, obtained the written consent of the Glenn Springs Company, for Bryan Lawrence to operate the hotel during the season of 1915, without releasing the plaintiffs from their liability to pay the rent, and on the next day copies of this written consent were delivered to Watkins, the attorney, and Milligan, the agent, of Bryan Lawrence, and about June 1, 1915, Milligan went to Glenn Springs, took charge of the hotel as the agent of Lawrence, and opened and operated it during the summer season of 1915. On June 2, 1915, Bryan Lawrence executed a power of attorney to his son, E. L. Lawrence, empowering him to do any and all things necessary for the operation of the Glenn Springs Hotel during the season of 1915. Bryan Lawrence went to the hospital some time during the month of April, 1915, and was in the hospital most of the time until his death in March, 1916. He died testate, leaving as the executors of his will Joseph S. Watkins, his attorney, and T. J. Morrow. On September 27, 1915, during the lifetime of Bryan Lawrence, the plaintiffs brought suit against him to recover the rental of the hotel, whereupon lunacy proceedings were instituted, and his son, E. L. Lawrence, was appointed as guardian, and filed the defense in this case, setting up:

(1) That Bryan Lawrence was insane at the time of the execution of the alleged contract, and therefore not bound by its terms; and (2) that the plaintiffs failed to deliver the hotel property to Bryan Lawrence, or his agents, at the time specified in the contract, and that this failure to so deliver said hotel relieved Bryan Lawrence of the contract, or, if it did not wholly relieve him of the contract, he was entitled to have credit for whatever damages he suffered by reason of such delayed delivery. Upon the death of Bryan Lawrence his executors were made parties defendant, and upon the trial the jury returned a verdict in favor of the plaintiffs for the full amount sued for. The defendants made a motion for a new trial, which was overruled, and to this ruling the defendants excepted.

Upon the question as to the plaintiffs' rights under a contract where a plea of insanity had been interposed in behalf of the defendant, the judge charged the jury in substantial accord with the principles of law set forth in the first headnote of this opinion. On each of the issues of fact as made by the evidence upon the several questions thus involved, the jury was authorized to find in favor of the plaintiffs.

[1-10] The rulings made in the headnotes do not require elaboration.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(28 Ga. App. 245)

SMITH v. FISHER. (No. 9754.)

(Court of Appeals of Georgia. Jan. 15, 1919.)

(Syllabus by the Court.)

NEW TRIAL §96—GROUNDS—ALLEGATIONS.

This case is controlled by the ruling made by this court in *McAnally v. Bank of Abbeville*, 22 Ga. App. 178, 95 S. E. 737, where the facts were similar. It was not error to refuse the grant of a new trial on the ground of the movant's absence on account of sickness at the time the case was tried; it appearing that, even though the movant was represented at the trial, no motion for continuance was then made, and it not being made to appear that the movant was at that time unable, by the exercise of due diligence, to communicate the fact of his illness

to the court or his attorney. In this case it appears that the movant had ample opportunity to inform the court or his attorney of his sickness, and failed to do so merely because he was under the impression that the case would not be called. See, also, *Burton v. Etheridge*, 19 Ga. App. 511, 91 S. E. 927.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between J. M. Smith and M. L. Fisher. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

F. W. Copeland, of Rome, for plaintiff in error.

Maddox & Doyal, of Rome, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 265)

DAUE v. ROYAL MIN. & MILL. CO.
(No. 9839.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

There was evidence to support the verdict returned, and none of the numerous special grounds of the motion for a new trial contain such harmful error as to require a reversal.

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action between E. O. Daue and the Royal Mining & Milling Company. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

Griffith & Matthews, of Buchanan, and Hutchens & McBride, of Tallapoosa, for plaintiff in error.

Price Edwards, of Buchanan, and Lloyd Thomas, of Tallapoosa, for defendant in error.

WADE, C. J. Judgment affirmed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 311)

LIBERTY LUMBER CO. v. ENECKS.
(No. 9739.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)*(Syllabus by the Court.)***1. EXECUTION** \S 181, 193—**TITLE—JUDGMENT.**

In an ordinary claim case, the claimant is entitled to a verdict in his favor if he shows title in himself, and the question whether or not he is liable to pay the debt on which the execution is founded is not properly triable in the case. The question is not as to the claimant's liability for the debt, but as to his title to the property levied on. He asserts, by filing his claim, merely that the property is not subject to sale under the execution. In such a case, in the absence of a suitable amendment or of proper equitable pleas, the plaintiff in *fi. fa.* cannot introduce evidence which merely tends to show that in good conscience and equity the claimant is liable for the debt. Civil Code 1910, §§ 5407-5409, 5412; *Gormerly v. Chapman*, 51 Ga. 421; *Hamberger v. Easter*, 57 Ga. 72; *Ford v. Holloway*, 112 Ga. 851, 38 S. E. 373; *Southern Mining Co. v. Brown*, 107 Ga. 264, 269, 33 S. E. 73.

2. CLAIM CASE—ADMISSION OF EVIDENCE.

Under the foregoing ruling, the court erred in admitting, over the claimant's timely and appropriate objections, the evidence set forth in the first special ground of the motion for a new trial.

Error from Superior Court, Screven County; R. N. Hardeman, Judge.

Claim case between the Liberty Lumber Company and W. R. Enecks. Judgment for the latter, motion for new trial overruled, and the former brings error. Reversed.

M. R. Lufburrow, of Sylvania, for plaintiff in error.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 312)

PETTY v. STATE. (No. 9870.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)*(Syllabus by the Court.)***1. CHARGE OF COURT.**

While some of the excerpts from the charge of the court complained of are subject to slight criticism, none of them, when considered in connection with the charge as a whole, and in the light of the facts of the case, contains reversible error.

2. SUFFICIENCY OF EVIDENCE.

The verdict was amply authorized by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Proceeding by the State against Fred Petty. Judgment against Petty, his motion for new trial overruled, and he brings error. Affirmed.

Mozley & Gann and Geo. D. Anderson, all of Marietta, for plaintiff in error.

Herbert Clay, Sol. Gen., of Marietta, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 315)

VICKERS v. STATE. (No. 10109.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW** \S 1160—**CONVICTION—REVIEW.**

There is no merit in the special ground of the motion for new trial. The evidence, while somewhat weak, authorized the defendant's conviction on both counts of the accusation, and, the verdict having been approved by the trial judge, this court is without authority to interfere.

2. SUFFICIENCY OF EVIDENCE.

As to the sufficiency of the evidence to convict under the first count of the accusation, see *Fitzgerald v. State*, 10 Ga. App. 70 (5), 76 (5), 72 S. E. 541; *Basil v. State*, 22 Ga. App. 765, 97 S. E. 259.

Stephens, J., dissenting.

Error from City Court of Hazlehurst; Gordon Knox, Judge.

Eli Vickers was convicted of an offense, and he brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error.

J. Mark Wilcox, Sol., of Hazlehurst, for defendant in error.

PER CURIAM. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

STEPHENS, J., dissents.

(23 Ga. App. 804)

MATHEWSON et al. v. BRIGMAN MOTORS CO. (No. 9904.)(Court of Appeals of Georgia, Division No. 1.
Jan. 18, 1919. On Motion for Rehearing, Jan. 28, 1919.)*(Syllabus by the Court.)***1. POSSESSORY WARRANT — NATURE OF REMEDY—TITLE AND POSSESSION.**

The defendant in error sued out in the municipal court of Atlanta a possessory warrant against the plaintiffs in error for a certain motor truck, and the judge of the municipal court, on the hearing before him, awarded the possession to the plaintiff, whereupon the defendants, by petition for certiorari, took the case to the superior court, and the certiorari was by that court denied, to which ruling defendants excepted. *Held*, "in a possessory warrant proceeding there is no question as to the title or as to the right of possession of the property in controversy; the sole question is as to the manner in which the possession was acquired by the defendant." *Oaks v. Singer Sewing Machine Co.*, 17 Ga. App. 517, 87 S. E. 719; *Trotti v. Wyly*, 77 Ga. 684.

2. POSSESSORY WARRANT — SALES — 456, 479(2)—CONDITIONAL SALE — CONSTRUCTION OF CONTRACT.

Where a vendor sells certain property, to be paid for in installments by the vendee, and enters into a written contract with the vendee, retaining the title to the property, with a stipulation in the contract that, if any of the installments are not paid, the vendor "shall have the right to take possession of said property without any legal process, and all payments made up to the time of default shall be applied as rental for said property and depreciation in value," the contract is one of conditional sale, and not of lease (*Rhodes Furniture Co. v. Jenkins*, 2 Ga. App. 475, 478, 58 S. E. 897); but where the vendee defaults as to some of the payments, the vendor, as between himself and the vendee, nevertheless has the right, under the contract, so far as mere possession of the property is concerned, to remove it without any legal process (*Wilmerding v. Rhodes-Haverty Furniture Co.*, 122 Ga. 312, 50 S. E. 100); yet where a third person, in good faith and without any notice of such conditional sale contract, has acquired the property from the vendee, and is in possession of it in a quiet, peaceable, and lawful manner, and such possession is taken from him by the vendor, without any legal process and without his consent and against his will, he is entitled to a judgment in his favor in a possessory warrant proceeding instituted by him against the vendor, since the scope of such a proceeding is limited as indicated above. Civ. Code 1910, § 5371; *Marchman v. Todd*, 15 Ga. 25; *Broadhurst v. Carswell*, 119 Ga. 529, 48 S. E. 658; *Copeland v. Lucas*, 6 Ga. App. 6, 64 S. E. 113; *Oaks v. Singer Sewing Machine Co.*, *supra*.

(a) The judge of the municipal court was authorized, under the facts of this case, to find that the plaintiff acquired possession of the property in dispute in good faith, and without notice of the conditional sale contract existing between *Mathewson & Lane*, defendants and vendors,

and *J. W. Bowen*, vendee, and that it was in the quiet, peaceable, and legally acquired possession of the property at and before the time possession thereof was taken by defendants, without legal process and without plaintiff's consent.

3. ASSIGNMENTS OF ERROR.

The assignments of error not disposed of by the foregoing rulings are without substantial merit.

On Motion for Rehearing.

*(Additional Syllabus by Editorial Staff.)***4. BILLS AND NOTES — 342—TRANSFER—NOTICE—CONSTRUCTION.**

A recital in a note that it is given in pursuance of a specified contract is sufficient to charge even a purchaser of the note with knowledge of the contract to which such reference is made.

5. CONTRACTS — 164—CONDITIONAL SALE—NOTE.

It is a general rule that, where instruments are executed at the same time, for the same purpose, and in the course of the same transaction, they are to be read and construed together.

6. SALES — 473(1) — CONDITIONAL SALE—LEASE BY BUYER—NOTICE.

Where truck was sold under contract of conditional sale, stipulating that, on default in payment of installments, seller might take possession without legal process and apply payments to rentals, a lessee from buyer, under lease mentioning certain unpaid purchase-money notes, who agreed with lessor that they should be first satisfied out of future profits from use of truck, was not charged with notice of terms of conditional sale contract, or put upon inquiry as to its terms.

Error from Superior Court, Fulton County; *J. T. Pendleton*, Judge.

Possessory proceedings by the *Brigman Motors Company* against *J. H. Mathewson* and others. Judgment awarding possession to plaintiff, defendants' petition for certiorari denied, and defendants bring error. Affirmed.

Robt. C. & Philip H. Alston, of Atlanta, for plaintiffs in error.

Westmoreland, Anderson & Smith, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

On Motion for Rehearing.

JENKINS, J. The defendant in error in this case was the lessee in possession under the vendee when the motor truck was seized without legal process by the original vendor. Under the terms of the lease by which the defendant in error had gone into possession of the truck, mention was made in general

terms of certain remaining unpaid purchase-money notes, maturing monthly, due by the vendee to his vendor, and it was agreed as between the lessee and his lessor, the vendee, that these notes should be first satisfied out of any future rental profits derived from the use of the truck, before any portion of such profits should be applied upon a pre-existing debt owing by the vendee to the lessee.

It is urged by counsel for plaintiff in error, the original vendor, that the lessee at that time, and because of such reference, must necessarily have been charged with legal notice, or put upon sufficient inquiry, as to what constituted the terms, stipulations, and conditions of the original sale. It is not contended by plaintiff in error that the lessee, at the time he went into possession of the truck, had any other or different notice of these terms than such as might in this way be implied. The lease contract itself in no way refers to the terms, conditions, and reservations of the original sale; and while the lease makes general reference to the outstanding purchase-money notes as indicated, even the notes themselves in no way purport to state such terms. It is only in still another and different instrument, referred to, not by the lease, but only by the notes, that the terms and conditions of sale are actually set forth.

[4-6] It is the general rule that, where instruments are executed at the same time, for the same purpose, and in the course of the same transaction, they are to be read and construed together; and where a note recites that it is given in pursuance of a specified contract, such recital is sufficient to charge even a purchaser of the note with knowledge of the contract to which such reference is made. *Turner Lumber Co. v. Henderson Co.*, 20 Ga. App. 682 (2), 688, 93 S. E. 301; *Glover v. Wesley*, 20 Ga. App. 814, 93 S. E. 513. Thus, were it here a question between the original vendor and vendee, or between the maker of the note and a purchaser thereof, as to what constituted the consideration and purport of that obligation, it would manifestly be true that the reference made in the notes to the contemporaneous agreement would be sufficient to require that it, together with the notes themselves, be considered as one instrument, and that they be construed together.

But the issue which is here involved is not one of construction as to what constituted the terms and conditions of the sale as between the original parties to the sale, or as to a party made by the purchase of the notes given under the sale, but the sole and only

issue here presented is one of notice to a third party holding possession under an independent lease. The lessee of the truck was neither party nor privy to the original contract of purchase and sale, nor did he ever become such. So far as we are able to say from the record, the lessee had a right to believe that the notes referred to by the lease, and which he had never seen, were ordinary, plain purchase-money notes, without reservation, restriction, special rights, or conditions therein contained. There was no sort of effort to effect a substitution of parties as to the original contract of sale. Even so far as the lessor himself was concerned, the lessee did not undertake to assume that contract or bind himself in regard to its terms and obligations. All that he did do was merely to agree with his lessor that the first rental profits derived from the use of the leased truck should be held back for the benefit of the lessor in an amount sufficient to satisfy the maturing obligations of the lessor.

It would not seem that, merely because he had entered into such a limited and independent agreement with the vendee, and with him alone, that he should be charged with notice, on behalf of the original vendor, of the terms, stipulations, and conditions relative to the original sale, though in nowise stated or referred to in the lease, nor even set forth in the notes to which general reference was made by the lease, and where the reference to the notes by the lease was only for a purpose restricted by the agreement. The lease in no wise attempted, by reference or otherwise, nor for its own purpose was it in any way necessary, to ingraft within itself the independent terms and conditions imposed by the provisions of the anterior sale, and to which the lessee was neither party nor privy, and we cannot say as a matter of law that, simply because he had thus agreed with the vendee to hold back for his benefit certain profits as indicated, diligence required of him, not only to run down the terms of the notes referred to, but also the terms of the separate and independent instrument to which reference was made by the notes, in order to ascertain if perchance the vendor, in his contract made with another party, had seen proper to enter and reserve the extraordinary right, on default of any payment, to seize and possess the property without process at law.

The other cases cited by movant pertain to the right of possession, and this question, as already stated in the first headnote, is not here involved.

Rehearing denied.

(23 Ga. App. 288)

GAINESVILLE BUGGY & WAGON CO. v. MORROW et al.**MORROW et al. v. GAINESVILLE BUGGY & WAGON CO.**

(Nos. 9874, 9875.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. JUDGES ⇨25(1)—SPECIAL JUDGE—POWERS.**

As to the case for which he is chosen, a judge pro hac vice has all the powers and duties which, but for the disqualification, would devolve upon the regular presiding judge of the court, not only with respect to the jury trial of the case, but also with respect to matters of review and appeal and to all other matters therein subsequent to the verdict and judgment. Civ. Code 1910, § 4856; Henderson v. Pope, 39 Ga. 361; Clayton v. Wallace, 41 Ga. 288.

2. NEW TRIAL ⇨113 — MOTION FOR NEW TRIAL—TIME—STATUTE.

All applications for a new trial, except in extraordinary cases, must be made during the term at which the trial was had, and within the time prescribed by law. Civ. Code 1910, § 6089. But the clerk is not required to enter such motions upon the minutes of the court, or to treat them otherwise than as pleadings regularly filed in vacation. Civ. Code 1910, § 6080. The presentation and approval of such a motion, together with the rule nisi issued thereon, is an ex parte proceeding. There is no statute prescribing that such steps shall be taken while the trial judge is upon the bench presiding in the same or another case; nor is there any reason known to the law why a motion for a new trial may not be presented, approved, served, and filed, or why any one or more of such steps may not be taken, during a temporary recess of the court, or away from the courthouse as well as at it. King v. Sears, 91 Ga. 577, 18 S. E. 830.

3. CASES DISTINGUISHED.

In view of what is said above, the refusal to dismiss the motion for a new trial was not error. The decision in the case of Norris v. Pollard, 75 Ga. 358(3) is not in point here, because that decision does not relate to the case in which a judge pro hac vice presided, but to a separate and distinct case. Nor is the case of Pendergrass v. Duke, 140 Ga. 550, 79 S. E. 129, here in point, because in that case the judge who was presiding at the time the motion for a new trial was presented, and to whom the motion should have been presented, had also presided at the time the verdict therein complained of was received, and had actually entered the final decree in the case, and his qualification to entertain the motion for a new trial and to issue the rule nisi thereon was unquestioned.

4. RULING ON MOTION FOR NEW TRIAL.

The evidence authorized the verdict, which has the approval of the trial judge. The charge of the court was, as a whole, full and fair, and for no reason assigned does this court see er-

ror requiring a reversal of the judgment overruling the motion for a new trial.

Error from City Court of Hall County; H. H. Perry, Judge pro hac.

Action between Gainesville Buggy & Wagon Company and A. W. Morrow and others. Judgment for the latter, and the former excepts, and the latter take a cross-bill of exceptions. Affirmed.

J. O. Adams and Ed. Quillian, both of Gainesville, and C. R. Faulkner, of Bellton, for plaintiff in error.

W. M. Oliver and W. B. Sloan, both of Gainesville, for defendants in error.

LUKE, J. Judgment affirmed on both the main bill of exceptions and the cross-bill.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 255)

WISE v. MOHAWK RUBBER CO. (No. 9766.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. PRINCIPAL AND AGENT ⇨94, 99—APPARENT AUTHORITY OF AGENT.**

Where one holds another out as his special agent, the principal is bound by the agent's apparent authority to do the particular thing thus authorized, as well as to do any and all things usual and necessary, and to employ all usual and necessary means that may be reasonably required, in the due, proper, and ordinary performance of the particular purpose of the appointment (Civ. Code 1910, § 3595; Bass Co. v. Granite City Co., 119 Ga. 124, 45 S. E. 980 [1]; Raleigh Railroad Co. v. Pullman Co., 122 Ga. 700, 705, 50 S. E. 1008); but a person dealing with such an agent takes the risk as to any extension of the agent's authority beyond that which is thus authorized, and the burden rests upon him to show authority from the principal for any act of the agent which exceeds or transgresses the usual and ordinary acts, such as are reasonably necessary to a due performance of the particular purpose of the agency. Napier v. Strong, 19 Ga. App. 401, 408, 91 S. E. 579 (3).

2. PRINCIPAL AND AGENT ⇨101(3), 169(3)—COLLATERAL CONTRACT BY AGENT.

As it was not shown that the collateral contract made by the purchaser with the traveling salesman was a usual and necessary incident to the sale, or that the salesman had authority to make such a contract, it had no binding effect upon the principal; nor would the fact that the seller, after the buyer had apprised him of such unauthorized agreement, proceeded to sell and furnish to the buyer another consignment of the articles of merchandise, have the effect of

ratifying the terms of the original unauthorized agreement; it appearing also that, at the time the subsequent sale was made, the seller repudiated the agreement in question, and made shipment of the additional articles without any agreement or understanding, expressed or implied, that the repudiated promise of his agent would be recognized.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action between J. A. Wise and the Mohawk Rubber Company. Judgment for the latter, and the former brings error. Affirmed.

W. M. Goodwin, of Sandersville, for plaintiff in error.

Evans & Evans, of Sandersville, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 301)

ESTES v. THOMAS. (No. 9893.)

(Court of Appeals of Georgia, Division No. 1. Jan. 16, 1919.)

(Syllabus by the Court.)

1. MOTION TO DISMISS—BILL OF EXCEPTIONS.

This was a suit for damages growing out of an alleged slander and libel. The petition alleged that, while the plaintiff was a candidate for re-election to a certain municipal office, the defendant caused to be written, printed, and circulated certain false and slanderous statements charging petitioner with having previously cheated, robbed, and defrauded the defendant of certain money which the plaintiff, as the attorney of defendant, had collected for him on a claim growing out of a damage suit. The defendant admitted the publication and circulation of the charge, and pleaded the truth of the charge as justification, and this is the only defense relied upon. *Held*, the motion to dismiss the bill of exceptions is without merit. Civ. Code 1910, § 6182; Barfield Music House v. Harris, 20 Ga. App. 42, 92 S. E. 402.

2. APPEAL AND ERROR ⇐1001(1)—VERDICT—REVIEW.

The verdict, though not demanded, was supported by evidence sufficient to authorize it, and will not be disturbed on the general grounds of the motion for a new trial.

3. LIBEL AND SLANDER ⇐50 — NEW TRIAL ⇐41(3) — CANDIDATE FOR OFFICE — PRIVILEGE—MISLEADING CHARGE.

The fourth ground of the motion for a new trial, as amended, assigns error because the court gave in charge to the jury section 4436 of the Civil Code 1910, except subsection 4. It is contended that, one of these subsections being

applicable, it is not cause for a new trial that the judge read in charge to the jury such other parts of the section; it not appearing that the reading of the inapplicable part was calculated to mislead the jury or erroneously affect their verdict, to the prejudice of the complaining party. See *Eagle & Phenix Mills v. Herron*, 119 Ga. 389, 46 S. E. 405(3). Subsection 6, which is the only portion of the section which it is contended was applicable in the present suit, provides that "comments upon the acts of public men, in their public capacity, and with reference thereto," are privileged communications. Since the defendant could not justify the publication of the alleged libel if it were in fact untrue, on the ground that it was made bona fide and related to the acts of the plaintiff as a public man and in his public capacity, the contention as to the applicability of this subsection, it being the only one thus relied upon, is without merit, and since the charge here complained of might have reasonably misled and confused the jury, to the prejudice of the plaintiff, a new trial must follow as a consequence.

4. MOTION FOR NEW TRIAL.

The exception taken in the fifth ground of the motion for a new trial is without substantial merit.

5. LIBEL AND SLANDER ⇐2—GOOD FAITH.

The charge complained of in the sixth ground of the motion for a new trial was not an accurate statement of the law, since the rule is that, unless the communication be a privileged one, the bona fides of the motive, purpose, and intent of the person publishing the libel is not involved. In other and different portions of the charge, the correct rule seems to have been clearly indicated, without, however, undertaking to correct the inaccuracy here referred to. See, in this connection, *Central of Georgia Ry. Co. v. Deas*, 22 Ga. App. 425, 96 S. E. 267.

6. MOTION FOR NEW TRIAL.

The exception taken in the seventh ground of the motion for a new trial is without merit.

7. ASSIGNMENT OF ERROR.

The assignment of error in the eighth ground of the motion for a new trial is not properly presented.

Error from City Court of Waycross; Jno. O. McDonald, Judge.

Action by A. B. Estes against J. S. Thomas. Judgment for defendant, motion for new trial denied, and plaintiff brings error. Reversed.

John W. Bennett and Parks & Reed, all of Waycross, for plaintiff in error.

H. M. Wilson and A. B. Spence, both of Waycross, for defendant in error.

JENKINS, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 270)

MIZELL LIVE STOCK CO. v. SUTTON.
(No. 9916.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. BILLS AND NOTES** \S 332 — **CONSIDERATION**—NOTICE TO HOLDER—STATUTE.

Where a purchaser of a promissory note has actual notice that the note was given for the purchase of stock in an incorporated company, and sold by an agent, traveling salesman, or promoter, such notice is just as effective to put the purchaser of the note on notice that he is taking it subject to the equities existing between the original parties thereto as if the consideration of the note had been expressed in the face of the note. See Civ. Code 1910, § 4294; *Heard v. National Bank of Wilkes*, 143 Ga. 48, 84 S. E. 129.

2. CHARGE OF COURT — MOTION FOR NEW TRIAL.

The charge of the court, when read as a whole, is not subject to the criticisms urged. The evidence authorized the verdict, which has the approval of the trial judge. For none of the reasons assigned did the court err in overruling the motion for a new trial.

Error from City Court of Nashville; C. A. Christian, Judge.

Action between the Mizell Live Stock Company and J. W. Sutton. Judgment for the latter, and the former brings error. Affirmed.

H. L. Jackson, of Adel, and W. D. Bule, of Nashville, for plaintiff in error.

H. J. Quincey, of Ocilla, and J. D. Lovett, of Nashville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 267)

CHRISTIAN v. MATTHEWS. (No. 9845.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***TRIAL** \S 260(1)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

The verdict is amply supported by the evidence, and the charge of the court fully and fairly covered every issue made by the testimony and the pleadings. The failure to charge as complained of, even had there been a timely request, would not have been error. *Hill v. Ludden & Bates*, 113 Ga. 320, 38 S. E. 752 (3).

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action between J. I. Christian and Mrs. L. C. Matthews. Judgment for the latter, and the former brings error. Affirmed.

Thos. B. Brown, of Atlanta, for plaintiff in error.

Hewlett & Dennis, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 265)

SHAPLEIGH HARDWARE CO. v. MCCOY & SON. (No. 9840.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***PARTNERSHIP** \S 34—**LIABILITY**—**ESTOPPEL**.

One who tacitly permits himself to be held out to the public as a partner, though he in fact has no interest in the partnership, will be estopped from denying his connection with the firm, and will be bound, where the opposite party was misled by the putative status and acted thereon. Civ. Code 1910, § 3157; *Bowie v. Maddox*, 29 Ga. 285, 74 Am. Dec. 61; *Am. Cotton College v. Newspaper Union*, 138 Ga. 147, 74 S. E. 1084 (4); *Mims v. Brook*, 3 Ga. App. 247, 59 S. E. 711; *Meinhard v. Bedingfield*, 4 Ga. App. 176, 61 S. E. 34. Thus, where a person knows that his name is being used as that of a member of a firm, and that he is being held out as a partner in a particular business, he is not only under the duty to prohibit such use, but it is also incumbent upon him to take such steps as an ordinarily prudent person would take in the circumstances to notify the public, as well as individuals to whom he knows that he has been so held out as a partner, that he is not a partner. 30 Cyc. 393, 394.

Error from City Court of Millen; G. C. Dekley, Judge.

Suit by the Shapleigh Hardware Company against McCoy & Son, composed of R. L. McCoy and B. L. McCoy. Verdict against defendant B. L. McCoy, and in favor of R. L. McCoy. Plaintiff's motion for a new trial was overruled, and it brings error. Reversed.

Wm. Woodrum, of Millen, for plaintiff in error.

Jas. A. Dixon, of Millen, for defendants in error.

JENKINS, J. Suit on an account for goods furnished was brought against McCoy & Son, as a partnership composed of R. L. McCoy and B. L. McCoy. B. L. McCoy filed no answer. R. L. McCoy filed an answer, wherein he denied the indebtedness, and set up a plea of no partnership. Upon the trial of the

case the jury returned a verdict against B. L. McCoy, and in favor of R. L. McCoy. The plaintiff made a motion for new trial on the usual general grounds only, which was overruled, and exception was taken.

While the evidence adduced upon the trial of the case was sufficient to authorize a finding that the defendant R. L. McCoy had no interest in the partnership, he admitted and testified that he learned in January, 1916, that his son, B. L. McCoy, was using his name and holding him out as a member of the firm of McCoy & Son, and that he burned all the bill heads he could find with the name of McCoy & Son on them, and instructed his son not to use his name. He further testified, however:

"I never made any effort to publish in any newspaper that I was not a member of that firm. I never made any effort to find out who were the creditors of the firm. * * * I never made any effort to notify any one."

The traveling salesman of the plaintiff testified:

"Before I sold these goods to McCoy & Son, I saw a sign on the front of their place there, 'McCoy & Son.' * * * I have never received any notice that R. L. McCoy was not a partner. I never did receive any written notice of a dissolution of the firm of McCoy & Son. I sold the goods upon the faith of R. L. McCoy being a partner. * * * As soon as I saw this dissolution notice in the paper, I wired the company—we had a shipment ready for them then—I wired the company to hold shipment back; they did, and paid the freight back on it to St. Louis."

This testimony in behalf of the plaintiff was undisputed. The evidence does show that the following notice was published in the official organ of the county by the defendant, B. L. McCoy:

"Dissolution Notice. Notice is hereby given that the firm of McCoy & Son, heretofore engaged in the business of general automobile service station and electrical supplies and wiring, in the city of Millen, state of Georgia, is this day dissolved by mutual consent; R. L. McCoy retiring therefrom. The business will be conducted in the same place as the Ford Service station, with B. L. McCoy, manager, who will settle all firm liabilities and receipt for all debts due the firm. This the first day of June, 1916. [Signed] R. L. McCoy, B. L. McCoy."

The notice thus published is dated June 1, 1916, but the evidence shows that the goods furnished to defendants, for the purchase price of which the present suit was instituted, were furnished during the months of March, April, and May, 1916.

Applying to the facts above stated the principles of law stated in the headnote, we think the evidence demanded a finding in

favor of the plaintiff against the defendant R. L. McCoy, and that the court therefore erred in overruling the motion for a new trial.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 322)

CAULEY v. STATE. (No. 10180.)

(Court of Appeals of Georgia, Division No. 2
Jan. 23, 1919.)

(Syllabus by the Court.)

1. REFUSAL OF CONTINUANCE.

It does not appear from the record that the trial judge abused his broad discretion in refusing a continuance or a postponement of the case.

2. CRIMINAL LAW §1178—GROUND OF MOTION FOR NEW TRIAL—ABANDONMENT.

The second special ground of the motion for a new trial, complaining of the exclusion of certain testimony, not having been argued in the brief of counsel for the plaintiff in error, is treated as abandoned.

3. CRIMINAL LAW §1178—GROUND OF MOTION FOR NEW TRIAL—ABANDONMENT.

While several excerpts from the charge of the court are excepted to in the amendment to the motion for a new trial, these excerpts are not referred to in the brief of counsel for the plaintiff in error, but the only complaint in their brief, so far as the charge is concerned, is that the entire charge was erroneous; and there is no such exception in the amendment to the motion for a new trial. Under such circumstances the grounds of the motion for a new trial complaining of such excerpts will be treated as abandoned, and the correctness of the charge as a whole will not be passed upon.

4. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Taylor County; G. H. Howard, Judge.

Proceeding between the State and O. E. Cauley. Judgment against Cauley, his motion for new trial overruled, and he brings error. Affirmed.

Jere M. Moore, of Montezuma, and C. B. Marshall, of Reynolds, for plaintiff in error.
C. F. McLaughlin, Sol. Gen., of Columbus, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 199)

DODGE v. ROYAL MIN. & MILL. CO.
(No. 9837.)(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)*(Syllabus by the Court.)***MOTION FOR NEW TRIAL—CHARGE OF COURT.**

The grounds of the motion for a new trial which have the approval of the trial judge do not show material error in the admission of testimony. The charge of the court is subject to some slight criticism, because of inapt expressions, but, upon the whole, was full, and submitted the issues to the jury, and could not have misled the jury in such a way as to work injury to the plaintiff. The evidence, though conflicting, authorized the verdict, which has the approval of the trial judge. There is no error or harm shown to the plaintiff by reason of the rulings upon the demurrers to the answer of the defendant. For none of the reasons assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Haralson, County; A. L. Bartlett, Judge.

Action between W. R. Dodge and the Royal Mining & Milling Company. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

Griffith & Matthews, of Buchanan, and Hutchens & McBride, of Tallapoosa, for plaintiff in error.

Price Edwards, of Buchanan, and Lloyd Thomas, of Tallapoosa, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 220)

FANNIN COUNTY v. DAVES. (No. 9935.)(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)*(Syllabus by the Court.)***COUNTIES ~~vs~~ 98(1) — COUNTY TREASURERS**
—LIABILITY OF SURETY.

This case was tried by the judge without a jury upon the following agreed statement of fact: "Fannin county, by its ordinary, G. A. Curtis, and J. M. Daves, by his attorneys of record, agree that the following statement of facts are true: That M. K. McKinney was elected county treasurer of Fannin county, Ga., for the years 1913 and 1914; that on January 1, 1913, he entered upon the discharge of the duties of such, and discharged the duties of said office of county treasurer of said county for said years, going out of office on the 31st

day of December, 1914. That he was succeeded on the 1st day of January, 1915, by R. H. Wheeler as county treasurer. That J. M. Daves signed the bond of the said M. K. McKinney along with certain other persons as securities, and said bond was signed by the said M. K. McKinney as principal. Said bond was made payable to A. S. J. Hall, ordinary of said county, and his successors in office, and was sealed by both principal and securities as required by law, and dated November 9, 1912, and was attested and approved by A. S. J. Hall, ordinary, on November 14, 1912, and was recorded in the office of the ordinary of said county, together with his oath of office as required by law. Said bond recited that said M. K. McKinney was elected county treasurer for the years 1913 and 1914, and further recited as follows: 'Now, the condition of the above obligation is such that if the said M. K. McKinney shall faithfully discharge all and singular the duties required of him by virtue of his said office as county treasurer of said county, as aforesaid, during the time he continues therein, or discharges any of the duties thereof, then the above obligation to be void; otherwise to remain in full force and virtue.' And that said bond was a legal bond required by law of county treasurers. That on the 11th day of January, 1915, after the said M. K. McKinney had retired from office, and while R. H. Wheeler was county treasurer, the said R. H. Wheeler as such county treasurer made and signed and delivered to M. K. McKinney the following check: 'The North Georgia National Bank, Blue Ridge, Ga., January 11, 1915. Pay to the order of M. K. McKinney retiring treasurer, \$338.08, three hundred thirty-six and 08/100 dollars, balance on commissions for 1914. R. H. Wheeler, County Treasurer. No. 1.' On the back of said check there appears the indorsement of the said M. K. McKinney. And that the said M. K. McKinney received the amount of said check out of county money collected for county purposes for the year 1914 and due and owing to said county. And that the said M. K. McKinney thus received out of such county funds collected for county for said year the sum of \$156.75 in excess of the legal fees and commissions due him as such county treasurer for the year 1914. It is further agreed that no order was issued by the ordinary of said county authorizing the issuance of said check and the receiving of said county money, and that there does not appear upon the records or minutes of court in the office of the ordinary of said county any order, writing, or statement which shows any final settlement between the county of Fannin and the said M. K. McKinney as required by sections 586 and 587 of the Civil Code of 1910. It is therefore agreed between the parties in the above-stated case that the said entitled case be submitted upon the agreed statement of facts to his honor, N. A. Morris, judge of the superior court of said county, for determination upon the law and the facts without the intervention of a jury, and that either party shall have the right to except to the judgment of the court rendered therein and to carry said case to the Court of Appeals by a direct bill of exceptions. It is further agreed that in the event said court has not sufficient time to consider and dispose of

said case on this day, he may take the same under advisement and render his judgment later, to which neither party shall take exception."

Held, the court did not err in sustaining the affidavit of illegality. The agreed statement of facts shows that the money received by McKinney was not received by him as and while treasurer of the county, but was received after his term of office had expired and when his successor was discharging the duties of that office. The payment to him was the voluntary act of the county treasurer who succeeded him. The surety on the bond, Daves, is not by reason of any obligation in the bond, liable to the county for the money thus received by his principal, McKinney. See *McDonald v. Bradshaw*, 2 Ga. 248, 46 Am. Dec. 385; Civ. Code 1910, § 3540.

Error from Superior Court, Fannin County; N. A. Morris, Judge.

Action by Fannin County against J. M. Daves, submitted on agreed statement of facts. Affidavit of illegality sustained, and Fannin county brings error. Affirmed.

Wm. Butt, of Blue Ridge, for plaintiff in error.

Thos. A. Brown and B. L. Smith, both of Blue Ridge, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 269)

CENTRAL OF GEORGIA RY. CO. v. HOWELL. (No. 9910.)

(Court of Appeals of Georgia, Division No. 1. Jan. 15, 1919.)

(Syllabus by the Court.)

1. NEW TRIAL \Leftrightarrow 68—**RAILROADS** \Leftrightarrow 350(5)—**GROUND—VERDICT CONTRARY TO EVIDENCE**—**INJURY AT CROSSING.**

The following facts made out a case peculiarly for determination by the jury, and their verdict is conclusive, so far as the general grounds of the motion for a new trial are concerned: Plaintiff was, on the day of the injury, driving an automobile on the highway in the city of Macon, and in the direction of a public crossing intersected by several lines of track, where the defendant company had stationed a flagman to warn travelers of approaching trains, etc., and, just as plaintiff drove up to and upon said crossing the said flagman ordered him to stop, which he did as quickly as possible, causing his machine to come to a standstill upon and across one of the defendant's lines of track. After so stopping his machine in obedience to said order, the flagman ordered him to go back, but before he was able to move his car he was again ordered to go forward, and in this state of confusion, upon observing a train in close proximity and running upon the track on which his automobile was standing, he speedily

removed himself from the car, in order to save his life, but the train continued on its way, and struck his car, and completely destroyed it.

2. MOTION FOR NEW TRIAL.

None of the special grounds of the motion for a new trial contain reversible error, and the trial judge did not err in overruling the motion.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by W. W. Howell against the Central of Georgia Railway Company. Judgment for plaintiff, motion for new trial denied, and defendant brings error. Affirmed.

R. C. Jordan, of Macon, for plaintiff in error.

L. D. Moore, of Macon, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 189)

ARMOUR FERTILIZER WORKS v. DASHER. (No. 9675.)

(Court of Appeals of Georgia, Division No. 1. Jan. 14, 1919.)

(Syllabus by the Court.)

1. TRIAL \Leftrightarrow 251(5)—**INSTRUCTIONS—ISSUES.**

Plaintiff in error complains that the court erred in not confining his charge to the issues made by the pleadings, in that the court injected into the case an issue as to whether or not the defendant paid the purchase price of the fertilizer in question to one J. F. Stapler as the agent of the plaintiff, whereas the only issues between the parties, according to the pleadings, were whether the defendant purchased the same amount and brand of fertilizer described in the petition from said Stapler as an individual, and whether he had paid Stapler therefor—no plea having been filed by defendant alleging that he had made any payment to Stapler as the agent of the plaintiff. Although the pleadings do not raise the issue of agency (it being merely alleged that the fertilizer was purchased from and payment made to Stapler in his individual capacity), nevertheless the charge of the court on this subject was not erroneous, in view of the admission in open court by the defendant that the fertilizer in controversy was bought from Stapler as the agent of the plaintiff corporation, and that payment therefor was made to him in that capacity. It was not incumbent upon defendant to recast his plea in this particular.

2. CHARGE OF COURT.

The complaint that the charge of the court is too indefinite to make it clear whether the defendant admitted that he purchased the fertilizer from Stapler as agent of the plaintiff or as an individual is without merit.

3. SUBMISSION OF ISSUES—FINDINGS.

The several assignments of error complaining that the identity of the fertilizer alleged to have been paid for by the defendant was not established are without merit. This issue was fairly submitted to the jury, and there was evidence to sustain their finding that the payment made was for the particular fertilizer involved.

4. TRIAL \S 85—OBJECTION TO EVIDENCE—PARTIAL ADMISSIBILITY.

Certain testimony of the witness Jones was objected to as a whole, and since upon examination it appears that a part of it at least was admissible, under the repeated rulings of the Supreme Court and of this court, the action of the trial judge in overruling the objection thereto will not be controlled. *Birmingham Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437 (1); *Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159(3); *Southern Ry. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803; *Strickland v. Richardson*, 135 Ga. 513, 69 S. E. 871; *Walker v. Riley*, 6 Ga. App. 519, 65 S. E. 301(2); *Great Southern, etc., Co. v. Guthrie*, 13 Ga. App. 288, 292, 79 S. E. 162(6), and cases there cited; *Desverges v. Marchant*, 18 Ga. App. 248, 89 S. E. 221(2); *Selman v. Manhattan Life Ins. Co.*, 20 Ga. App. 440, 93 S. E. 60(2); *Consolidated Phosphate Co. v. Sturtevant*, 20 Ga. App. 474, 93 S. E. 155(3).

5. WITNESSES \S 158, 159(3)—TRANSACTIONS WITH DECEDENT—STATUTE.

The assignments of error objecting to portions of defendant's testimony as being inhibited by Civ. Code 1910, § 5858, are without merit. The destruction, after its payment of the note, given to the First National Bank, was not a transaction with the deceased agent. See *Puryear v. Foster*, 91 Ga. 444, 448, 18 S. E. 316. And the other circumstances testified to by the defendant were independent facts, not involving any communication or transaction with the deceased agent.

6. SUFFICIENCY OF EVIDENCE—CHARGE.

There was evidence to support the verdict returned, the charge of the court fairly submitted all issues to the jury, and the numerous special assignments of error are without such substantial merit as to require a reversal.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by the Armour Fertilizer Works against J. A. Dasher. Judgment for plaintiff, and defendant brings error. Affirmed.

Franklin & Langdale, of Valdosta, for plaintiff in error.

Patterson & Copeland, and Whitaker & Dukes, all of Valdosta, for defendant in error.

WADE, C. J. Judgment affirmed.

JENKINS, and LUKE, JJ., concur.

(23 Ga. App. 309)

SOUTHERN RY. CO. et al. v. MASSEE & FELTON LUMBER CO. (No. 9721.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)

(Syllabus by the Court.)

1. CARRIERS \S 84(1½)—FAILURE TO DELIVER GOODS—VENUE.

The petition as amended showed an action *ex contractu* against the defendant railway company for its failure to deliver property at Toccoa, Ga., the property having been delivered to the railway company at Macon, Ga., for shipment; and the courts of Bibb county had jurisdiction of the suit. *Central Railroad Co. v. Brunson*, 63 Ga. 506; *Albany & Northern Ry. Co. v. Merchants' & Farmers' Bank*, 137 Ga. 391, 73 S. E. 637; *Friedman v. Seaboard Air Line Ry.*, 124 Ga. 472, 52 S. E. 763; *Wright v. Southern Ry. Co.*, 7 Ga. App. 542, 67 S. E. 272.

2. DEMURRER TO PETITION.

The petition as amended was not subject to any ground of the demurrer interposed.

3. CARRIERS \S 83 — DELIVERY OF GOODS — SURRENDER OF BILL OF LADING.

A provision in a bill of lading requiring the surrender of the original order bill of lading, properly indorsed, before the delivery of the shipment, does not operate solely for the protection of the carrier. This provision is likewise for the protection of the shipper, and prohibits the carrier from delivering the property until the bill of lading is properly indorsed. *First National Bank v. Oregon-Washington R. R. & Nav. Co.*, 25 Idaho, 58, 136 Pac. 798; *Judson v. Minneapolis & St. L. R. R. Co.*, 131 Minn. 5, 154 N. W. 506.

4. CARRIERS \S 82, 83—DELIVERY OF GOODS—INDORSEMENT OF BILL OF LADING.

Where an "order notify" bill of lading contains a provision requiring the surrender of the original order bill of lading, properly indorsed, the fact that the shipper, by mistake, sends the original bill of lading (instead of the memorandum bill of lading) direct to the order notify party, but sends it undorsed, does not relieve the carrier from requiring it to be properly indorsed before it delivers the shipment to the order notify party; and where, under such circumstances, the carrier so delivers the property, without requiring such indorsement, and the "order notify" party obtains the shipment, and subsequently becomes insolvent, without having paid the purchase price of the property, the principle of law that, where one of two innocent persons must suffer for the act of a third person, he who puts it in the power of the third person to inflict the injury must bear the loss, is not applicable. The antecedent error of the shipper in sending the original bill of lading to the order notify party did not put it in the power of that party to inflict the injury, as its possession of the undorsed bill of lading did not vest it with any apparent right to the property. The loss resulted from the negligence of the carrier in failing to require the proper indorsement of the bill of lading. *Wey-*

and v. Atchison, Topeka & Santa Fé Ry. Co., 75 Iowa, 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504.

5. CARRIERS — 83—DELIVERY OF GOODS—INDORSEMENT OF BILL OF LADING—LIABILITY.

The Massee & Felton Lumber Company, at Macon, Ga., delivered to the defendant railway company a car of lumber consigned to the order of the shipper at Toccoa, Ga., with instruction to notify the Georgia Furniture Company, at the latter place. An "order notify" bill of lading was executed in triplicate, and signed by both the shipper and the railway company, and contained the following provision: "The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property." The three copies of the bill of lading were practically the same, with the exception that one was headed "Order Bill of Lading—Original," another was headed "Memorandum Bill of Lading," and the third was headed "Shipping Order." The original and memorandum bills of lading were delivered by the railway company to the shipper, and the shipping order was retained by the railway company. Through an error of a clerk in the office of the lumber company, the original bill of lading, unindorsed, was mailed direct to the Georgia Furniture Company at Toccoa (the "notify party" in the bill of lading), and the memorandum bill of lading, indorsed on the back thereof by the lumber company, was attached to a draft by that company on the furniture company, for the purchase price of the car of lumber, and the draft with the memorandum bill of lading, so indorsed, was deposited by the lumber company in a bank at Macon, Ga., and transmitted by that bank to the Bank of Toccoa, Ga., the residence of the furniture company. The defendant railway company had no actual knowledge of the drawing or forwarding of this draft. The Georgia Furniture Company, upon receiving the original bill of lading, carried it to the agent of the Southern Railway Company at Toccoa, and on the demand of the furniture company upon the agent and the presentation and surrender of the original bill of lading, unindorsed, the lumber was delivered by the railway company to the furniture company. The furniture company was put in bankruptcy subsequent to the delivery of the lumber to it by the railway company. The draft attached to the memorandum bill of lading was never paid, and, together with this memorandum bill of lading, was returned to the lumber company, which has never been paid anything by the Georgia Furniture Company for the lumber. *Held*, that the railway company, in delivering the lumber to the furniture company, upon its presentation of the original bill of lading, unindorsed, breached its contract with the shipper and became liable to it in damages for the value of the lumber. *American National Bank v. Lee*, 124 Ga. 863, 53 S. E. 268; *Southern Railway Co. v. Strozler*, 10 Ga. App. 157, 73 S. E. 42; *Weyand v. Atchison, Topeka & Santa Fé Ry. Co.*, 75 Iowa, 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504; *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276; *Killingsworth v. Norfolk Southern R. R. Co.*, 171 N. C. 47, 87 S. E. 947; *First National Bank*

v. Oregon-Washington R. R. & Nav. Co., *supra*; *Judson v. Minneapolis & St. L. R. R. Co.*, *supra*; *Arkansas Southern Ry. Co. v. German National Bank*, 77 Ark. 482, 92 S. W. 522, 4 L. R. A. (N. S.) 649, 113 Am. St. Rep. 180.

6. RULING ON CERTIORARI.

Under the rulings enunciated above, the court did not err in overruling the certiorari.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Massee & Felton Lumber Company against the Southern Railway Company and others. From the judgment, and from the overruling of the certiorari, defendants bring error. Affirmed.

Harris, Harris & Witman and Mallary & Wimberly, all of Macon, for plaintiffs in error.

Hardeman, Jones, Park & Johnston, and Harry S. Strozler, all of Macon, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 186)

LYNCHBURG SHOE CO. v. DANIEL
(No. 9612.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1918.)

(Syllabus by the Court.)

1. EVIDENCE — 432, 437—PAROL EVIDENCE—CONTRACT.

As between the original parties, the consideration of a contract is ordinarily open to inquiry for the purpose of showing, either that the consideration was originally illegal, and for this reason the promise so predicated was void, or that the consideration has subsequently failed in whole or in part, so as no longer to support the promise as made. If such be the real purport and intent of the plea, there results no infringement of the rule which forbids the variance by parol of the expressed terms of a written instrument. It is only when a defendant, under the guise of seeking to inquire into the consideration, is in fact using such privilege merely as a pretext, for the purpose of varying the written terms of the promise itself, that the inhibition of the parol evidence rule becomes applicable. *Rheney v. Anderson*, 96 S. E. 217.

2. PRINCIPAL AND SURETY — 89—DEFENSES—MISREPRESENTATIONS.

Thus, in a suit against a surety on a promissory note, his plea, setting up that he was induced to sign the note by the false and fraudulent representations of the plaintiff's agent that, in consideration of the defendant signing as surety, the plaintiff would proceed to furnish to the principal, a mercantile business, additional goods in a named amount, which promise the plaintiff had failed and refused to perform, and

which failure resulted in injury, and increased the risk and hazard to defendant, was not subject to general demurrer. *Marchman v. Robertson*, 77 Ga. 40. What was said by this court in the case of *McKee v. Hurst*, 21 Ga. App. 571. 94 S. E. 886, is not in conflict with the holding here made, since that ruling was based upon the idea that the surety in subsequently renewing the notes waived any such defense, he being estopped by reason of his knowledge then had of the facts, or by his negligence in failing to know them.

3. NEW TRIAL ⇨70 — GROUNDS — SUFFICIENCY OF EVIDENCE.

There was evidence sustaining the defendant's plea, and the judgment of the trial court, overruling the motion for a new trial, cannot be disturbed on the theory that the verdict was contrary to the evidence.

Error from City Court of Morgan; W. H. Gurr, Judge pro hac.

Action by the Lynchburg Shoe Company against Harper Daniel. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. L. Dowling and Erle B. Askew, both of Moultrie, for plaintiff in error.

E. L. Smith, of Edison, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 206)

COTTON STATES SEED & FERTILIZER CO. v. MACON, D. & S. R. CO.

MACON, D. & S. R. CO. v. COTTON STATES SEED & FERTILIZER CO.

(Nos. 9858, 9859.)

(Court of Appeals of Georgia, Division No. 1. Jan. 14, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇨979(3)—ABUSE OF DISCRETION IN OVERRULING MOTION FOR NEW TRIAL—REVERSAL.

Where a trial judge, in overruling a motion for a new trial based on the general grounds only, fails to exercise that discretion with which he is charged by law, on proper exception, this court is compelled to reverse the judgment, unless the evidence demanded the verdict.

Error from City Court of Macon; Du Pont Guerrey, Judge.

Suit by the Cotton States Seed & Fertilizer Company against the Macon, Dublin & Savannah Railroad Company. Verdict for defendant, plaintiff's motion for new trial overruled, plaintiff excepts, and defendant takes a cross-bill of exceptions. Reversed on

main bill of exceptions, and affirmed on the cross-bill of exceptions.

Miller & Jones and Warren Grice, all of Macon, for plaintiff in error.

Jesse Harris, Minter Wimberly, and Chas. Akerman, all of Macon, for defendant in error.

LUKE, J. The Cotton States Seed & Fertilizer Company sued the Macon, Dublin & Savannah Railroad Company for damages alleged to have been occasioned by the negligence of the defendant. The petition alleged that the plaintiff was a fertilizer factory on the outskirts of the city of Macon, with its plant located on the low lands of the Ocmulgee river, upstream from the defendant's railroad embankment, over which its tracks approach and cross the Ocmulgee river below the plant of the plaintiff. Around the property of the plaintiff there had been erected a levee sufficient to keep out the water in ordinary freshets. The railroad embankment filled up the natural drains and outlets of the river in times of freshet, and, by impeding and preventing the overflow waters, backed them up on the plaintiff's property, and caused them to overflow its levee, and occasioned the damage sued for. The water which inundated the plaintiff's plant was an ordinary freshet, and, had it not been for the impounding of the water by the defendant, the damage would not have been done. The jury returned a verdict in favor of the defendant. The plaintiff filed a motion for a new trial, based on general grounds. The court overruled the motion, and, as a part of such order overruling and denying the motion, filed an opinion. To this order the plaintiff excepts upon the ground that the evidence demanded a verdict in favor of the plaintiff, and upon the ground that the court, in the judgment overruling the motion for a new trial, did not exercise that discretion with which the trial judge is charged by law.

1. The order of the trial judge in overruling the motion for a new trial is as follows:

"The movant alleges in its petition that the freshet, the waters of which it says were obstructed by the defendant's embankment, so as to cause the overflow and injury of its property, was an ordinary freshet. The defendant denied this allegation in its answer, and pleaded that the freshet was extraordinary and unprecedented. There was evidence strongly supporting each contention, and the court, in its instructions on this issue, gave the petitioner the full benefit of its contention, and the court cannot say that the finding of the jury thereon is without sufficient evidence to support it, or strongly and decidedly against the weight of the evidence. While, under the pleadings and issues thereby made, the court may not have been authorized to do so, it instructed the jury in this connection as follows: 'If the freshet was ex-

traordinary and unprecedented, but would not for this reason have overflowed and damaged the plaintiff's property without being obstructed by defendant's embankment, and defendant's embankment did obstruct such freshet, and thereby caused it to overflow and damage the plaintiff's property when it would not have been otherwise damaged, the defendant is liable.' The court believed during the trial, and now believes, that the petitioner's right of recovery on this theory was shown by a preponderance of the evidence, but the court cannot say that the verdict of the jury to the contrary is without sufficient evidence to support it, or strongly and decidedly against the weight of the evidence. The court was during the trial, and is now, of the opinion, from the evidence, that while the waters of the freshet were detained by the defendant's embankment, and were thereby finally ponded around three sides of petitioner's levee, so that they rose to the point where some of them ran over its western levee and over the gate in the switchway through its southern or front levee, and must have increased the depth of submergence and the extent of the damages, the breaking through of the waters at these points was not chiefly the result of the pressure of ponded water, but of the violence of the waters flowing from the river through the crevasses of the city's levee which they made, and through the trestle of the old Macon & Augusta (or Central) Railroad embankment against the western levee of petitioner, where it broke at a point much in the line of said waters after they rose high enough to reach said levee, and against the gate, sandbags and abutments at the switch entrance in the southern levee of petitioner, while the waters in that vicinity were passing violently through what must have been a gorge between the petitioner's levee and the defendant's embankment. Possibly the court should have instructed the jury on this theory of increased overflow and damages, and in doing so have charged them on the subject of nominal and general damages, but there was no request or claim or contention on the subject, the petitioner asking the special damages sued for only, and it did not occur to the court to give instructions in relation thereto.

"Petitioner, in paragraph 11 of the petition, avers 'that the entire injury and damage it has suffered by reason of said freshet was caused solely by the faulty construction and maintenance of the defendant's roadway embankment, and that petitioner was wholly without fault in regard thereto, and could not have avoided, even by the exercise of extraordinary diligence, the result of the wrongdoing on the part of the defendant.' This paragraph the defendant denied in its answer, and the court cannot say that the verdict of the jury in its favor was without evidence to support it, or strongly and decidedly against the weight of the evidence. The two great causes of the catastrophe were the breaks through the city's levee by the waters of the freshet, and their subsequent detention by the defendant's embankment. The court cannot say, as a matter of law or fact, the latter was the proximate cause. The waters overflowed the gate in the switchway, but never overflowed the petitioner's southern levee through which the switchway entered, and which was higher than the gate, and the petitioner

was at least equally responsible for the existence of the switchway. Whether the switchway precipitated or increased the overflow of petitioner's property, or did both, or whether, if the switchway had not been there, the overflow of the petitioner's western levee at the break therein or elsewhere would have increased or diminished the overflow of petitioner's property, are questions that are very problematical. Although there was much discussion thereof during the trial, there was not in the pleadings any reference to the evident fact that the great mass of the waters of the freshet which overflowed petitioner's property and vicinity escaped from the river through the two crevasses in the city's levee, which, together with the petitioner's river levee and the river levees of other owners below, and a portion of the Macon & Augusta embankment, extended from the front of the city's park to the defendant's embankment, and constituted one continuous river levee. While it is true that, prior to the construction of this levee many years ago, the waters of the river in times of ordinary freshet, as well as in times of extraordinary freshet, must have overflowed the lowlands described, and had established drains through the same, it did not appear that such had been the case since 1900, or definitely so since the construction of the river levee, except in 1916, when the alleged freshet occurred, and in 1913, during another freshet, and on both of these occasions the overflow occurred by means of breaks through the river levee, when, according to the record of highwater marks of the river kept at Macon by the United States government, covering the period from 1900 to 1916, inclusive, that of 1916 reached 23.1 feet, and that of 1913 23.6 feet, the lowest stage in the record being 18 feet in 1906. It appears from the evidence that the freshet in dispute, that of 1916, was larger and more violent and destructive than that of 1913, at and upon the property of petitioner and vicinity, although its high-water mark at Macon was five-tenths of a foot lower. The defendant constructed its embankment in 1912, and the question of its negligence should be determined in the light of the conditions at that time and in view of the notice it may have then had of the dangers of the situation with reference to the petitioner's property and its own. The defendant, probably relying upon the existing system of river levees as safe for all concerned, apparently provided culverts in its embankment for surface water only; whereas it is also apparent that the petitioner did not rely upon the river levees only, as it had additional levees of its own for the further or ultimate protection of its property, and the defendant had notice of this fact through the obvious presence of the same.

"Did the defendant under all the circumstances, have the right, when it built its embankment, to rely upon the river levees and the levees of the petitioner so far as the property of the petitioner was concerned? If it did not have such right, and it nevertheless did so, and such security proved inadequate, and the disaster occurred partly for this reason and partly for the reason that the waters could not escape through the culverts of defendant's embankment, because they were inadequate for the purpose, was the defendant thereby guilty of negligence,

making it liable for the damages that ensued? *Georgia Railroad Co. v. Bohler*, 98 Ga. 188, 26 S. E. 739. If conditions and structures partly natural and partly artificial are safe for adjoining and neighboring landowners while operative, and some person should contribute another structure, and the then existing conditions and structures should cause damage to one of such owners, which would not have occurred without the co-operation of the added structure, such person would be liable. In this case, however, if the existing conditions and structures on which defendant relied had all remained operative, the overflow and damage to the petitioner's property would not have occurred by means of the defendant's embankment or otherwise; that is to say, if the river levee had performed its function. This being true, which was the proximate cause—the breaking of the freshet through the river levee, or its inability to break through the defendant's embankment? While the continuation of the river levees, including a part of the Macon & Augusta Railroad and the river levees of the petitioner and the owners below, as well as that of the city, may have been a system as to the petitioner, it may not have been as to the city. The petitioner was evidently enjoying the protection of it as a system, but the city had connected its levee, not with petitioner's levee, or any other levee, but with the Macon & Augusta embankment, and was not concerned beyond that, and may not have been responsible to landowners below and outside the city limits, for that or other reasons, for a failure, if any, to properly maintain its levee and the consequent injury. *Savannah, Florida & Western Railway Co. v. Lawton*, 75 Ga. 192. According to the verdict the defendant is not liable, and according to the preceding view the city is not liable, or may not be liable, because it is a municipal corporation. It therefore seems that the petitioner, notwithstanding the fact that it has suffered serious damages, without any fault on its part, and without responsibility on the part of others, because of the absence of wrong intent and culpable negligence on their part, is without remedy and right against any one whomsoever. The jury probably believed that the freshet was extraordinary and unprecedented, an act of God, and left the parties where the freshet left them, the petitioner with its damaged levees, machinery and material, and the defendant with its broken embankment; and the court cannot say that their verdict is without sufficient evidence to support it, or strongly and decidedly against the weight of the evidence. The court is not presuming to enlighten the court of review, but is seeking to take its judgment refusing a new trial away from the general principles and presumptions in its favor, by exposing its controlling error or errors, if any, so that it or they may be detected and corrected by reversal. The motion to set aside the verdict and judgment and grant a new trial is refused."

In view of the statement of the trial judge in his order, we are constrained to hold that there is no such unqualified approval of the finding of the jury by the court as convinces us that the trial judge exercised that discretion with which he is by law charged, in

passing upon the motion for a new trial in this case. As was said by Judge Powell in *Walters v. State*, 6 Ga. App. 565, 65 S. E. 357:

"If the judge meant to say that the verdict of the jury had convinced his mind and conscience of the defendant's guilt, the approval is sufficient; but if he meant to say that he did not have the power to set it aside, or that there was no duty upon him to set it aside if his mind and conscience were not convinced of the defendant's guilt, then the approval is insufficient. Before the verdict of the jury becomes final it should, where the defendant requires it by a motion for a new trial, receive the approval of the mind and conscience of one more man—the trial judge. Until all 13, the 12 jurors and the judge, agree upon the prisoner's guilt, his conviction is not legally final. The finding of the jury is not binding on the judge. It may be, and for the most part should be, highly persuasive upon him; but he is authorized to set it aside, and indeed is under the duty of doing so if he does not approve of it as a finding of fact."

See, also, *Livingston v. Taylor*, 132 Ga. 7, 9, 61 S. E. 694; *Thompson v. Warren*, 118 Ga. 644, 45 S. E. 912; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 169.

2. We have carefully examined the crossbill of exceptions, and are of the opinion that the trial court committed no error in any of the rulings complained of therein.

3. The defendant in error in its brief requests that, if this court should be of the opinion that the trial judge did not exercise his discretion in passing upon the motion for a new trial, the judgment be not unqualifiedly reversed, but that the case be returned to the court below, with direction that the judge pass upon the motion in the exercise of his legal discretion. The defendant in error relies upon the decision in *Central Railway Co. v. O'Kelly*, 16 Ga. App. 594, 85 S. E. 938 (3). We do not think that the *O'Kelly* Case is precedent for the request. In the *O'Kelly* case a motion for a new trial had been overruled, and the judgment was affirmed by the appellate court, and after such affirmance a motion for a new trial was made, upon extraordinary grounds, and the trial court determined that it had no jurisdiction to pass upon the motion. This court simply held that the trial court did have jurisdiction, and the motion was returned to the trial court with direction that it pass upon the case in the exercise of that discretion with which it was charged by law.

4. We do not mean to intimate that the verdict in this case was wrong, or that there was not evidence upon which it might stand. The reversal of the order of the trial judge, overruling and denying the motion for a new trial, is solely upon the ground that in his order and opinion, taken altogether, he

did not unqualifiedly approve the finding of the jury.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 261.)

LOWENSTEIN v. JOHNSTON. (No. 9786.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919. Motion for Rehearing
Denied Jan. 28, 1919.)

(Syllabus by the Court.)

1. EVIDENCE \S 71, 89—PARTNERSHIP \S 296
(3)—DISSOLUTION NOTICE—PRESUMPTION OF
RECEIPT.

The testimony was sufficient to authorize the finding that a notice of dissolution of partnership, such as would relieve the defendant from liability on the claim sued on, had been sent to and was received by the plaintiff. While the mailing of such a notice, properly stamped and directed, raises only a presumption of its receipt (*Bush v. McCarty Co.*, 127 Ga. 308, 311, 312, 56 S. E. 430, 9 Ann. Cas. 240), and while this presumption may be entirely overcome by the undisputed evidence of the addressee that the letter was never received (*Hamilton v. Stewart*, 108 Ga. 472, 476, 34 S. E. 123; *Cassel v. Randall*, 10 Ga. App. 587, 73 S. E. 858), still, in this case, proof to the effect that the plaintiff had subsequently proceeded against the other partner in bankruptcy by proving the claim in dispute as an individual liability of that partner for goods "sold and delivered to the bankrupt [that is the other partner] at his special instance and request," together with other corroborative testimony as to the conduct of the plaintiff tending to indicate such notice, furnished sufficient corroboration to sustain the finding in accordance with the presumption raised by the defendant's testimony as to the sending of the notice. *Strauss v. Pearlman*, 15 Ga. App. 86, 87, 82 S. E. 578; *Parker v. Southern Ruralist Co.*, 15 Ga. App. 334, 337, 83 S. E. 158.

2. CERTIORARI \S 57, 64(1)—PETITION—REQUISITES.

A petition for certiorari "shall plainly and distinctly set forth the errors complained of." Civ. Code 1910, \S 5183; *Callaway v. Atlanta*, 6 Ga. App. 354, 64 S. E. 1105. "No ground of error shall be insisted upon, on the hearing, which is not distinctly set forth in the petition" (Civ. Code 1910, \S 5199), and questions not referred to in the petition cannot be considered by either the superior court or by this court (*Fouche v. Morris*, 112 Ga. 143, 37 S. E. 182; *Perry v. Brunswick Railway Co.*, 119 Ga. 819, 47 S. E. 172). Thus the assignment of error that, "after the introduction of the evidence as related heretofore the court took this case under advisement, and did thereafter render judgment in favor of the defendant and against the plaintiff, without announcing the said judgment

in open court as provided by section 224 [Act 1913, p. 167, \S 42 (a)] of the act creating the municipal court of Atlanta," does not present the question as to whether or not the court failed to notify the parties or their counsel of the time when such judgment would be rendered; and since the answer of the trial judge does not verify the assignment as actually made, but, to the contrary, says that he did announce said judgment in open court, this assignment of error cannot be considered. *Shirling v. Kennon*, 119 Ga. 501, 46 S. E. 630; *Stephens v. Barnes*, 11 Ga. App. 491, 75 S. E. 827. See, also, in this connection, *Hays v. Philadelphia, etc., Railroad Co.*, 99 Md. 413, 58 Atl. 439.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between J. Lowenstein and W. T. Johnston. Judgment for the latter, and the former brings error. Affirmed.

C. N. Anderson, W. O. Slate, and P. B. D'Orr, all of Atlanta, for plaintiff in error.

C. M. & G. F. Mitchell, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 223)

DAVIS v. STATE. (No. 10149.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1158(2)—RULING ON APPLICATION FOR CHANGE OF VENUE—CONCLUSIVENESS.

In an application for a change of venue, "where the evidence is conflicting upon the issue as to whether or not under the petition such a case is made as requires the judge to grant the motion, the judge hearing the same passes upon the issues that are to be determined upon evidence, and that his finding and judgment upon the same is final and controlling, unless manifestly erroneous." *Wilburn v. State*, 140 Ga. 138, 141, 78 S. E. 819, 820. See, also, *Park's Ann. Penal Code*, \S 964; *Coleman v. State*, 141 Ga. 737, 82 S. E. 227; *Bivins v. State*, 145 Ga. 416, 89 S. E. 370; *Marshall v. State*, 20 Ga. App. 416, 426, 427, 93 S. E. 98. In the present case, the evidence before the judge of the superior court was conflicting, and it cannot be said that it was manifestly erroneous to refuse to grant a change of venue.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Proceeding by the State against R. E. Davis. From the judgment, Davis brings error. Affirmed.

E. K. Overstreet, of Sylvania, E. V. Heath and Joseph Law, both of Waynesboro, and Archibald Blackshear and C. H. & R. S. Cohen, all of Augusta, for plaintiff in error.

A. L. Franklin, Sol. Gen., of Augusta, and W. H. Davis, and H. J. Fullbright, both of Waynesboro, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 279)

J. M. DIXON & CO. v. BANK OF QUITMAN.

BANK OF QUITMAN v. J. M. DIXON & CO.

(Nos. 9482, 9511.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES §370 — RIGHTS OF PAYEE OF ACCEPTED BILL.

"The payee of an accepted bill, who has paid value to the drawer before maturity, is not concerned with the consideration as between drawer and acceptor. He holds the bill unaffected by equities in favor of the acceptor against the drawer." *Flournoy v. First National Bank*, 79 Ga. 810, 2 S. E. 547 (2).

2. EVIDENCE §420(7)—PAROL EVIDENCE—VARYING TERMS OF ACCEPTANCE.

In the absence of fraud, accident, or mistake being set up, parol evidence is not admissible to vary the terms of an acceptance which is absolute and unconditional on its face, by showing that it was in fact intended to be based upon a condition. *Heaverin v. Donnell*, 7 Smedes & M. (Miss.) 244, 45 Am. Dec. 302; *Ray v. Morgan*, 112 Ga. 923, 38 S. E. 335; *Rheney v. Anderson*, 22 Ga. App. 417, 96 S. E. 217.

3. ASSIGNMENTS §49—BANKS AND BANKING §140(1) — UNACCEPTED CHECK — EFFECT—NONPAYMENT—RIGHT OF ACTION.

"An unaccepted check, drawn in the ordinary form, not describing any particular fund or using words of transfer of the whole or any part of any amount standing to the credit of the drawer, does not amount to an assignment at law or in equity of the money to the credit of the drawer;" and the nonpayment of such a check does not give the payee a right of action against the drawee. *Reviere v. Chambliss*, 120 Ga. 714, 48 S. E. 122.

4. BANKS AND BANKING §105(3)—PROMISE BY CASHIER TO CUSTOMERS—ENFORCEMENT.

"A promise by the cashier of a bank, made without consideration to the drawer of a draft, to pay the same out of funds of a customer on whom the draft is drawn and who has been credited with the proceeds of negotiable paper which he as owner transferred to the bank, is not enforceable against the bank, unless the customer assents that the bank shall make such an appli-

cation of the funds so placed to his credit." *Bullard v. Bank of Madison*, 121 Ga. 527, 49 S. E. 615.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by the Bank of Quitman against J. M. Dixon & Company, with counterclaim by defendants. Judgment for plaintiff and defendants except and bring error, and plaintiff takes a cross-bill of exceptions. Affirmed on main bill of exceptions.

Suit was instituted by the Bank of Quitman as payee and holder of a draft drawn by Thompson in the sum of \$1,250 on the defendants, Dixon & Co., who unconditionally accepted it in writing before it was discounted by the plaintiff. The acceptance sued on was the last of a series of similar transactions. The defendants contend that they should not be held liable on their acceptance, for several reasons, in substance as follows: (1) Because the acceptance was merely one of accommodation on their part, and without any benefit flowing to them, which fact was known to the plaintiff when it discounted the draft. This ground of defense is not, however, relied upon by counsel, who state that it was made only by way of inducement, in order to show the relationship between the parties. (2) Because when Thompson deposited the proceeds of the draft with the plaintiff, the plaintiff knew, both by virtue of the previous course of dealings and by the statement then made to it by Thompson, that it was with the understanding and agreement that the amount of the draft was to be applied in part payment of a check for \$1,500 which Thompson was to draw in favor of the defendants, to cover their acceptance and payment of a previous draft in the latter amount, and yet, despite such knowledge and understanding, the plaintiff applied these funds and other sufficient funds, later deposited by Thompson for the same understood and stated purpose, to the payment of other checks drawn by Thompson. (3) Because the plaintiff failed to pay off the said \$1,500 check drawn on it by Thompson in favor of the defendants, although it had sufficient funds of Thompson for that purpose at the time of its presentation. (4) Because the plaintiff failed to pay a draft drawn on Thompson by defendants with the said check attached, although the plaintiff had promised and agreed so to do in writing, but applied the funds of Thompson held by it, and which were sufficient for that purpose, to the payment of other claims against Thompson.

The evidence shows that Thompson had been engaged for a number of years in the sawmill business, and that he had shipped a large part of his lumber to the defendants; and that during this period an arrangement

between Thompson and the defendants, and for the accommodation of Thompson, was in operation, whereby Thompson was accustomed to draw 60 and 90 day drafts upon the defendants, which would be accepted by them, and that Thompson would then discount these accepted drafts with the plaintiff. The evidence further shows that when one of these drafts would become due, it would be paid by the acceptors, Dixon & Co., giving their check therefor, and that Thompson, for the purpose of settling the obligation thus raised in the defendants' favor, would send to them his check on the Bank of Quitman for a like amount; that Thompson, in order to take care of the check thus sent to defendants, would draw another draft upon them, but for a less amount, which would also be accepted by them, and which would in turn be discounted by Thompson with the plaintiff bank, and the proceeds thereof placed in the said bank to the credit of Thompson's general account; and that Thompson would then have on deposit, or else would place on deposit, a sufficient amount to cover the difference between the amount of his check and the proceeds of the second draft.

There was no direct testimony from either the defendants or Thompson that the plaintiff in point of fact had knowledge that the last acceptance made by the defendants, and on which the suit is entered, was for the purpose of providing a portion of the funds whereby Thompson would be enabled to discharge his previous indebtedness to the defendants; while, on the other hand, the cashier of the plaintiff bank testified positively and unequivocally that neither he nor the bank had any such knowledge, and the judge, sitting as both court and jury, was therefore authorized to find that such was the case, and that, so far as the bank knew or was informed, each of these transactions was a separate and distinct transaction, and bore no relation to each other.

There was no evidence to sustain the allegations of the defendants' answer that the drafts on other persons deposited by Thompson with the plaintiff bank were deposited with the agreement, direction, or understanding that the proceeds should be applied to the payment of the \$1,500 check drawn by Thompson in favor of the defendants and upon the plaintiff bank; nor was there any evidence that Thompson ever subsequently directed the bank to pay this check or the defendants' draft out of these or any other funds. The evidence fails to disclose that there was on deposit with the said bank, to the credit of Thompson, sufficient funds to pay the check or the draft at the time of their several presentations. The letter and telegram relied upon by the defendants to show a promise upon the part of the bank to pay the draft drawn by them on Thompson, out of these funds, are as follows:

Telegram:

"Quitman, Ga. October 13th.

"J. M. Dixon & Co., Savannah, Ga. John P. Thompson has deposited enough items here for collection to make your draft for fifteen hundred good. Think can remit in few days, as soon as returns are had.

"The Bank of Quitman."

The letter was dated October 21, 1914, addressed to the Exchange Bank of Savannah, and was as follows:

"I have yours of the 20th relative to draft of J. M. Dixon & Co. on Jno. P. Thompson for \$1,500.00. I have been holding this draft here trying to collect it. Mr. Thompson has been depositing items for collection and we put them through with some paid and a good many of them being returned unpaid. We have worked the collected balance up to within a few hundred dollars of having enough to take up the draft. We may get enough to-day to finish it, and if so will remit it this week, possibly to-day or to-morrow, depending upon just what we get from him to-day. We are protecting balance collected against anything else. We hope this is satisfactory.

"[Signed] H. M. Stubbs, Cashier."

Upon the trial of the case, the court rendered the following judgment:

"The above cause was submitted to the court for its determination, without the intervention of a jury, of the law and the facts. The objections to testimony are all overruled. I think the testimony shows that the paper sued on was an accommodation paper. I think also that it shows that plaintiff was not advised of this fact at the time it was discounted. But these facts do not affect the respective rights of the parties involved here. Some of the questions propounded to Thompson were leading, but, notwithstanding this, I think the objections on that ground were properly overruled. In my judgment the defense and counterclaim of James M. Dixon & Co. are not sustained by the record. An agreement, to which the bank was a party, as contended for by the defendant is not established by the evidence. It is therefore considered, ordered, and adjudged that the plaintiffs above named do recover from the defendants above named the principal sum of \$1,250 principal, with interest thereon at 7 per cent. per annum from December 11, 1914, and also \$1.50 protest fees, 25 cents revenue stamp affixed to certificate of protest, and also all costs of court, without offset or deduction on account of the defensive matter and counterclaim set up by defendants."

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Wm. L. Clay, of Savannah, for defendant in error.

JENKINS, J. (after stating the facts as above). [1-4] Under an application of the different principles of law as stated in the syllabus, there was no error in the judgment rendered in the court below. In point of fact it does not appear, and the judge so held, that there was ever any express or implied agreement that the unconditional writ-

ten acceptance as made by the defendant was based upon a parol condition that the proceeds derived therefrom should only be applied in part payment of a previous indebtedness owing to defendants by Thompson; but, under our view of the law, even had this been made to appear, it would not have been competent, in the absence of fraud, accident, or mistake being set up, to thus vary the terms of the absolute and unconditional written acceptance by showing that it was in fact based upon a condition.

It furthermore does not appear that there were ever sufficient funds in the bank to pay either the \$1,500 check drawn by Thompson or the draft upon him drawn by the defendants, upon their respective presentations; but, even had such been the case, under the authority cited in the third headnote, we do not think that the failure on the part of the drawee to pay an unaccepted check would give to the payee thereof a right of action against him since there ordinarily exists no privity of contract between the payee and the person on whom the check is drawn.

Under the authority cited in the fourth headnote, even had the promise to the defendants by the bank to pay the defendants' draft been absolute and unconditional, it still would not have been a binding agreement upon its part, unless it had been made to appear that the drawee had contemporaneously assented that the bank might accumulate and hold for such specific purpose the funds of Thompson then accruing on deposit in said bank. In the instant case, however, it does not appear, either that the promise by the bank was absolute or unconditional, or that any such direction or authority for such specific application had been given it.

Judgment affirmed on main bill of exceptions; cross-bill dismissed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 163)

CHICKAMAUGA MFG. CO. v. AUGUSTA GROCERY CO. (No. 9547.)

(Court of Appeals of Georgia, Division No. 1. Jan. 14, 1919.)

(Syllabus by the Court.)

1. SALES \S 377 — ACTION FOR BUYER'S BREACH OF CONTRACT—MUTUALITY.

This suit was for damages on account of a breach of an alleged contract. The defendant signed an order, directed to the plaintiff, for 250 gross of a certain commodity therein described, to be delivered by freight, and "to be used as ordered within 12 months from date." The petition alleges that this commodity was to be manufactured by the plaintiff, "and put

up under their particular brand in a special package for the defendant, in accordance with defendant's instructions," and that plaintiff "was at all times prepared to deliver said 250 gross of Honest John bluing to defendant at Augusta, Ga., under the terms of said contract, at any time during the 12 months between the 12th day of March, 1912 [the date of the order], and the 12th day of March, 1913." It is not, however, anywhere expressly alleged that this order was ever in fact accepted by the plaintiff at any time, either orally or in writing, or that the goods were ever manufactured in accordance with the terms of the order, or were ever tendered or delivered by the plaintiff, and it does not appear that the plaintiff ever expressly bound itself to manufacture and deliver the total quantity of 250 gross of the commodity ordered, in exact conformity with all the terms of the order as to price, time of shipment, etc. The unaccepted order did not itself constitute a valid contract, as it was wanting in mutuality, orally or in writing, or by the conduct of the parties, so accepted as to bind both the prospective vendor and the vendee.

2. SALES \S 23(3) — SHIPMENT OF PART OF GOODS—PERFORMANCE OF CONTRACT.

It is alleged that the "defendant ordered out 45 gross of said 250 gross of bluing during the time specified in said order, but refused to accept the remainder of said contract of 205 gross," and "notified your petitioner that it would not accept the 205 gross of Honest John bluing." The statute of frauds was not involved in this case, and the mere fact that the plaintiff actually shipped some of the commodity specified in the order, before the defendant directed that no further shipments be made, did not amount to such an acceptance of the entire order as would legally bind the plaintiff to ship the remainder of the quantity therein specified and at the price, etc., therein named, it not even being alleged that the plaintiff advised the defendant, or indicated to it in any manner, at the time this particular shipment was made or before the order for the remainder of the commodity was revoked, that the shipment was so made under the terms of the order. The shipment of some of the commodity ordered, without reference to its terms, could not of itself convert the mere order into a valid and binding mutual agreement between the parties. See, in this connection, *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Waycross R. Co. v. Southern Pine Co.*, 115 Ga. 7, 41 S. E. 271; *McCaw Mfg. Co. v. Felder*, 115 Ga. 409, 411, 41 S. E. 684; *Harrison & Garrett v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730; *Sivell v. Hogan*, 119 Ga. 167, 46 S. E. 67; *Seaboard Air Line Ry. v. Harris*, 121 Ga. 707, 49 S. E. 703; *Swindell & Co. v. First Nat. Bank*, 121 Ga. 714, 49 S. E. 673; *Simpson v. Sanders*, 130 Ga. 265, 60 S. E. 541; *Denton v. Butler*, 7 Ga. App. 267, 66 S. E. 810; *Trigg Candy Co. v. Emmett Shaw Co.*, 9 Ga. App. 358, 71 S. E. 679; *Martin v. Cox*, 13 Ga. App. 238, 79 S. E. 39; *Haynes Auto Co. v. Turner*, 18 Ga. App. 22, 88 S. E. 717.

3. DEMURRER TO PETITION.

The court did not err in sustaining a demurrer to plaintiff's petition.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by the Chickamauga Manufacturing Company against the Augusta Grocery Company. Demurrer to petition sustained, and plaintiff brings error. Affirmed.

P. C. O'Gorman, of Augusta, and Chas. G. Reynolds, of Millen, for plaintiff in error.
E. H. Callaway, and Callaway & Howard, all of Augusta, for defendant in error.

WADE, C. J. Judgment affirmed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 140)

SMITH v. STATE. (No. 9950.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 9, 1919.)

(Syllabus by the Court.)

1. ATTEMPT TO MANUFACTURE WHISKY.

The defendant was charged with manufacturing whisky in 1916 (which offense was then a misdemeanor), and convicted of an attempt to manufacture the same. The question of law raised by the fourth, sixth, eighth, and ninth grounds of the motion for a new trial was decided adversely to the contentions of the plaintiff in error in *Leverett v. State*, 20 Ga. App. 748, 93 S. E. 232, upon a state of facts substantially identical with those sub judice, and growing out of the same transaction.

2. CRIMINAL LAW \S 59(5), 61½, 64—"PRINCIPAL"—MISDEMEANOR.

The excerpt from the charge of the court, complained of in the fifth ground of the motion for a new trial, upon the subject of principals in the first and second degrees, was not technically accurate, since all persons aiding and abetting in the commission of a misdemeanor are principals, and in misdemeanors there are no principals in the "first" or "second" degree. Under the facts of the case, however, this inaccuracy affords no cause for a new trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Principal.]

3. CRIMINAL LAW \S 828 — REQUEST FOR CHARGE—DEFINING OFFENSE.

In the absence of a timely written request, the trial judge in his charge to the jury did not err in not describing or defining "the nature and character of the acts essential and necessary for this movant to commit in order to render him guilty of an attempt to manufacture whisky illegally as distinguished from the nature and character of those acts which were merely preparatory and would not authorize the jury to find the movant guilty of any offense."

4. SUFFICIENCY OF EVIDENCE — MOTION FOR NEW TRIAL.

The evidence authorized the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

Shep Smith was convicted of an attempt to manufacture whisky, his motion for new trial was overruled, and he brings error. Affirmed.

Greene F. Johnson, of Monticello, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 141)

LEVERETT v. STATE. (No. 9949.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 9, 1919.)

(Syllabus by the Court.)

1. COMPANION CASE.

The defendant was charged with manufacturing whisky in 1916, which offense was then a misdemeanor, and convicted of an attempt to manufacture the same. The offense charged being substantially the same as the offense charged in the case of *Smith v. State*, 98 S. E. 115, this day decided, and growing out of the same transaction, the assignments of error raised in the fifth, sixth, seventh, eleventh, and twelfth grounds of the motion for new trial are disposed of in the first and second headnotes of that case. See, also, *Leverett v. State*, 20 Ga. App. 748, 93 S. E. 232.

2. CRIMINAL LAW \S 781(2) — CHARGE ON CONFESSIONS—EVIDENCE.

There being evidence tending to show a confession on the part of the defendant, it was not error for the court to charge the law relative to confessions, and the assignment of error set out in the fourth ground of the motion for new trial is therefore without merit.

3. EXCEPTIONS TO CHARGE OF COURT.

There is no merit in the exceptions taken to the charge of the court as set out in the eighth and tenth grounds of the amendment to the motion for new trial, nor is there any merit in the exception taken to the failure of the court to charge as set out in the ninth ground of said motion.

4. MOTION FOR NEW TRIAL—REFUSAL.

The charge of the court fairly submitted the case to the jury; and, there being evidence to support the verdict, the court did not err in overruling the motion for new trial.

Error from Superior Court, Jasper County; Jas. B. Park, Judge.

B. Leverett was convicted of an offense under the liquor law, his motion for new trial was denied, and he brings error. Affirmed.

Greene F. Johnson, of Monticello, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, and Richard B. Russell, of Atlanta, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 169)

WESTERN UNION TELEGRAPH CO. et al.
v. OWENS. (No. 9574.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919. Motion for Rehearing
Denied Jan. 28, 1919.)

(Syllabus by the Court.)

1. RULINGS ON DEMURRERS.

The meritorious special demurrers to the petition were sufficiently cured by amendments, and the petition as amended was not subject to the general demurrers interposed by the three defendants. There was no misjoinder of parties, under the allegations made.

2. TELEGRAPHS AND TELEPHONES ¶20(5) — PERSONAL INJURY—LIABILITY—EVIDENCE.

The evidence disclosed liability on the part of the Georgia Northern Railway Company and the Western Union Telegraph Company, but failed to fix liability against the Southern Bell Telephone & Telegraph Company.

3. APPEAL AND ERROR ¶1067—ACTION FOR PERSONAL INJURIES—LIABILITY—INSTRUCTION.

There was no harmful error in the failure of the court to instruct the jury that they might find one or more, or all, of the defendants liable.

4. TELEGRAPHS AND TELEPHONES ¶20(7) — NEGLIGENCE—QUESTION FOR JURY.

Whether or not the plaintiff failed to exercise ordinary care was a question for determination by the jury.

5. TRIAL ¶261—REQUESTED INSTRUCTIONS—REVERSAL.

Where a series of propositions are presented en bloc in a single request to charge, the court is not required to give them, or any part of them, if any one of them is erroneous, or inapplicable to the case on trial.

6. RULING ON MOTION FOR NEW TRIAL.

The court erred in overruling the motion for a new trial made by the Southern Bell Telephone & Telegraph Company, but the judgments overruling the motions for a new trial made by

the Georgia Northern Railway Company and the Western Union Telegraph Company are affirmed.

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by A. T. Owens against the Western Union Telegraph Company, the Georgia Northern Railway Company, and the Southern Telephone & Telegraph Company. Judgment for plaintiff, and defendants appeal. Affirmed as to the Western Union Telegraph Company and the Georgia Northern Railway Company, and reversed as to defendant Southern Bell Telephone & Telegraph Company.

Bennet & Harrell, of Quitman, Walters & Redfearn, of Albany, and Merrill & Grantham, of Thomasville, for plaintiffs in error.

Branch & Snow, of Quitman, and H. J. MacIntyre, of Thomasville, for defendant in error.

WADE, C. J. [1] 1. The plaintiff's petition alleged that he was injured by stumbling over certain telegraph and telephone wires which had been precipitated to the ground by a violent wind, across a road in daily use by pedestrians and vehicles, because of the defective and rotten condition of the posts to which the wires were affixed, and that said posts and wires were maintained jointly by all three of the defendants named, for the transaction of their business, as was particularly set out, and that all of said defendants "did have and maintain" the line of posts from which were suspended the wires causing the injury; and it was further alleged that all of the defendants were negligent, in that they maintained, across and over said road, telegraph and telephone wires attached to posts which were rotten and insecure, and therefore liable to fall at any time across the road, and in allowing said posts to become rotten and unsafe, and in failing to replace or repair said posts, notwithstanding the defendants had long known of their insecure and unsafe condition, or could have had such knowledge by the exercise of ordinary care. Under the allegations made, there was no misjoinder of parties. The petition as amended was not subject to the general demurrers or to the various special demurrers separately interposed by the three defendants.

[2] 2. Upon the trial the evidence disclosed that the Georgia Northern Railway Company originally constructed a telegraph line along its right of way, which it thereafter sold absolutely to the Western Union Telegraph Company, making at the time a separate contract with said telegraph company that in consideration of the setting apart for the exclusive use of the railway company of

one of the wires attached to the posts of the system, said railway company would "furnish at its own expense all the labor to maintain the telegraph company's line of poles and wires along the railway company's railroad * * * in good order and repair, and to reconstruct said line of poles and wires when required by the telegraph company," all poles, wires, insulation, and other material for such repairs and reconstruction to be furnished by the telegraph company. It was further shown that the Southern Bell Telephone & Telegraph Company purchased from the telegraph company, at an agreed price per annum, the privilege of attaching to said posts two lines of wire, which were to be exclusively owned, used, and maintained by said telephone company, but the evidence nowhere discloses which particular wires so attached to the posts of the telegraph company were the property of the telephone company, or which one of the two wires which belonged to the telegraph company was allotted to the use of the railroad company; nor did it appear which particular wire or wires caused the plaintiff to stumble, fall, and suffer the injuries sued for.

(a) The telegraph company, being the owner of the poles, the defective condition of which was the direct cause of the injury complained of, was liable therefor, and this regardless of what particular wires, attached to its poles by its consent, actually produced the injury. The fact that said telegraph company had employed the railway company to repair and maintain the posts and wires belonging to said telegraph company, could not in any wise relieve the owner of the posts from liability to third persons because of the failure of its servants or employees to carry out and perform the contract to repair, and the court did not err in declining to allow the amendment setting up the said maintenance contract as a matter of defense. Incidentally it appears that this contract provided that the line of poles and wires should be reconstructed by the railway company only "when required" by the telegraph company, and there was no proof that any such requirement had ever been made.

(b) The railway company parted absolutely with the title to the wires and poles of the telegraph system, and its failure to maintain them in safe condition, in accordance with its contract with the telegraph company, did not, therefore, render it primarily liable to third persons, suffering injury resulting from its breach of contract with the telegraph company. Nevertheless it must be inferred from the evidence (and it is conceded in the brief for the railway company) that the posts of the telegraph system, though owned, since the sale to the telegraph company on December 12, 1899, by the last-named company, were allowed and permitted by the railway company to remain upon its right of way, in a

rotten and unsafe condition, with potentially dangerous wires attached thereto, crossing over a public way. Hence said railway company was liable for any injuries directly resulting to passers along said road, from contact with said wires, where such persons were at the time in the exercise of proper care, not because of any omission to perform its duty to maintain the wires and posts under its contract with the telegraph company, but for wrongdoing in permitting the dangerous instrumentality to exist on its property. The case of *Southern Railway Co. v. Sewell*, 18 Ga. App. 544, 90 S. E. 94, in so far as it relates to misfeasance and non-feasance, is not opposed to this ruling, but to the contrary. See 18 Ga. App. 552, 553, 90 S. E. 94.

(c) The telephone company, though having no title to the posts on which its wires were strung, nevertheless strung such wires over and across a public highway, where people constantly passed, and where injury to them was liable to result unless, in the exercise of proper diligence towards the public, the wires were safely attached to sound and stable posts or other objects on either side of such highway, and consequently liability attached to said company for any injuries resulting to a traveler on said highway, brought about by contact with its particular and individual wires. The telephone company would not, however, be liable for injuries resulting from the defective and rotten condition of the posts to which its lines were attached, by the consent of the actual owner of the posts, unless it was made to appear that the injuries were caused by its particular wires. If the wires of the telephone company did not in fact injure the plaintiff, it was, of course, immaterial whether they were attached to stable or unstable supports, or whether the supports fell or remained standing, so far as the creation of any liability against that company was concerned. The evidence failed altogether to indicate or even in any wise to suggest, which of the four wires attached to the rotten posts were the property of the telephone company, and there was no testimony from which it could be definitely inferred that the plaintiff stumbled against or came in contact with either or both of the wires of the telephone company in such a way as to produce or contribute to the injuries complained of, and hence the verdict as against the telephone company was unauthorized by the proof, as no injury was shown to have resulted from its negligence in properly supporting its wires.

[3] 3. Under the foregoing rulings the telegraph and railway companies were both liable for any injuries to travelers on the highway, shown to have resulted from the rotten and defective posts actually owned by the one company, and permitted by the other

to remain on its right of way, to which the wires inflicting the injury were attached, and, the jury having found that the plaintiff was entitled to compensation for such injuries, no harm resulted to either of these defendants from the failure of the court to instruct the jury that a joint or several verdict might be returned—or a verdict against one or more of the three defendants or in favor of the remaining one or more. Likewise it is unnecessary to consider the several grounds of the motion for a new trial made by the telephone company, which are based upon the failure of the court to submit various contentions of that defendant, a new trial being granted to the last-named company because the evidence was insufficient to show that it was liable.

[4] 4. Whether or not the plaintiff failed to exercise ordinary care and diligence in running along a well-known road in the dark, with his hat partially over his eyes to protect them from the sand and trash carried by the high wind prevailing at the time, notwithstanding the degree of knowledge possessed by him as to the defective condition of one of the poles adjacent to the road, was a matter for the jury, and this court cannot arbitrarily usurp their province.

[8] 5. It is not error to refuse a request to give in charge to the jury a series of propositions presented en bloc, where any one or more of the propositions is unsound, notwithstanding the various propositions included in the one request are stated in separate paragraphs, more or less disconnected. In this case, among the propositions presented in the one request was the following:

"I charge you further that before the plaintiff is entitled to recover any amount in this case of the defendant, you must believe from the evidence that the plaintiff was free from fault."

This was not a correct statement of the law, and the court properly refused to comply with the request as presented. The legal principles embodied in the request which were applicable were in fact submitted to the jury. See, in this connection, *Thompson v. O'Connor*, 115 Ga. 120 (5), 123, 41 S. E. 242; *Wallis v. Heard*, 16 Ga. App. 802, 803,

86 S. E. 391; *Shippey v. Owens*, 17 Ga. App. 127, 86 S. E. 407 (3); *Woodard v. State*, 18 Ga. App. 59, 88 S. E. 825 (2); *Conley v. State*, 21 Ga. App. 135, 94 S. E. 261 (6). In *Thompson v. O'Connor*, supra, the request to charge not only comprehended various propositions of law presented in separate paragraphs, but the paragraphs were identified as "(a)," "(b)," "(c)," etc. In *Shippey v. Owens*, supra, the request held to be an en bloc request was introduced with the words, "The court is requested to charge," and following this appeared five different propositions, numbered 1, 2, 3, 4, and 5. In the case under consideration, not only does the presiding judge, in approving the grounds of the amendment to the motion for a new trial presented by the defendant, that preferred the request which was refused, certify that the several propositions included in the one request to charge "were not preferred separately, but were embodied in a single request," one of which was not the law, but the request itself, which appears in the bill of exceptions as an exhibit, is headed "Request to Charge Made by Bennet & Harrell, Attorneys of Record for the Western Union Telegraph Company," and each of the 14 paragraphs following commences, "I charge you further," except one, which commences, "You will determine," etc. Clearly this was, under the rulings cited, an en bloc request, and not a number of separate requests, and one, if not more, being erroneous, the court did not err in declining to comply with the request as preferred.

[8] 6. The evidence authorized the verdict returned against the Georgia Northern Railway Company and the Western Union Telegraph Company, and the judgment overruling their motions for a new trial is affirmed. But as the evidence does not authorize a recovery against the Southern Bell Telephone & Telegraph Company, the judgment in overruling its motion for a new trial is reversed. See, in this connection, *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955 (6); *Bonner v. Standard Oil Co.*, 22 Ga. App. 532, 96 S. E. 573.

Judgment reversed in part, and affirmed in part.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 245)

BELLINGER v. MUTUAL BEN. INDUSTRIAL LIFE INS. ASS'N.
(No. 9761.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. CERTIORARI \Leftrightarrow 64(1) — PETITION—AFFIDAVIT OF ILLEGALITY.**

Where, in his petition for certiorari, a plaintiff in *fi. fa.* in an illegality proceeding set forth the grounds of the affidavit of illegality filed by the defendant, and he alleged that "no facts were necessary to a determination of the issues involved, the questions presented being exclusively questions of law," and assigned error solely upon the following grounds, to wit: (1) Because the court overruled petitioner's motion to strike the several stated grounds of the affidavit of illegality, for the reason that they or none of them presented any matter of defense; and (2) because the court erred in sustaining said affidavit of illegality upon any or all of its grounds, for the reason that no one or all of them presented any legal reason why the *fi. fa.* should be quashed, the judge of the superior court in passing upon the only exceptions thus brought before him, was authorized to consider that the statements of fact contained in the several grounds of the affidavit of illegality were conceded to be true.

2. EXECUTION \Leftrightarrow 166 — AFFIDAVIT OF ILLEGALITY—SUFFICIENCY.

Under the facts as thus considered, the affidavit of illegality was properly sustained. *Lott v. Wood*, 135 Ga. 821, 823, 70 S. E. 661; *Freeman v. Gaither*, 76 Ga. 741. See, also, *Bedingfield v. First National Bank*, 4 Ga. App. 197, 61 S. E. 30; *Continental Fertilizer Co. v. Pass*, 7 Ga. App. 721, 67 S. E. 1052; *Hartsfield v. Morris*, 89 Ga. 254, 15 S. E. 363.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Executory proceeding by Gilbert Bellinger against the Mutual Benefit Industrial Life Insurance Association, in which defendant filed an affidavit of illegality. Affidavit sustained, *fi. fa.* quashed, and levy dismissed. From the overruling of his certiorari, plaintiff in *fi. fa.* brings error. Affirmed.

The defendant in error filed an affidavit of illegality to the further proceeding of a justice court *fi. fa.* in which it was the defendant, upon numerous grounds, the substance of which were to the effect: (1) That the justice court was entirely without jurisdiction to render a money judgment in a proceeding which did not seek to obtain such, but which was merely an attempt in a justice court to obtain specific performance under an alleged contract; and (2) that the judgment was not rendered on the regular day fixed for the holding of said court, and, although he had filed with the justice a demurrer to the

jurisdiction of the court, that he had no notice of the hearing, and did not waive notice. The illegality was heard in the municipal court of Savannah, the courts of the justices of the peace in Savannah having in the meantime been abolished, and the municipal court having superseded same. The judge of the municipal court sustained the illegality, quashed the *fi. fa.* and dismissed the levy made thereunder. The plaintiff in *fi. fa.* brought the case by certiorari to the superior court, setting forth in the petition the grounds of the illegality, and alleging that—

"No facts were necessary to a determination of the issues involved, the questions presented being exclusively questions of law."

Complaint was made in the petition for certiorari on the failure of the municipal court judge to sustain a motion made before him to strike the several grounds of illegality, for the reason that they failed to present "any sufficient matter in law why the execution should not proceed to satisfaction." The petition also complained of the judgment sustaining the illegality, dismissing the levy, and quashing the *fi. fa.*, for the reason that—

"No one or all of the several grounds of illegality presented any legal reason why the *fi. fa.* should be quashed, and plaintiff therein denied satisfaction thereof."

The judge of the superior court sanctioned the certiorari, and the chief judge of the municipal court who had tried the case adopted for his answer "all the allegations of fact as contained in the petition." No evidence was embodied in the petition. The record sent up to the superior court in answer to the writ of certiorari consisted of the answer of the municipal court, the judgment of the municipal court, and the *fi. fa.* While a copy of what purports to have been the original summons was actually included with the record sent up, no reference was made thereto either by the petition for certiorari or the answer. Upon the hearing in the superior court, the judge thereof rendered the following judgment:

"Usually in certiorari cases the issues are clearly presented by the petition and answer, but in the instant case there is so much confusion that it is difficult to reach a satisfactory conclusion. It appears that a suit was commenced in the justice court of the Third district, G. M., that this court was abolished, and that its duties devolved upon the municipal court of Savannah. It further appears that the justice court had rendered a judgment in favor of Bellinger against the insurance company for \$80, besides interest and costs. I say inferentially, because in the record before me there is no judgment, and I assume there was a judgment, because it is so recited in the execution. The execution was levied on April 7, 1917, and affidavit of illegality was interposed on April 13, 1917. The plaintiff in *fi. fa.* moved to dismiss the affidavit of illegality. It does not

appear, except inferentially, what action was taken in the court on this motion to dismiss. As the illegality was sustained, I must assume that the motion to dismiss was overruled, although no order or judgment to that effect appears. His honor, Judge Rourke, on the 8th day of August, 1917, rendered a judgment sustaining the affidavit of illegality, dismissing the levy, and quashing the *fi. fa.* To this judgment plaintiff in *fi. fa.* excepted, and these exceptions form the grounds of the petition for certiorari. To the writ of certiorari the court below answers that 'all the allegations of fact contained in the petition are true.' There is no exception or traverse to the answer, and I am now compelled to dig out of the debris of the abolished court and 15 grounds of illegality the legal truth.

"I find among the papers what purports to be a copy of the original summons and exhibit. The order setting up the copy of the pleadings in lieu of the lost original is not signed by the judge, and it neither appears in the petition for certiorari nor in the answer thereto that this copy was ever established nor introduced in evidence. How it gets into the papers before me does not appear, and yet the first six grounds of illegality are based on the alleged illegality of the judgment. What that judgment was, or if any were rendered, only appears from the recital in the *fi. fa.*, which *fi. fa.* is dated April 8, 1917, and recites that in the justice court for the Third district a judgment for \$80 was rendered. No evidence whatever seems to have been introduced. The petition for certiorari avers: '(2) No facts were necessary to a determination of the issues involved, the questions presented being exclusively questions of law.'

"As illustrative of the almost inextricable confusion which exists, look at the seventh ground of illegality, which is: 'Said justice court was not in session at the time said alleged judgment was rendered.' This ground raises a great, big controlling issue of fact. The burden was on the defendant in *fi. fa.* to sustain by evidence this averment, and yet I am told by the plaintiff in *fi. fa.*, in his petition for certiorari, 'that no facts were necessary to a determination of the issues involved.' I can only understand from this that it was conceded in the court below that the ground in the affidavit of illegality, 'that the justice court was not in session at the time said alleged judgment was rendered,' is true. It is too clear for argument that justice courts must be held at stated times and places, and, if the court rendering the judgment was not in session at the time when the judgment was rendered, then such judgment is void, and illegality is the proper defensive remedy.

"A consideration of the several grounds of illegality is not necessary. If the affidavit is good on any of the grounds, that is sufficient. The burden is on the plaintiff in certiorari to show affirmatively that the judgment of the court below should be reversed, and the error committed must be alleged in the petition. It has not been so made to appear. The certiorari is overruled and the judgment affirmed.

"[Signed]

Peter W. Meldrim,

"Judge E. J. C. Ga.

"January 14, 1918."

To this judgment of the superior court, overruling the certiorari, the plaintiff in *fi. fa.* brings his exceptions to this court, setting forth numerous grounds, most of which are based upon the theory that the judgment itself shows that it was arrived at from a consideration of certain pleadings in the case, not a part of the record in the certiorari proceeding, and also that the judgment itself indicates that it rests upon a conception of the facts in the case likewise not supported by any evidence contained in the certiorari record, and, finally, that—

"No one or all of the several grounds of illegality constitute any legal reason why the *fi. fa.* should have been quashed."

Plaintiff in error specifies, as material to a clear understanding of the errors complained of, the *fi. fa.*, with all entries thereon, the affidavit of illegality, the petition for certiorari, with all entries, the answer thereto, the judgment of the court on the certiorari, and the alleged copy summons of the justice court, from which the *fi. fa.* issued.

Don H. Clark, of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 212)

E. TRIS NAPIER CO. v. BROWN.
(No. 9862.)

(Court of Appeals of Georgia, Division No. 1
Jan. 14, 1919.)

(Syllabus by the Court.)

COURTS ~~6~~188(8) — MUNICIPAL COURT OF CITY OF MACON—JURISDICTION—DISPOSSESSORY WARRANT.

Under the terms of the act creating the municipal court of Macon, jurisdiction is not given it to try and determine proceedings had under dispossessionary warrants against tenants holding over.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Dispossessionary proceedings between the E. Tris Napier Company and Julius Brown. From the judgment of the superior court sustaining a certiorari from the municipal court of Macon, the former brings error. Affirmed.

Chas. H. Garrett, of Macon, for plaintiff in error.

J. P. Burnett and Napier & Maynard, all of Macon, for defendant in error.

JENKINS, J. The sole question in this case is whether, by the terms of the act of the General Assembly creating it, the municipal court of Macon is given jurisdiction to try and determine issues made under dispossessory warrants. The legal purpose and intent of the act in this respect will suffice to determine the only question involved in the case. The Supreme Court has held that an act giving to a city court concurrent jurisdiction to try an issue formed by a counter affidavit to dispossessory warrants is not unconstitutional as being a special law, where there is an existing general law. *McDonald v. Vaughn*, 130 Ga. 398, 60 S. E. 1060. Moreover, the municipal court of Macon was established under an act passed in pursuance of a constitutional amendment which had authorized the Legislature to confer upon such a court jurisdiction to try any case which was not under the Constitution within the exclusive jurisdiction of some other court. The Constitution itself does not give to any court exclusive jurisdiction in the matter of evicting tenants holding over. While section 5388 of the Civil Code (1910) provides that if the counter affidavit and bond provided for in such a proceeding shall be made by the alleged holding over tenant, and delivered by him to the sheriff or constable, the proceedings to evict shall be stayed, and the officer shall return the papers "to the next superior court of the county where the land lies, and the fact in issue shall be there tried by a special jury as in case of appeal," it is nevertheless true that this provision of the Code cannot be taken as giving to the superior court exclusive jurisdiction of such cases, since it is plainly modified by the provisions relative to the jurisdiction given to county courts (Park's Ann. Code, § 4775mm); and the Supreme Court ruled in *Harper v. Tomblin*, 127 Ga. 390, 56 S. E. 433, that a county court, by virtue of this section pertaining to its jurisdiction, has full authority to hear and determine such an issue. In the case just mentioned, the statement made in *Stephenson v. Warren*, 119 Ga. 504, 46 S. E. 647, to the effect that "exclusive jurisdiction over such a proceeding is, by statute, conferred upon the superior courts," is stated to be obiter, since the point in the *Stephenson* Case was not at all whether a county court had such jurisdiction, but pertained solely to the question as to whether or not such jurisdiction was in the city court of Moultrie. The ruling made in the *Stephenson* Case, however, to the effect that the city court of Moultrie was without such authority was in no wise overruled. By reference to the act of the Legislature creating the city court of Moultrie, and cited in the *Stephenson* Case (Ga. Laws 1901, p. 136, § 2), it will be seen

that the jurisdiction of that court is at least fully as broad as that which is conferred upon the municipal court of Macon. The city court of Moultrie was given general and sweeping authority to "try and dispose of all cases of whatever nature, except cases over which exclusive jurisdiction is vested in other courts," whereas the jurisdiction given to the municipal court of Macon is defined (Ga. Laws 1913, p. 253, § 2) to be as follows:

"Said municipal court of Macon shall have jurisdiction within the incorporate limits of the city of Macon, as aforesaid, concurrent with the superior court to try and dispose of all civil causes or proceedings of whatever nature, whether arising ex contractu or ex delicto, under the common law or by statute, in which the principal sum sworn to or claimed to be due, or the value of the property in dispute, does not exceed five hundred dollars, and of which jurisdiction is not vested by the Constitution and laws of the state of Georgia exclusively in other courts." (Italics ours.)

Section 15 of this act is as follows:

"Be it further enacted by the authority aforesaid, that all warrants, summary processes and writs issuing out of said municipal court, in which the principal sum claimed to be due or the value of the property in dispute does not exceed five hundred dollars (\$500.00), shall be returnable to said municipal court in the same manner and under the same rules as such writs are required to be returned to the superior courts or the justice courts of this state as the case may be."

While, as we have seen, the jurisdiction given by section 5388 of the Code to the superior courts is not exclusive, since the Code itself gives concurrent jurisdiction to the county courts, and since the provisions of various acts of the Legislature creating city and municipal courts have legally given and may legally continue to give concurrent jurisdiction in such cases, still, before any other court shall have such concurrent jurisdiction, it must first have been actually granted to it by the lawmaking body. In other words, all dispossessory warrant cases shall, in accordance with section 5388 of the Code, be returned to the superior court of the county in which the land lies, except in so far as concurrent jurisdiction may be or has been given, either under other provisions of the Code or under the special acts of the Legislature creating city and municipal courts.

Can the language of the act creating the municipal court of Macon be taken as giving to it such concurrent jurisdiction? The summary process by which claims for rent are to be collected is that of distress warrant. The primary purpose and intent of a dispossessory warrant against a tenant holding over is to obtain possession of the premises thus wrongfully withheld. Section

5386 of the Code provides that, when the affidavit provided for to be made by the owner of the property against tenants holding over has been made, he is entitled to a writ or process directed to the sheriff, or his deputy, or any lawful constable, commanding and requiring him to deliver to the owner possession of the land or tenements mentioned. When such possession has been thus obtained, there is an end to the matter, since, unless the tenant holding over sees proper to file a counter affidavit and bond, no issue has been raised for trial. *Clark v. Lee*, 80 Ga. 617, 6 S. E. 170. It is true that, if the tenant sees proper to arrest the proceeding and prevent the removal of himself and goods from the land, he may do so by declaring on oath any of the defenses specified by the Code, and at the same time furnishing a bond with good security payable to the landlord for the payment of such sum, with costs, as may be recovered against him on the trial of the case; and, if upon the trial of the case the issue should be determined against the tenant, then the person taking out the warrant shall not only be entitled to an enforcement of the writ of dispossession against the tenant, but shall also be entitled to a judgment against him for double the rent reserved or stipulated to be paid, or, if he should be a tenant at will or sufferance, then for double the amount of what the rent of the premises is shown to be worth. The purpose of such a proceeding is, however, to obtain possession of the premises, and not the incidental penalty which may or may not be imposed, according to whether the tenant may wrongfully seek to resist the proceeding of the writ. In a proceeding against a tenant holding over, it is not even necessary that any mention as to rent shall be made in the affidavit, in order for such penalty to be recovered. *Pettis v. Brewster*, 94 Ga. 527, 19 S. E. 755. It was held by this court, in the case of *Tomlin v. Harper*, 6 Ga. App. 808, 65 S. E. 1093, that, upon the trial of such an issue in the county court, certiorari, and not appeal from that court to the superior court, is the proper procedure, inasmuch as the purpose of the writ is merely to obtain possession of the premises, whereas an appeal is allowed only in a case where the principal sum or the damages claimed exceeds \$50.

The municipal court of Macon is given very large and important powers and functions, but it is nevertheless a court of limited and not general jurisdiction, and thus can claim only such jurisdiction and authority as has been specifically granted to it. The provisions of the act by which it was created confers general power and authority to try and dispose of all civil cases or proceedings of whatever nature "in which the principal

sum sworn to or claimed to be due, or the value of the property in dispute, does not exceed \$500," and of which jurisdiction is not vested by the Constitution and laws of the state of Georgia exclusively in other courts. Since a dispossessionary warrant is not a proceeding in which a sum not exceeding \$500 is sworn to or claimed to be due, and the property itself is not properly in dispute, and since the only questions involved and to be determined in such a proceeding are:

"Did the relation of landlord and tenant exist between the parties? And, if so, has the relation terminated in such a way that the landlord is entitled again to the possession of the premises?" *Jordan v. Jordan*, 103 Ga. 482, 30 S. E. 265.

—we do not think that the jurisdiction conferred by the act as above quoted can be properly taken as covering the subject-matter of a dispossessionary proceeding. The judgment of the superior court sustaining the certiorari from the municipal court is therefore affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 238)

SWAFFORD v. KEATON et al. (No. 9996.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §84—RULES OF ORGANIZATION—RELIGIOUS FREEDOM.

"The First Amendment to the Constitution of the United States denies to Congress the power to make any law respecting an establishment of religion or prohibiting the free exercise thereof. Civil Code 1910, § 6684. That instrument contains no limitations on the powers of the states in this particular, but every state in the Union has in its Constitution a provision denying to the civil authorities the right to control or interfere in any way in matters purely ecclesiastical. The people of no state in the Union, as a political entity, have any creed or religion. The people of the United States, as a political entity, have no creed or religion. Each individual within the jurisdiction of the United States, whether he be within the limits of a state or elsewhere, has a right to determine for himself all of those questions which relate to his relation to the Creator of the universe. No civil authority can coerce him to accept any religious doctrine or teaching, or restrain him from associating himself with any class or organization which promulgates religious teaching. Whether he shall adopt any religious views, or, if so, what shall be the character of those views, and the persons with whom he shall associate in carrying out the particular views, are all questions addressed to his individual conscience, which no human authority has the right, even in the slightest way, to interfere with, so

long as his practices in carrying out his peculiar views are not inconsistent with the peace and good order of society." *Mack v. Kime*, 129 Ga. 1, 16, 58 S. E. 184, 191 (24 L. R. A. [N. S.] 675).

2. RELIGIOUS SOCIETIES §12(5)—RULES OF ORGANIZATION—DECISIONS OF ECCLESIASTICAL TRIBUNALS.

"When an individual becomes a member of a religious organization, his uniting with it is his voluntary act, and he becomes bound by the rules and usages of the organization. * * * As to all matters purely ecclesiastical, he is bound by the decisions of the tribunal fixed by the organization to which he belongs, as an arbitrator to determine the disputed questions relating to matters peculiarly within the province of the organization." *Mack v. Kime*, supra. Thus the courts of law must not and cannot seek to disturb, alter, or interfere with judgments thus rendered upon matters of church doctrine or discipline.

3. LIBEL AND SLANDER §45(3), 51(4)—PRIVILEGED COMMUNICATIONS—DISCIPLINE OF CHURCH MEMBER—MALICE.

(a) The law recognizes the necessity and propriety of an investigation by a church of alleged misconduct on the part of its members; and charges which may be preferred either orally or in writing in the bona fide discharge of such a duty are to be taken as privileged communications, and will be thus accounted when made in good faith, even though they should in fact be entirely erroneous.

(b) But if such charges are actually known to be false at the time they are entered, and are maliciously and willfully made, with the purpose and intent of injuring another, they cannot be regarded as privileged, and the occasion and circumstances of their making will afford no protection. *Etchison v. Pergerson*, 88 Ga. 620, 15 S. E. 680; Civ. Code 1910, § 4437.

4. DEMURRER TO PETITION.

Under the foregoing rulings, it was error to sustain the defendants' demurrer and dismiss the petition.

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Suit by W. H. Swafford against W. R. Keaton and others. Demurrer to petition sustained and petition dismissed and plaintiff excepts and brings error. Reversed.

See, also, 147 Ga. 491, 94 S. E. 568.

W. H. Swafford sued W. R. Keaton, M. M. Daniel, D. W. Daniel, J. T. Lee, and Thomas Carnes in Douglas superior court, claiming damages in the sum of \$10,000. Petitioner alleges:

That he had been a member in good standing of Cold Springs Primitive Baptist Church, located in said county, and that on the Saturday before the first Sunday in April, 1917, a regular preaching day for said church, Rev. Thomas Carnes announced the call of a church conference; whereupon,

without any previous notice to petitioner, the clerk informed Rev. Carnes that a certain charge had been handed in against the said W. H. Swafford, and in the presence of the public assembly, including petitioner, his wife, their sons and daughters, neighbors, and friends, as well as many members of said church, proceeded to read said charge, in form as follows:

"After careful investigation of the report, we the undersigned brothering of the Primitive Baptist Church at Cold Springs deem it our duty to present a charge against Brother W. H. Swafford for making what we consider a false affidavit to avoid paying the sum of \$1.75 court cost in making an appeal in a lawsuit between him and J. T. Duncan from the justice court to the superior court. This being what is usually termed a pauper oath. [Signed] W. R. Keaton. W. M. Daniel. D. W. Daniel."

That while the paper thus read was signed by only three of the defendants, its preparation and publication as aforesaid was the joint and several action of all five of the defendants named, who, it is alleged, had previously conspired together to write and publish the same. That although petitioner then and there arose and disclaimed any previous notice that the charge would be preferred, and though he attempted to be heard in explanation and defense, and sought to have the matter investigated before it came up for consideration, the said Thomas Carnes would not permit any discussion in his behalf, and made the announcement that the church was going to exclude petitioner, and that any member of the church who voted to retain him would be likewise excluded. That upon the vote being then and there taken 6 members voted to retain petitioner, and 28, acting under the intimidation of the said Rev. Carnes, voted to exclude him, whereupon the said Carnes announced that such 6 members would be given until the next regular meeting day, to make acknowledgment for having voted to retain petitioner, and that, in the event this was not done, they would be excluded. Petitioner alleges that the charge as prepared and read was knowingly and maliciously false, that it was intended by defendants to injure and damage petitioner, and that it resulted in the defamation of petitioner's character and standing, and exposed him to public hatred, contempt, and ridicule, all to his injury and damage in the amount claimed.

The defendants entered a demurrer to the petition on the following grounds:

"1. This court has no jurisdiction of said cause, same being privilege matters growing out of and concerning the deliberations of a church body and tribunal, no property right being involved.

"2. The petition shows on its face that this question and all matters complained of transpir-

ed in an ecclesiastic court and tribunal, said tribunal being within its power, authority, and jurisdiction, and only a question of doctrines of a church and crime and discipline concerning and involving such questions, this court has no jurisdiction in such matters."

The court sustained the demurrer and dismissed the petition, and the plaintiff excepted.

James & Bedgood, of Atlanta, for plaintiff in error.

J. H. McLarty, J. R. Hutcheson, and Astor Merritt, all of Douglasville, for defendants in error.

JENKINS, J. (after stating the facts as above). [1-4] The rules of law which in our opinion touch upon and govern this case are set forth in the headnotes. In a case of this particular character it may not, however, be amiss to state plainly that, the judgment of the court below having been based purely upon a question of law as raised on demurrer, neither the judgment of that court nor the judgment of this court either expresses or intimates any opinion whatever as to what is the truth as to any issue of fact involved.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 216)

COSMOPOLITAN LIFE INS. CO. v. HEAD.
(No. 9869.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES ¶150(1), 342, 343, 365
(1)—"NEGOTIABLE INSTRUMENT"—RIGHTS OF
HOLDER.

The note sued upon was by its terms payable to the order of the maker. It appears to have been simply indorsed by him, "H. J. Head," and to have been also and further indorsed as follows: "Pay to The Cosmopolitan Life Ins. Co. of Atlanta, Ga., or order, Cosmopolitan Life Insurance Company, by Wm. A. Wright, Ins. Com'r., State of Georgia, in charge." Cosmopolitan Life Insurance Company and The Cosmopolitan Life Insurance Company being entirely different and distinct corporations. Suit thereon was brought by The Cosmopolitan Life Insurance Company as holder. "A promissory note payable to the order of the maker thereof and properly indorsed by him is a negotiable instrument, and the holder is presumed to be such bona fide and for value, and is protected from any defense set up by the maker, acceptor, or indorser, except non est factum, gambling, or immoral and illegal consideration, or fraud in its procurement by the

holder." Pryor v. American Trust, etc., Co., 15 Ga. App. 822, 84 S. E. 312. None of these defenses were pleaded in the instant case. Knowledge on the part of a bona fide holder of a negotiable note that it was given in consideration of an executory contract or agreement of the payee, even though the consideration may be expressed in the instrument itself, will not deprive the indorsee of the character of a bona fide holder, unless he had additional notice of the breach of such agreement by the payee; and it has been often held that such a transferee is not bound to make inquiry as to whether or not there has been such a failure. Bank of Commerce v. Barrett, 38 Ga. 126, 95 Am. Dec. 384; Post v. Abbeville & Waycross Railroad Co., 99 Ga. 232, 25 S. E. 405; Citizens' Bank of Vidalia v. Greene, 12 Ga. App. 49, 78 S. E. 795; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238; Brooks v. Floyd, 12 Ga. App. 530, 77 S. E. 877; Fryer v. State, 12 Ga. App. 533, 77 S. E. 830; McMillan v. First National Bank, 13 Ga. App. 23, 78 S. E. 734; Hudson v. Best, 104 Ga. 131, 30 S. E. 688; 3 R. O. L. 1067, § 273. Defendant, however, contends that the indorsement, "Cosmopolitan Life Ins. Co., by Wm. A. Wright, Ins. Com'r., State of Georgia, in charge," was a sufficient fact of itself to rebut the presumption that plaintiff was a bona fide purchaser without notice. This contention is without merit. In Wade v. Elliott, 11 Ga. App. 646, 75 S. E. 989, it is held that the law presumes that a holder of a negotiable paper bought it before maturity and for value, and that a transfer by a bankrupt court did not prevent the transferee from being a bona fide purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

2. BILLS AND NOTES ¶369—EVIDENCE ¶370(4)—COLLATERAL AGREEMENT—NOTICE.

The following documentary evidence was inadmissible:

"Cosmopolitan Life Insurance Company of Atlanta, Ga. Series No. 2-A 39. No. Shares, 2. Receipt for Stock Settlement. Receipt. —. \$400. Received of H. J. Head four hundred dollars (note) \$400, in full payment for two shares of the capital stock of the Cosmopolitan Life Insurance Company, of Atlanta, Ga. It is understood that no person except an executive officer of the company has or shall have power to bind the company by the making of any contract for the acceptance of the subscription of the same number as this receipt. If the settlement is accepted, notice will be promptly mailed. If not accepted the settlement will be promptly returned. Not valid unless countersigned by the agent. Dated at Tunnel Hill, Ga., 6/28/1912. J. L. Holbrook, Agent, Cosmopolitan Life Insurance Company."

The transferee of a negotiable paper, who receives it before it is due, cannot be affected by an agreement between other parties thereto, in the absence of notice. Dorris v. Farmers' & Merchants' Bank of Cummings, 22 Ga. App. 514, 96 S. E. 450. It will be noted that the receipt is signed by Cosmopolitan Life Insurance Company, an entirely different and distinct corporation from The Cosmopolitan Life Insurance Company which sued the note. No state-

ment was made by counsel as to what evidence they proposed to offer in connection with the receipt, and no foundation was laid for its introduction, and the rejection thereof was therefore proper. See *Hatcher & Co. v. Nat. Bank of Chambersburg*, 79 Ga. 542 (2) 544, 5 S. E. 109.

3. APPEAL AND ERROR \S 977(4)—**BILLS AND NOTES** \S 491—**FIRST NEW TRIAL—BURDEN OF PROOF—REVIEW OF DISCRETION.**

The defendant, having admitted a *prima facie* case, thereby assumed the onus of proving his defense, and, there being no evidence whatever introduced in his behalf, a verdict in favor of the plaintiff was demanded, and the trial judge's grant of a first new trial must be controlled.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Suit by The Cosmopolitan Life Insurance Company against H. J. Head. Verdict for plaintiff, first new trial granted, and it brings error. Reversed.

Moise & Riddell, of Atlanta, for plaintiff in error.

Maddox, McCamy & Shumate, of Dalton, for defendant in error.

WADE, C. J. Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 317)

SMILEY v. STATE. (No. 10118.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION \S 124(6)—**RECEIVING STOLEN GOODS** \S 5—**PROSECUTION—PRIOR CONVICTION OF PRINCIPAL.**

One charged with buying or receiving goods, knowing them to have been stolen, cannot be indicted and punished until after the conviction of the principal offender, or until it appears that the principal offender cannot be taken, so as to be prosecuted and convicted. It follows that the principal and the "accessory after the fact" cannot be jointly indicted, where the prosecution is under section 168 of the Penal Code of 1910.

Error from Superior Court, Mitchell County; W. M. Harrell, Judge.

Yank Smiley was convicted of being accessory after the fact to a burglary, in that he received the property obtained by the burglary. His motion for a new trial was overruled, and he brings error. Reversed.

A. S. Johnson, of Camilla, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

BLOODWORTH, J. The indictment in this case charges Leroy Winchester with burglary, and the plaintiff in error and others as accessories after the fact, alleging that they "did buy and receive all of the property from said Winchester which he obtained by the burglary." The indictment was demurred to on several grounds, among them that the indictment should be quashed because the person who is alleged to have committed the burglary was joined "in the same indictment and the same count thereof" with the plaintiff in error, who was charged with receiving stolen goods. The demurrer was overruled, and a bill of exceptions *pendente lite* was filed. The case proceeded to trial and resulted in a verdict of guilty. A motion for new trial was overruled, and this also is alleged as error.

The learned trial judge erred in overruling the demurrer to the indictment. He evidently acted upon the general proposition that the principal felon and the accessory may be indicted in the same bill. This is true when they are joint offenders, both concurring, at least in intent, in the commission of the same crime. While the statute law of our state designates one who receives stolen goods, knowing them to be stolen, an "accessory after the fact," and he may be indicted as such, this is not strictly in accord with the definition of an accessory after the fact as given in our Code. The isolated fact that one receives stolen goods, knowing them to be stolen, does not make the receiver guilty as an "accessory after the fact," under the Code definition thereof above quoted; but he would be such if, in addition to receiving the goods, and after full knowledge that a crime had been committed, he "conceals it from the magistrate, and harbors, assists, or protects the person charged with or convicted of the crime." Penal Code 1910, \S 47. In *Lloyd v. State*, 42 Ga. 221, Chief Justice Lochrane said:

"To receive stolen goods, knowing them to be stolen, did not fall under any of the definitions of the common law, and did not constitute the receiver an accessory, but was, in itself, a distinct and separate offense. 1 Bishop, \S 493. The receiver of stolen goods, knowing them to be stolen, is not an accessory, according to our definition, because he renders no aid to the principal felon. Nor, in speaking of the common law, do we overlook the statute, 8 and 4 W. & M., or of 1 and 5 Anne, but after a review of the whole subject, and in view of the provisions of our own Code, which makes this a distinct offense as accessory after the fact, we lay down the true test to be to consider whether what he did was done by

way of personal help to his principal, with a view to enable the principal to elude punishment."

We have not overlooked the fact that in *Bieber v. State*, 45 Ga. 569, the headnote is as follows:

"One who buys or receives goods, chattels, money, or other effects that have been stolen, or feloniously taken from another, knowing the same to have been stolen, or feloniously taken, may be indicted as an 'accessory after the fact,' under the provisions of the 4420th section of the Code [section 168 of the Penal Code of 1910]; that section creates and defines a distinct offense."

It is true that under section 168 of the Penal Code of 1910 the indictment may properly designate one who receives stolen goods as an "accessory after the fact." However, *Bieber* was not indicted with the principal, and the indictment "set forth the plea of guilty of the principals to an indictment that had been found against them for simple larceny." In the case of *Licette v. State*, 75 Ga. 253, Mr. Justice Hall follows the Code, and designates one who receives stolen goods, knowing them to be stolen, as an accessory after the fact; yet he distinctly rules that the statute requires the prosecution and conviction of the principal before the "accessory" can be tried. In *Jordan v. State*, 56 Ga. 92, the first headnote is as follows:

"An indictment for this offense, under section 4488 of the Code, should allege that the principal thief has been *tried and convicted* of the offense; if such principal cannot be taken so as to be prosecuted and convicted, then the accessory in receiving the stolen goods should be indicted under section 4489 for a misdemeanor." (Italics ours.)

Sections 4488 and 4489, referred to in the headnote quoted above, are sections 168 and 169 of the Penal Code of 1910. The third headnote in that case is in part as follows:

"The indictment should specify the particular offense of which the principal thief was convicted, whether larceny from the person or the house or simple larceny or burglary, so that the record of the court—the pleadings—shall show that the judgment or sentence is right according to the case made." (Italics ours.)

While Mr. Justice Lumpkin in *Martin v. State*, 95 Ga. 478, 20 S. E. 271, referred to the above ruling in the *Jordan* Case and said its correctness "admits of grave doubt," it has not been overruled, but the same principle was positively asserted in *Rogers v. Brown*, 138 Ga. 750, 75 S. E. 1131 (3), where Mr. Justice Atkinson ruled that an indictment was fatally defective which charged the accused with "being accessory after the fact by receiving stolen goods, knowing them

to be stolen, and the indictment failed to allege that the principal thief had been convicted (Penal Code, § 168), or that the principal thief could not be taken so as to be prosecuted and convicted (Penal Code, § 169)"—citing *Jordan v. State*, 56 Ga. 92. The ruling in the *Jordan* Case was also approved and followed in *Butler v. State*, 57 Ga. 610. In *Roberts v. State*, 18 Ga. App. 529, 89 S. E. 1055, will be found an interesting and lucid discussion of a question somewhat analogous to the one sub judice; Chief Judge Wade concluding the opinion thus:

"It is true the indictment in the case under consideration charged the defendant with receiving, harboring, and concealing a guilty person, knowing such person to be *guilty*. However, it cannot be reasonably contended that the defendant knew that the principal offender charged with the commission of a felony was *legally guilty*, since under our law every person accused of crime is presumed to be innocent until the contrary is established by legal proof, or, in other words, until he has been tried and convicted in a court of competent jurisdiction. It would certainly present an anomalous state of affairs, should one be indicted and convicted as an accessory after the fact, and thereafter the principal offender be tried and found not guilty. As in a great measure a safeguard against such results, the statute relative to accessories before or after the fact wisely provides in effect (as construed by the courts) that only after the conviction of the principal offender, or where such offender cannot be taken, so as to be prosecuted and punished, can an alleged accessory be indicted and tried."

It therefore appears settled, under the rulings of the courts of last resort in our state, that—

"Only after the conviction of the principal offender or, where such offender cannot be taken, so as to be prosecuted and punished, can an alleged accessory be indicted and tried."

An examination of all the cases cited by counsel for the state will show that they are not in conflict with what is here decided. Under the foregoing rulings, the person committing the burglary and the receiver of the stolen goods cannot be joined in the same indictment. It might be well for the Legislature to take some action in reference to the proposition under discussion, and provide for the indictment of an accessory before the trial of the principal. In the instant case, the court having erred in overruling the demurrer to the indictment, the further proceedings were nugatory.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(111 S. C. 352)

STATE v. HEARST et al. (No. 10131.)

(Supreme Court of South Carolina. Jan. 25, 1919.)

CRIMINAL LAW §784(4)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Instruction explaining difference between direct and circumstantial evidence, stating that state "relies upon certain circumstances from which it expects the jury to draw the inferences of guilt," was not objectionable on ground that state had no right to expect defendant to be found guilty.

Appeal from General Sessions Circuit Court of Abbeville County; S. W. G. Shipp, Judge.

John Hearst and George Carter were convicted of grand larceny, and they appeal. Affirmed.

J. Howard Moore, of Abbeville, for appellants.

H. S. Blackwell, Sol., of Laurens, for the State.

HYDRICK, J. Appellants were convicted of grand larceny, the theft of a bale of cotton. The state relied entirely upon circumstantial evidence. The court instructed the jury that the accused were presumed to be innocent until their guilt was established to the satisfaction of the jury beyond a reasonable doubt. The court then explained the difference between direct and circumstantial evidence, and clearly and correctly stated the rules by which the jury should be guided in the consideration of circumstantial evidence. In the course of the charge the court said:

"There is no direct testimony here that the defendants stole this bale of cotton. No witness has gotten on the stand and sworn that he saw these defendants take the cotton and carry it away, but the state has relied upon circumstantial testimony; that is, it relies upon certain circumstances from which it expects the jury to draw the inference of guilt."

Appellants assign error in the last sentence quoted, to wit, that the state "relies upon certain circumstances from which it expects the jury to draw the inference of guilt." They argue that this was error, because, in no case, does the state expect the jury to find a defendant guilty, but it is the duty of the state merely to lay the facts and circumstances before the jury for their consideration. The objection is wholly unfounded. The instruction was neither erroneous nor prejudicial. To what purpose would the state introduce any evidence, if it did not expect the jury to draw from it an inference of guilt?

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(111 S. C. 352)

STATE v. MARTIN. (No. 10123.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

1. CRIMINAL LAW §823(16)—HARMLESS ERROR—INSTRUCTIONS.

An instruction upon conspiracy in the trial of one of two defendants accused of using an automobile without owner's consent and malicious mischief to personal property, if error, was harmless, where the court instructed that there was no charge of conspiracy.

2. CRIMINAL LAW §1059(2)—APPEAL—EXCEPTIONS.

Exceptions which are too general will not be considered.

Appeal from General Sessions Circuit Court of Greenville County; John S. Wilson, Judge.

B. B. Martin was convicted of using an automobile without the owner's consent and of malicious mischief to personal property, and he appeals. Affirmed.

H. P. Burbage, of Greenville, for appellant. Solicitor J. Robert Martin, of Greenville, for the State.

WATTS, J. The defendant was tried alone on a joint indictment with one George Williams, alleging joint use of an automobile without owner's consent, and malicious mischief to personal property. The absent defendant was in the army. The defendant was tried before Judge Wilson and a jury at the court of general sessions for Greenville county. After conviction and sentence, defendant appeals and by thirteen exceptions imputes error and seeks reversal. The first six exceptions present the same question.

[1] Was it error to charge law with reference to conspiracy, under the circumstances as developed under the evidence in the case? We see no incorrectness in the law as charged by his honor. The court instructed the jury that there was no charge of conspiracy, and this, in any phase of the case, was harmless and not prejudicial, and the jury had the right to pass upon all the facts of the case and apply the facts applicable to the law as charged by his honor, and these exceptions cannot be sustained as the law charged was correct. These exceptions are overruled.

Exceptions 7, 10, and 11 complain of error in that the court charged upon the facts. The exceptions are overruled, being without merit.

Exception 8 is overruled, being without merit.

[2] Exceptions 9 and 12 are overruled. These exceptions are too general for consideration.

Exception 13 is overruled. There was suf-

sufficient evidence to support the verdict. All exceptions overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 364)

WESTINGHOUSE ELECTRIC & MFG. CO.
v. GLENCOE COTTON MILLS.
(No. 10134.)

(Supreme Court of South Carolina. Jan. 25, 1919.)

TRIAL \S 295(11) — CONSTRUCTION AS A WHOLE.

Where charge 17 pages long gave jury a broad correct rule as to measure of damages, the fact that an inconsistent and incorrect rule was also given will not justify reversal, where, considered in its entirety, it is not made to appear that such inconsistent rule was prejudicial to appellant.

Fraser and Hydrick, JJ., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; J. W. DeVore, Judge.

Action by the Westinghouse Electric & Manufacturing Company against the Glencoe Cotton Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

Nettles & Tobias, of Columbia, for appellant.

Barron, McKay, Frierson & Moffatt, of Columbia, for respondent.

GARY, C. J. The following statement appears in the argument of the appellant's attorneys:

"Owing to the fact that there is little difference between the testimony, at the first trial and the second, we and our colleagues have thought it well to relieve the court from reading the testimony anew; and to state to the court that the decision in the first case (108 S. C. 133 [90 S. E. 526]) together with the statement in the case and exceptions herein, correctly set forth the substance of the testimony necessary for the consideration of this appeal."

In discussing the exceptions, the appellant's attorneys say:

"The jury was given a broad correct rule as to the measure of damages, but they were also given an inconsistent and incorrect rule. We cannot say which they followed."

The charge, which was 17 pages in length, must be considered in its entirety. In a charge of such length, it is not surprising if expressions were used, which, standing alone, might be regarded as erroneous. This action was commenced in 1913, and there should be an end of litigation, unless there was prejudicial error.

None of the exceptions can be sustained, for, even conceding that there was error in the particulars therein specified, it has not been made to appear that it was prejudicial. Affirmed.

WATTS and GAGE, JJ., concur.

FRASER, J. (dissenting). I think exceptions 4 and 5 should be sustained.

I think the charge complained of is clearly erroneous. When there are two statements, one general and the other specific, the specific statement restricts the rule to the specific statement.

HYDRICK, J., concurs.

(111 S. C. 366)

STATE v. MARTIN. (No. 10144.)

(Supreme Court of South Carolina. Feb. 1, 1919.)

LANDLORD AND TENANT §333 — ABANDONMENT OF CONTRACT TO FARM LAND—CRIMINAL LIABILITY.

Defendant, who entered into contract whereby prosecutor was to pay him \$7 a month and let him have five acres of land to cultivate as part payment of his wages, held not guilty of violating Cr. Code 1912, § 500, making violation of agreement to farm lands a misdemeanor, because he failed to work the five acres.

Appeal from Common Pleas Circuit Court of Clarendon County; Frank B. Gary, Judge.

Junius Martin was indicted and tried before a magistrate upon a charge of abandoning land rented. He was convicted and sentenced, and appealed to the circuit court, which dismissed the prosecution, and the State appeals. Exception overruled.

The exception is as follows:

The circuit judge erred, it is respectfully submitted, in deciding that section 500 of the Code applied only to cases in which the land was rented for a cash rental and could not apply in cases where the rent was to be paid in labor; it being respectfully submitted that it is immaterial for the purpose of the prosecution whether the plaintiff rented land for a money rental and failed to pay the rent and abandoned the land, or rented it upon a promise to perform labor as rent and failed to perform the labor and abandoned the land.

Frank A. McLeod, Sol., of Sumter, and Durant & Ellerbe, of Manning, for the State.
J. H. Lesesne, of Manning, for respondent.

FRASER, J. This is an appeal by the state. The whole case is summed up in this quotation from the order of the circuit judge. The appellant says:

"The prosecutor claims that he made a contract with the defendant by which he was to pay him \$7 per month and let him have five acres of land as part payment of his wages, and that he also rented to him one acre of land, which one acre he abandoned without just cause or excuse. This prosecution cannot be maintained on account of defendant having abandoned the five acres mentioned in the contract for the reason that the defendant took the right to work this land as a part of his wages, and if he did not see fit to avail himself of the right to work it, such failure to work could not be regarded as an abandonment of farm land such as is contemplated in the statute."

"This involves a construction of section 500, Criminal Code 1912, which reads as follows: 'Sec. 500. Violating Agreement to Farm Lands Made a Misdemeanor—Penalty.—Any person or persons who shall hereafter go into possession of any farming land of another, or shall enter into a written agreement or contract

to go into possession of the farming land of another, as a tenant or under a contract to farm and cultivate said land, and shall, without just cause or excuse, leave, desert or quit the lands so leased or contracted for, shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five dollars or more than one hundred dollars, or suffer imprisonment not less than five nor more than thirty days, in the discretion of the court. Any person who shall violate any of the contracts mentioned in this section shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five dollars nor more than one hundred dollars, or suffer imprisonment not less than five nor more than thirty days, in the discretion of the court.'"

The statute under which the defendant was indicted, provides a punishment for "any person who shall violate any of the contracts mentioned in this section." The prosecuting witness testifies:

"This agreement between us was, I was to give Junius Martin (the defendant) \$7.00 per month and five acres of land and the mule and plow one day out of each week, to plow said five acres of land only. Also 3 lbs. of meat and 1 peck of meal each week during this contract beginning the 8th day of January and to work for nine months."

So far as the record shows, it was no more a crime to fail to work the land than to receive the money, meat, or meal.

There is but one exception, and that is overruled.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 333)

MILLER v. GOODWIN et al. (No. 10125.)

(Supreme Court of South Carolina. Jan. 21 1919.)

1. REFERENCE §26 — PROCEEDINGS — RIGHT TO MAKE.

A resident judge in chambers may refer cause to master for taking of testimony during term time after proper notice, notwithstanding that notice of application for reference had been made to presiding judge in same county.

2. APPEAL AND ERROR §91(7)—ORDERS APPEALABLE.

An order of reference to master for taking of testimony by resident judge in chambers during term time and after proper notice, not affecting substantial rights, is not appealable.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by E. McKay Miller against George Goodwin, Gus F. Wiles, and others. From

an order referring cause to the master, the defendants named appeal. Affirmed.

B. B. Evans, of Columbia, for appellants.
Hunter A. Gibbs, of Columbia, for respondent.

WATTS, J. [1, 2] This is an appeal from an order of his honor Judge Townsend, resident judge of the Fifth circuit, referring the cause to the master made in term time while a presiding judge was holding the court of the Fifth circuit. Notice having been given that application would be made to the presiding judge for an order of reference, but this notice was withdrawn, and notice given that application would be made to the resident judge. The appeal raises the question whether the resident circuit judge at chambers has jurisdiction to grant after notice an order of reference to take testimony after notice of application for a similar order has been made that application would be made to the presiding judge holding court in the same county. There is no merit in the appeal. An order of this kind can be made either by the presiding or resident judge after proper notice. No substantial rights of the appellants have been violated, and the order appealed from is not appealable.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 356)

STATE v. MARSHALL. (No. 10128.)

(Supreme Court of South Carolina. Jan. 22, 1919.)

1. HOMICIDE — 203(5) — DYING DECLARATIONS — HOPE OF LIFE.

To make a dying declaration admissible, deceased, at time of making declaration, must have lost all hope of life.

2. HOMICIDE — 203(5) — DYING DECLARATIONS — HOPE OF LIFE.

It does not necessarily follow that because deceased sends for a physician, or asks that one be sent for, he has any hope of life from the timely aid of such physician, for he may want physician to relieve suffering.

3. HOMICIDE — 218 — DYING DECLARATIONS — DETERMINATION OF DECEASED'S CONDITION.

Whether deceased was in such condition, at time of making alleged dying declaration, that declaration is admissible, is primarily for the trial court.

4. HOMICIDE — 331 — REVIEW — DISCRETION OF COURT.

Trial court's ruling that conditions under which deceased made alleged dying declarations were such as to make declarations admissible

will not be reversed on appeal, unless clearly erroneous and prejudicial.

Appeal from General Sessions Circuit Court of Lancaster County; S. W. G. Shipp, Judge.

Duff Marshall was convicted of manslaughter, and he appeals. Affirmed.

John T. Green, of Lancaster, for appellant.

J. K. Henry, Sol., of Chester, and C. N. Sapp, of Columbia, for the State.

HYDRICK, J. On indictment for murder, appellant was convicted of manslaughter. The only assignment of error is in the admission of the alleged dying declaration of deceased, who was shot about 10 o'clock at night, at the house of Betsy Massey. There were no eyewitnesses to the shooting. Appellant and deceased were outside of the house. A number of persons in the house testified that they heard a conversation between them and two shots, both of which struck deceased; and from the effect of one of them he died, about 6 o'clock the next afternoon.

Roy Taylor, a witness for the state, testified that he went to the house where deceased was shot, about 12 o'clock the same night, and carried him home, about 2½ miles, in a wagon; that after he got home he made the declaration in question—that appellant shot him for nothing. The foundation laid by the state was as follows:

"Q. What did he say about dying? A. He told me it was no use to send after a doctor; he was going to die. I didn't know who shot him, and asked him. Q. Wait a minute. How many times did he say that? Why did he say it was no use to send for a doctor? Anybody saying anything about sending for a doctor? A. Yes, sir. His wife told him to be quiet until the doctor came. Q. What did he say? A. He said, if he didn't make haste and come, it would do no good, for he was going to die. Q. That he was going to die? How long did he live after that? That was about what time of night? A. It was in the morning. It was about 5 o'clock in the morning. * * * Q. How long did he live? A. He lived until about 6 in the afternoon. * * * Q. About 12 hours afterward? A. Yes, sir. Q. He said it was no use to send for a doctor? A. Yes, sir. Q. That he was going to die? A. Yes, sir. Q. Now, do you know whether he got any hope after that of getting better? A. No, sir; he didn't get any hope. Q. About getting better? A. No, sir."

Appellant contends that the declaration was inadmissible, because it did not appear that deceased had lost all hope of life. As evidence of that fact, appellant relies upon the statement of deceased that "if he (the doctor) didn't make haste and come, it would do no good, for he was going to die."

We do not think that the only inference of

which that statement is susceptible is that the deceased thought that, if the doctor did make haste and come, he could save his life. The statement also warrants the inference that, deceased believed that death was imminent and certain, but that, if the doctor did not get to him pretty soon, he could do no good, in the way of relieving his pain and suffering; for, in connection with the use of the words "it would do no good," he added, "for he was going to die."

[1, 2] While it is true that, to make a dying declaration admissible, the deceased must have lost all hope of life, it does not follow necessarily that, because he sends for a physician, or asks that one be sent for, he has any hope of life from the timely aid of a physician. One may be so severely wounded that he may know that death is imminent and certain, and yet he may want a physician to relieve his suffering. See 2 Jones, Ev. § 332, and cases cited in the note.

[3, 4] The trial court must primarily decide whether the conditions exist under which such declarations are admissible, and its ruling will not be reversed, unless it is clearly made to appear that it was erroneous and prejudicial. State v. Smalls, 87 S. C. 550, 70 S. E. 300. Appellant has failed to satisfy the court of error in the ruling complained of.

Judgment affirmed.

FRASER and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(111 S. C. 353)

**BIG SALKEHATCHIE CYPRESS CO. v.
COLLETON CYPRESS CO.**
(No. 10124.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

**INJUNCTION — 136(3) — PENDING TRIAL ON
MERITS — "IRREPARABLE INJURY."**

A trial on the merits being necessary to determine ownership of land and timber in question, plaintiff is entitled to an injunction restraining defendant from cutting and removing timber pending trial on merits; it being "irreparable injury," to take one's property and put it into another's possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Irreparable Injury.]

Appeal from Common Pleas Circuit Court of Colleton County; James E. Peurifoy, Judge.

Action by the Big Salkehatchie Cypress Company, a corporation, against the Colleton Cypress Company, a corporation. From an order dissolving an interlocutory order of injunction, plaintiff appeals. Reversed, and supersedeas, granted by a justice of the Supreme Court, continued.

D. B. Peurifoy, of Walterboro, L. D. Lide, of Marion, Randolph Murdaugh, of Hampton, and R. M. Jefferies, of Walterboro, for appellant.

M. P. Howell and Padgett & Moorer, all of Walterboro, for respondent.

WATTS, J. This is an appeal from an order of his honor, Judge Peurifoy, dissolving an interlocutory order of injunction granted by him. The primary question involved in the case as made by the exceptions is whether the plaintiff is entitled to an injunction restraining the defendant from cutting and removing timber on the land in question pending a trial on the merits. This point is raised by the first five exceptions of the appellant. These exceptions must be sustained. The allegations of the pleadings and evidence submitted at the hearing are such as necessitate a trial on the merits in order to determine the ownership of the land and timber in question, and it was the duty of the circuit court to preserve the status quo of the same until the true ownership can be determined by the proper judicial tribunal. Either party should be enjoined pending this determination.

The respondent had actual and constructive notice of appellant's title. It is irreparable injury to take one's property and put it into another's possession. All of the facts in this case show that it is a case for the court to interfere and grant injunction until the case can be tried on the merits. These exceptions are sustained; the other exceptions are not considered. The order of Judge Peurifoy is reversed, and order of supersedeas granted by a justice of this court is continued.

Reversed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 359)

**RICHARDSON v. ATLANTIC COAST LINE
R. CO. (No. 10130.)**(Supreme Court of South Carolina. Jan. 22,
1919.)**1. TRIAL ¶216 — INSTRUCTION — INDICA-
TION OF CHARACTER OF DAMAGES.**

In action for injuries by falling into open hole in floor of railroad toilet room, jury should have been instructed to indicate by their verdict whether they awarded only actual, or both actual and punitive, damages.

**2. CARRIERS ¶304(1) — PERSONS ACCOM-
PANYING PASSENGER—DUTY TO PROTECT.**

To licensee on its station premises who had gone there with a friend who was leaving on a train, the railroad owed only the duty to exercise ordinary care for his safety.

**3. RAILROADS ¶282(8)—INJURIES ON STA-
TION PREMISES—PUNITIVE DAMAGES—QUES-
TION FOR JURY.**

In action against railroad for injuries to licensee on station premises when he stepped into hole in floor of toilet room left open in course of repairs, whether hole was so left open and insufficiently lighted in close proximity to door as to indicate reckless or wanton disregard of safety of others who might use room, justifying punitive damages, held for jury.

Appeal from Common Pleas Circuit Court of Sumter County; T. S. Sease, Judge.

Action by Manning Richardson against the Atlantic Coast Line Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Lucian W. McLemore, of Sumter, for appellant.

L. D. Jennings and A. S. Harby, both of Sumter, for respondent.

HYDRICK, J. Plaintiff sued to recover actual and punitive damages for personal injuries sustained by falling into a hole left open in the floor in one of the toilet rooms in defendant's passenger station at Sumter. At the close of all the testimony, defendant requested an instruction that the evidence was not sufficient to warrant the infliction of punitive damages, which was refused. The jury found a general verdict for plaintiff for \$500 damages, without indicating whether it included punitive damages. The defendant appealed, and assigns error in the refusal of the instruction prayed for.

[1, 2] The litigants might have been saved the expense of this appeal, and this court might have been spared the necessity of hearing and deciding it, if the trial court had observed the frequent admonition of this court that, in cases like this, the jury should be instructed to indicate by their verdict wheth-

er they award only actual damages, or both actual and punitive damages. It is not improbable that actual damages alone were in fact awarded, since the amount found for plaintiff could not have been held to be excessive as an award of actual damages only. Defendant's passenger station was undergoing general repairs. The plumber found it necessary to have a hole cut in the floor of one of the toilet rooms to do some work on the pipes beneath. At his request, the carpenter in charge of the work cut the hole in the floor about 12 by 18 inches. It was some 3 or 4 feet deep; that is, from the floor to the ground. The hole was just inside the door leading from the waiting room into the toilet room. The door was hung on spring hinges which kept it shut, unless it was propped open. It was darker in the toilet room than in the waiting room, so that the hole could not be very easily seen by one going from the waiting room into the toilet room. When the plumber had finished his work, he left a work bench across the door, so that no one could go into the toilet room without removing or stepping over it. He went to the carpenter and notified him that he had finished, and told him to close the hole. While it was open, some one (the evidence does not disclose who) removed the bench, and plaintiff, desiring to go into the toilet room, opened the door and stepped into the hole. He fell and sustained the injuries complained of. It was only a short time—probably not more than half an hour—after the plumber had notified the carpenter to close the hole, before plaintiff fell into it. Plaintiff was not a passenger, but only a licensee upon the premises, having gone there with a friend, who was going off on a train, and therefore defendant owed him only the duty of exercising ordinary care for his safety.

[3] The decision of this case is controlled by the case of *Ruddell v. Ry.*, 75 S. C. 290, 55 S. E. 528. In that case, plaintiff was injured by falling into a hole which defendant had dug on its right of way within a few feet of a path which was one of the main thoroughfares of the town of Fairfax, and along which plaintiff was walking in the nighttime, in ignorance of the existence of the hole. On the question of plaintiff's right to have the issue as to punitive damages submitted to the jury, the court said:

"It was for the jury to say on this issue also whether in view of all the circumstances the hole was so left open and insufficiently lighted, in close proximity to a frequented path, as to indicate reckless or wanton disregard of the safety of those who might use the path without notice of the danger. We do not say there was wantonness or recklessness on the part of the defendant, but there was evidence from which the jury might infer it, and therefore it was not

error of law for the circuit judge to refuse a new trial on this ground."

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(111 S. C. 331)

STATE v. AYOUB. (No. 10129.)

(Supreme Court of South Carolina. Jan. 22, 1919.)

1. LARCENY \Leftrightarrow 23—GRAND LARCENY—WHAT CONSTITUTES.

If accused stole a number of automobile tire cases and tubes ranging in value from \$2.50 to \$6 each, and stole all of them at one time, he was guilty of grand larceny, but if they were stolen at different times, he was guilty of repetitions of the offense of petit larceny.

2. LARCENY \Leftrightarrow 68(1)—QUESTIONS FOR JURY—"GRAND LARCENY."

In prosecution for stealing a number of automobile tire casings and tubes, whose several value was less than, but whose aggregate value exceeded, the minimum value constituting the offense of grand larceny, where there was evidence warranting inference that all the goods were stolen at one time, there was no error in submitting to the jury the issue whether accused was guilty of "grand larceny."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grand Larceny.]

Appeal from General Sessions Circuit Court of Richland County; W. H. Townsend, Judge.

Alex Ayoub was convicted of grand larceny, and he appeals. Affirmed.

J. Hughes Cooper, of Columbia, for appellant.

W. H. Cobb, Sol., of Columbia, for the State.

HYDRICK, J. [1] Appellant was indicted for housebreaking and grand larceny, and convicted of grand larceny. The theft alleged was of a number of inner tubes and casings for automobile tires, which ranged in value from \$2.50 to \$6 each. If the several articles were stolen at different times, the thief was guilty of only so many cases of petit larceny, but if they were all taken at the same time, the aggregate value was enough to make a case of grand larceny.

[2] At the close of all the evidence, appellant moved for a directed verdict of not guilty of grand larceny, on the ground that the evidence was not sufficient to sustain a conviction of that offense. He concedes that, if the evidence was susceptible of the inference that the goods were all stolen at the

same time, there was no error in refusing his motion. We think the evidence clearly warranted the inference that the goods were all stolen at one time, and hence that there was no error in submitting that issue to the jury.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(111 S. C. 355)

UNITED STATES CASUALTY CO. v. CONSOLIDATED AUTO CO. (No. 10126.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

INSURANCE \Leftrightarrow 188(3)—ACTION FOR PREMIUMS—DIRECTED VERDICT.

In action for insurance premiums, the sole question being payment as alleged by defendant, verdict was properly directed for plaintiff, where the only reasonable inference to be drawn from all the testimony was that there had been no payment.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by the United States Casualty Company against the Consolidated Auto Company. Directed verdict for plaintiff, and defendant appeals. Judgment affirmed.

Nelson & Gettys, of Columbia, for appellant.

R. B. Herbert, of Columbia, for respondent.

WATTS, J. This was a suit for \$113.84, the amount of two insurance premiums on policies issued by the plaintiff to the defendant. The case was tried before Judge Townsend and a jury at the May term of court, 1918, for Richland county. The defendant by its answer alleged payment, and the sole question involved in the case was: Was there any evidence of payment? At the close of the testimony in the case, his honor, on motion of plaintiff, directed a verdict in favor of the plaintiff, on the ground that defendant had failed to show payment. After entry of judgment, defendant appealed, and by exception challenges the correctness of his honor in directing the verdict.

An examination of all the testimony in the case convinces us that the only reasonable inference to be drawn was that there was no payment, and his honor was correct in directing a verdict for the plaintiff.

Exception overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 387)

RICHARDSON v. UNION SEED & FERTILIZER CO. (No. 10127.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

1. MASTER AND SERVANT ⇨219(5)—INJURIES TO SERVANT—DEFECTIVE TOOLS—OBVIOUS DANGERS.

Where servant, directed to paint rafters with creosote, selected defective brush, whose condition was obvious, and from the brush paint splashed in his eye, he could not recover, having assumed the risk.

2. MASTER AND SERVANT ⇨150(1)—INJURIES TO SERVANT—DUTY TO WARN.

A paintbrush is an instrumentality of simple character as to which the duties of the master are not so strict as to require a warning of the defective condition of the brush.

3. MASTER AND SERVANT ⇨101, 102(10)—INJURIES TO SERVANT—MASTER'S RELIANCE ON SERVANT'S CARE.

The master has the right to assume that a man of ordinary intelligence and of full age and experience will know the condition of a paintbrush and the risk, if any, in using it.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Paul Richardson against the Union Seed & Fertilizer Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

A. F. Spigner and A. W. Hohman, both of Columbia, for appellant.

Benet, Shand & McGowan, of Columbia, for respondent.

WATTS, J. This is an appeal from an order of nonsuit as to the first cause of action set out in the complaint herein by County Judge Whaley upon trial in Richland county court in July, 1918. The injury plaintiff complained of in the action arose from paint getting into his eyes, at the mill of defendant, in the city of Columbia. The plaintiff alleged two specifications of negligence: (1) In failing to furnish him with safe, suitable, and proper tools and appliances to do the work required of him, in that the paintbrush was old, worn, and stubby, and unfit for the purpose for which plaintiff was required to use it. (2) The paint was dangerous and poisonous. The element of negligence raised by exceptions and involved in this appeal is the one as to the defective paintbrush.

[1-3] On the day of the accident Stevens gave the plaintiff a key, and told him to unlock the house where the creosote was kept, and to get some creosote and a brush and paint some rafters. Plaintiff did so, and proceeded to paint rafters, and while doing so some creosote splashed from the brush into his eyes. He did not stop work then, and did not lose a day until he left employ-

ment of defendant, in February, 1917. Plaintiff selected the brush himself; the condition was obvious and potent; nothing hid about its condition. There was no reason for the defendant to warn him that paint might splash into his eyes. Defendant had the right to assume that a man of ordinary intelligence and full age, and with experience as a workman, would know the condition of the paintbrush and the risk of using it, and, by having selected the brush and used it, with full knowledge of its condition, he assumed the risk attendant on its use. The paintbrush was an instrumentality of simple character different in character with complicated machinery, and the duties of the master in regard thereto are not so strict. The plaintiff, by the exercise of ordinary care and intelligence on making his selection of the paintbrush and voluntarily using the same, with such knowledge, assumed the risk of the use of the brush, and should not be allowed to recover.

Exceptions overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 389)

SCHIRMER v. CHARLESTON & W. C. RY. CO. (No. 10133.)

(Supreme Court of South Carolina. Jan. 25, 1919.)

CARRIERS ⇨277(5) — PASSENGERS — REFUSAL TO ACCEPT MILEAGE BOOK COUPON—PUNITIVE DAMAGES.

Where conductor refused to accept mileage book coupon and required passenger to pay cash fare, but thereafter discovered mistake and on following day tendered passenger difference between cash fare and coupon, passenger, refusing such difference and suing railroad for refusal to accept coupon, was not entitled to punitive damages.

Appeal from Common Pleas Circuit Court of Hampton County; James E. Peurifoy, Judge.

Action originating in magistrate's court by T. B. Schirmer against the Charleston & Western Carolina Railway Company. From a judgment giving him insufficient relief, plaintiff appeals. Appeal dismissed.

J. W. Vincent, of Hampton, for appellant.

J. W. Manuel, of Hampton, for respondent.

HYDRICK, J. This is an action for damages for the refusal of defendant's ticket collector to accept the coupons from a mileage book in payment of plaintiff's fare from Brunson to Hampton, a distance of six miles.

The collector thought the book was not good on defendant's road, and demanded cash fare—15 cents—which was paid. Afterwards on the same day, he discovered that he was in error; and on the next day, when plaintiff got aboard his train and tendered the same book, he accepted the coupon from it, told plaintiff that he had made a mistake, and tendered him 3 cents—the difference between the cash fare paid and the value of the coupons which he should have accepted the day before. Plaintiff declined the tender and sued for \$100 damages. The magistrate found that plaintiff's actual damage was 3 cents, that the circumstances did not warrant the finding of punitive damages, and gave judgment accordingly, which was affirmed on appeal to the circuit court.

There was no error. The case and this appeal are both without merit.

Appeal dismissed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 155)

FAIREY v. STRANGE et ux. (No. 10137.)

(Supreme Court of South Carolina. Jan. 27, 1919.)

1. SPECIFIC PERFORMANCE §=25—POWER OF COURTS—CONTRACTS.

Courts can only require the performance of contracts the parties have made themselves, and cannot make contracts for them.

2. VENDOR AND PURCHASER §=55—CONSTRUCTION—DESCRIPTION—NUMBER OF TRACTS.

A contract to convey tract of land, giving the acreage and boundaries as a whole, also the names of two tracts composing it, was an agreement to convey one tract, and not two tracts.

3. VENDOR AND PURCHASER §=349—BREACH—ANSWER—OFFER.

Allegation, in an answer in action for damages for breach of contract to convey land, alleging willingness to comply in part, held a statement intended in mitigation of damages, and not an offer to convey part of the land at a proportionate price which would authorize a judgment on the pleadings directing such a conveyance.

Appeal from Common Pleas Circuit Court of Fairfield County; R. W. Memminger, Judge.

Action by Thomas A. Fairey against C. E. Strange and wife. From a judgment directing a conveyance of land, the defendants appeal. Reversed.

W. D. Douglas and G. W. Ragsdale, both of Winnsboro, for appellants.

W. C. Wolfe, of Orangeburg, T. M. Lyles, of Spartanburg, and J. W. Hanahan and Mc-

Donald & McDonald, all of Winnsboro, for respondent.

FRASER, J. This is an action for damages for the failure of the defendants to perform on their part the following contract:

"State of South Carolina, County of Fairfield.

"This indenture made this the 14th of July, A. D. 1917, by and between C. E. Strange and Louise Strange and Thomas A. Fairey, witnesseseth:

"That the said C. E. Strange and Louise Strange hereby agree to sell unto the said Thomas A. Fairey: 'All that certain tract of land lying, being and situate in the county of Fairfield and state aforesaid, containing three hundred and ninety acres, more or less, situate about two miles south of Winnsboro, bounded by lands of Winnsboro Mills, J. G. McCants, W. L. Kirkpatrick, Joe Davis, and right of way of Southern Railway Company, being the Rabb tract and McCants tract.'

"And the said Thomas A. Fairey agrees to pay for the said land twenty-three thousand four hundred dollars on the 10th day of December next.

"The said C. E. Strange and Louise Strange hereby reserve the right of possession of said land until the 10th day of December next and all crops on said tract of land for the current year to belong to the said C. E. Strange and Louise Strange, and the said sellers are also to have the right to use and the possession of the ginnyery until the 30th day of December next.

"Upon the payment of the purchase money a good and sufficient deed of conveyance to be made and delivered to said tract of land.

"It is further agreed that in the event of the destruction of any building insured, then any amount collected on the policy of insurance by the sellers shall be deducted from the purchase money hereinbefore mentioned.

"And we hereby bind ourselves, our heirs, executors and administrators by these presents.

"Signed, sealed and delivered in the presence of: W. D. Douglas, S. D. Ellison.

"Louise Strange.

"C. E. Strange.

"Thomas A. Fairey."

The answer of the defendants is as follows:

"The defendants above named, by W. D. Douglas and G. W. Ragsdale, their attorneys, answering the complaint herein, for a first defense:

"(1) Deny each and every allegation therein contained, except as may be hereinafter specifically admitted or qualified.

"(2) The defendants admit that they did sign the instrument of writing which is annexed as an exhibit to the plaintiff's complaint, but they allege that as to the defendant Louise Strange she did not sign the same voluntarily and willingly, but on the contrary was unduly urged to do so, after she had repeatedly stated her unwillingness to sign.

"(3) Further answering the said complaint, the defendants allege that it was distinctly understood by and between the plaintiff and the defendants, at the time of the signing of the

said writing and before it was signed, that the price of the said lands to be paid to the defendants by the plaintiff was sixty (\$60.00) dollars per acre, and that as to the McCants tract, that the defendants were not the exclusive owners thereof, but, on the contrary, that the minor children of the defendants were seized and possessed of a remainder in the said tract, which was entirely beyond control of the defendants and which could only be conveyed to the plaintiff by the direction and approval of the court upon showing first made, that such conveyance would be advantageous to said minors.

"(4) That after signing the said writing annexed to said complaint and after full consideration, the defendants became convinced that the interests of their minor children would be greatly prejudiced by the terms, conditions, and stipulations contained in the said agreement, and thereupon at once notified the plaintiff that while they were ready and willing to carry out the same, in so far as their personal interests was concerned, that they had been advised by counsel to take no steps, so far as the interests of their said minor children should be involved, which would result to the prejudice of the rights and interests of said minors.

"(5) That prior to the commencement of this action the defendants have offered to convey to the plaintiff, pursuant to the said writing as above stated, all right, title, and interest of the defendants in the premises described in said writing and in the complaint, but, upon learning that a conveyance of the interests of the minor children of the defendants pursuant to the said agreement would certainly result to the great prejudice of their interests, defendants notified plaintiff that the said agreement must be construed to relate only to such interests as defendants possessed in the said premises and as plaintiff well knew at all times was the limit of their right to convey.

"(6) That the defendants have at all times been willing and ready to convey to the plaintiff the tract which is referred to in the said agreement as the 'Rabb tract,' which is owned exclusively by the defendants, or to convey all such interests as they own in both of said tracts, but the defendants' offer to so convey have been peremptorily rejected and declined by the plaintiff, who has made the unreasonable demand of the defendants that they proceed to obtain an order of court requiring the conveyance to him under the power and authority of this court of all the interests of the minor children of the defendants in the 'McCants tract,' which the defendants repeat would be to order the sacrifice of said interests, and defendants specifically deny that they have refused to carry out or have breached any agreement which was made by or between them and the plaintiff.

"Wherefore, the defendants demand judgment that the complaint be dismissed with costs."

The plaintiff construed this to be an offer of the defendants to convey the Rabb tract alone. The case was put on Calendar No. 1 for trial by a jury. When the case was called for trial, the plaintiff submitted an offer to accept a conveyance of the Rabb tract, at a proportionate price, in full settlement of the case, and moved for judgment on the pleadings. The defendant disclaimed that construction of their answer, but the trial judge gave judgment which directed a conveyance of the Rabb tract. From this judgment the defendants appealed.

[1] The courts have no power to make contracts for people and then require them to perform them. They can only require parties to contracts to specifically perform the contracts they themselves make. This is fundamental law, and no authority is needed for it.

[2] I. The first error is to be found in that construction of the contract that makes it a contract to convey two tracts of land.

It is a contract to convey one tract composed formerly of two tracts. The names of the former tracts are given as a part of the description. The acreage is given as a whole, and the boundaries are given as a whole. It is manifest that the subject of the contract is all the land included within those boundaries. The contract made the land one tract, and by the one tract the rights of the parties must stand or fall. The pleadings show that the plaintiff was notified that the contract could not be performed, and after that the plaintiff brought his action sounding in damages for its breach.

[3] II. This would end the case for specific performance, unless the defendants, by their answer, made a new offer to sell the Rabb tract alone. The plaintiff took that view of it, and the trial judge sustained their view. In this we think they were in error. The first part of paragraph 6, taken by itself, does look that way; but when the answer is taken as a whole and construed liberally, as required by the Code of Procedure, it appears that the statement was intended in mitigation of damages, if any, and not as an offer of compromise or a new contract.

The judgment is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 376)

FANNING et al. v. BOGACKI. (No. 10120.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

1. EQUITY §87(3)—STATUTES OF LIMITATION—APPLICATION.

In suit to enforce an executory agreement whereby defendant purchased plaintiff's land upon sale in a partition suit, to hold the same for plaintiffs and reimburse himself from rents, the legal bar of the 10 and 20 year statute of limitations cannot be interposed by defendant.

2. SPECIFIC PERFORMANCE §121(4)—ESTABLISHMENT OF ORAL CONTRACT—EVIDENCE.

In a suit to enforce an agreement whereby defendant purchased plaintiff's land upon sale in partition suit to hold for plaintiffs and reimburse himself from rents, evidence held sufficient to establish the agreement.

3. PLEADING §261—AMENDMENTS DURING TRIAL—CHANGING DEFENSES.

Defendant's motion for leave to amend answer by setting up statute of frauds, made after the case was argued, could not be allowed under Code Civ. Proc. 1912, § 224, where its effect was to change defense from denial of oral contract to avoidance.

4. PLEADING §236(7)—TRIAL AMENDMENTS—FURTHERANCE OF JUSTICE.

Defendant's motion for leave to amend answer by setting up statute of frauds, made after the case was argued, may be denied as not in furtherance of justice, in view of Code Civ. Proc. 1912, § 224.

5. SPECIFIC PERFORMANCE §105(3)—LACHES—CONTRACT TO HOLD REAL ESTATE IN TRUST.

An oral contract by which defendant purchased land at a partition sale and agreed to hold the same for plaintiffs until defendant had reimbursed himself out of the rents is valid at common law, and, where the reimbursement contemplated required a long time, a delay by plaintiff of about 19 years in beginning suit was not laches.

6. SPECIFIC PERFORMANCE §105(1)—ACTIONS—PREMATURE.

An action for specific performance of a contract whereby defendant, purchasing land at partition sale, agreed to hold the same in trust for plaintiffs, brought before defendant had fully reimbursed himself from rents as agreed, but after he had repudiated contract and tried to sell the land, is not premature.

Appeal from Common Pleas Circuit Court of Barnwell County; Ernest Moore, Judge.

Action by Lena Fanning and others against C. Y. Bogacki. Judgment for plaintiffs, and defendant appeals. Affirmed.

The decree of the presiding judge was as follows:

Decree.

This is a suit in equity, the complaint in which alleges that in 1894 the land described in the complaint was sold by the master for Barn-

well county in a partition suit among the plaintiffs, to which action W. H. Kennedy, holding two mortgages over the land, was made a party. That before said sale, the plaintiff, Mrs. Fanning, on behalf of herself and her children, had an oral agreement with C. Y. Bogacki, the defendant in this action, that he should buy in the land at this master's sale and hold the same until, out of the rents, he reimbursed himself for the outlay in the purchase price and such sums as he should thereafter advance for the support of the said Mrs. Fanning and her children, whereupon he would reconvey the land to them. The complaint also alleges that, by reason of this alleged agreement being known at the sale, the bidding was chilled and the land was sold to the defendant at much less than its value—at a sacrifice unless the agreement be enforced. The complaint, among other things, prays for such relief as may be equitable and just.

[1] The defendant answered by a general denial and pleaded adverse possession for 10 and 20 years. These two latter defenses are, of course, not applicable to this suit in equity. See *Blackwell v. Ryan*, 21 S. C. 124, where the Supreme Court uses this language: "It is undoubtedly true that 10 years' adverse possession gives title against all who are capable of suing and do not; but it seems to us that the legal bar of the statute cannot as such be interposed to a proceeding on the equity side of the court for the specific performance of an executory contract. See *Smith v. Smith*, *McMull. Eq.* 134." Also *Poston v. Ingraham*, 76 S. C. 167, 56 S. E. 790.

The action was referred to the master to take the testimony and comes up for hearing before me in open court upon this testimony.

The undisputed facts are that in 1891, one G. S. Fanning was killed, and died seized and possessed of seven undivided eighths of the tract of land described in the complaint, the other one eighth belonging to R. B. Fanning, who later conveyed it to the widow and children of G. S. Fanning. That he left surviving him his widow, Mrs. Lena Fanning, and certain infant children, the oldest being 20½ years and the youngest 4 years old at the time of the sale in 1894. These children or their heirs are all plaintiffs in this action. That G. S. Fanning had given two mortgages over this land to one W. H. Kennedy, now deceased. That in 1894 the land was sold by the master in a partition suit brought by Mrs. Fanning against her children and the said mortgagee. There was only one bid, and that was made by Messrs. Patterson & Holman, who were the attorneys conducting that partition suit. Pursuant to that bid, the master's deed was made to the present defendant, C. Y. Bogacki, who was then and is now a resident of the city of Montgomery, Ala., and who is a brother of the plaintiff, Mrs. Lena Fanning. C. Y. Bogacki was not present at the sale. The amount bid was the exact amount due on the mortgages, principal \$752.60, interest from the date of the decree to the date of the sale \$35.12, and costs \$40.78. For at least one year, if not more, after the sale the defendant, Bogacki, permitted the plaintiffs to collect and appropriate the rents from the land. He sent money to the plaintiffs, and continued it so long as their necessities required it. The disputed facts are:

The alleged contract and the allegation that the bidding was chilled by reason of said alleged contract or agreement.

[2] The plaintiff Mrs. Fanning testified that her brother, the defendant, promised to buy this land in, hold it until out of the rents he reimbursed himself for the outlay in purchase price and in advancements made to her, whereupon he would turn the land back over to her and her children. To corroborate her testimony there are two letters from the defendant to Mrs. Fanning, the testimony of her son, George, and the testimony of disinterested witnesses to the effect that there was a rumor afloat at the sale that the land was being bid in for Mrs. Fanning and her children. This together with the undisputed facts above mentioned and the testimony as to gross inadequacy of purchase price constituted the proof on the part of the plaintiff upon the question of whether or not the alleged oral contract did exist.

The proof on the part of the defendant upon this point is his denial of the existence of the alleged oral contract. In his testimony he would not deny that such a contract existed in letters he had written to Mrs. Fanning. The plaintiffs do not rely upon a written contract, but merely introduced certain letters of the defendant for the purpose of corroborating the testimony of the plaintiff and used the letters in the cross-examination of the defendant, with the aforesaid results, which to some extent must weaken the defendant's strong denial that such an oral contract existed.

After a careful consideration of the testimony and exhibits, my conclusion is that the alleged oral contract did exist.

[3, 4] After the plaintiffs had argued their case the attorneys for the defendant made a motion for leave to amend their answer by setting up the statute of frauds. This motion is made under section 224 of the Code of Civil Procedure. This section is a limitation upon the power of the court to grant amendments, and unless the proposed amendment falls within one of the four classes mentioned in that section the court has no power to grant it; and, if it does, then it is not grantable as a matter of course, but the court is called upon to exercise its discretion and determine whether the proposed amendment is in the furtherance of justice. The fourth class of amendments mentioned in section 224, that is, amendments during the trial, must not substantially change the claim or defense. *Knight v. Cotton Mill*, 80 S. C. 213, 61 S. E. 307; *Kennedy v. Hill*, 79 S. C. 270, 60 S. E. 689; *Jennings v. Parr*, 54 S. C. 110, 32 S. E. 73; *Cuthbert v. Brown*, 49 S. C. 513, 27 S. E. 485. Upon the authority of these cases, I hold that I have no power to grant the proposed amendment, for the reason that it substantially changes the defense from a denial of the oral contract to an avoidance of the same. 31 Cyc. 216.

In addition to the foregoing, however, such an amendment would not be "in the furtherance of justice," as required by the Code. *Bliss on Code Pleading* (3d Ed.) § 431; *Suber v. Richardson*, 61 S. C. 393, 39 S. E. 540; *Coward v. Boyd*, 79 S. C. 134, 60 S. E. 311; *Wallace v. Dowling*, 86 S. C. 307, 68 S. E. 571, 138 Am. St. Rep. 1064; 31 Cyc. 216.

By specific performance both plaintiffs and defendant received justice.

I therefore refuse to allow the amendment, and the plaintiffs are entitled to specific performance, unless they are guilty of laches, which was advanced by the defendant in argument as a bar to relief to the plaintiffs.

[5, 6] Are the plaintiffs barred by laches? What constitutes laches is not decided by length of time alone, but the question must be determined by the facts and circumstances of each case and according to right and justice. The doctrine of laches is applied to prevent the commission of a wrong. *Shute v. Shute*, 82 S. C. 264, 64 S. E. 145; note, *Ann. Cas.* 1914B, p. 314; *Hellams v. Prior*, 64 S. C. 298, 42 S. E. 106; *Hubbard v. Manhattan Trust Co.*, 87 F. 51, 30 C. C. A. 520. And the party who desires to maintain an objection founded on the other's laches must show himself to have been "ready, desirous, prompt and eager." *Pomeroy's Eq. Juris.* § 1408. This oral contract is valid at common law and in morals, and justice requires that it be enforced. The length of time over which it extended is not laches, because the contract itself contemplates a long length of time before its complete performance.

The acknowledged and reasonable confidence of the plaintiff in the integrity and protecting love of the defendant fully explains the fact that they took no action against him until he attempted to violate the contract in 1913.

I, therefore, hold that laches is not a bar to specific performance of this contract. Nor is the action prematurely brought even if the defendant has not fully reimbursed himself, for he has repudiated the contract and attempted to sell the land. *Payne v. Melton*, 87 S. C. 233, 45 S. E. 154; *Crosby v. Ga. Realty Co.*, 138 Ga. 746, 76 S. E. 38.

It is therefore ordered, adjudged, and decreed that when out of the rents of the said lands the defendant shall have reimbursed himself for the amount paid at the master's sale, \$828.50, with interest at the legal rate, and such advancements as he may have made to the plaintiffs, the clerk of this court do execute and deliver to the plaintiffs a sufficient deed of conveyance, conveying to them in fee simple the lands in question.

And it is further ordered, adjudged, and decreed that this cause be, and the same is hereby, recommitted to the master for Barnwell county, to take an accounting between the plaintiffs and defendant, and to report his findings of fact and law thereon to this court forthwith.

[Signed] Ernest Moore, Presiding Judge.

Harley & Blatt and G. M. Greene, all of Barnwell, for appellant.

Holman & Boulware, of Barnwell, for respondents.

WATTS, J. For the reasons stated in the circuit decree it is the judgment of this court that the judgment of circuit court be affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 332)

FLOYD et al. v. MONTGOMERY LUMBER CO. (No. 10122.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

1. EVIDENCE ¶213(1)—LETTERS—ATTEMPTED COMPROMISE.

Letters attempting to settle difference of opinion as to title to certain lands and the timber thereon, but which were written long prior to the bringing of the suit involving such title, land, and timber, could not be excluded as constituting an offer of compromise and settlement.

2. TRESPASS ¶45(1)—EVIDENCE—ADMISSIBILITY—LETTERS.

In action for trespass upon land, letters between the parties written prior to the alleged trespass were admissible to show that the trespass was committed after full notice of plaintiff's claim.

3. WITNESSES ¶159(8)—CONTRACT WITH DECEASED PERSON.

A witness could not, in view of Code Civ. Proc. 1912, § 438, testify regarding disposition a deceased ancestor made of his land and what arrangements, with respect to whether the ancestor had agreed to sign a deed to witness, had been made.

4. APPEAL AND ERROR ¶1050(1)—HARMLESS ERROR.

In trespass for cutting of timber, admission of tax duplicates of the county treasurer was harmless, where the fact that plaintiffs had paid the taxes was shown by other evidence and testimony.

Appeal from Common Pleas Circuit Court of Horry County; Hayne F. Rice, Judge.

Action by Lillie Mae Floyd and others against the Montgomery Lumber Company. Judgment on verdict for plaintiffs, and defendant appeals. Affirmed.

Testimony referred to in the opinion is: Johnson Floyd, a witness for the plaintiff, testified:

Direct examination: "I am a son of Frederick Floyd. My mother's name was Nancy Floyd. My father had six children by his first wife and seven by his last. Hardy Floyd, Elizabeth McDaniel, Asbury Floyd, Gourdin Floyd, William H. Floyd, and D. C. Floyd were children by the first wife. Gus Floyd was my half-brother. I am 44 years old and was only 8 when my father died about 36 years ago. After father's death, my mother and all his children lived on the old Fred Floyd place. Mother died two years ago. Up until a couple of years she stayed on the old place. The house got burned and she stayed with these children. The old house got burned 2 years ago, and after it was burned she lived with the other children."

Cross-examination: "I am one of the heirs that signed the timber deed to Mullins Lumber Company. My mother was my father's second

wife, and she also signed this title to the Mullins Lumber Company.

"Q. At that time, how long had it been since Augustus Floyd had lived on that place? A. I suppose he left when I was small; I suppose 30 or 35 years ago when he left.

"Q. Did he leave after this title had been made that has been introduced in evidence signed by the children of the first wife? A. He was away when that was signed. Augustus Floyd bought some of the old heirs, D. C. Floyd, Gourdin Floyd, and Elizabeth McDaniel. I don't remember what he paid. He did not pay them all. Three took pay and three did not, three of the older children. The title which was introduced, to Augustus Floyd, was left in the hands of my uncle, and he has it yet. Augustus Floyd left my mother and her children in possession of this land. I was one of them.

"Q. What arrangements did he have with you about it; in other words, had he promised that he would sign a deed to you? (Objected to as being obnoxious to section 438 of the Code. Objection sustained.)"

H. H. Woodward, of Conway, for appellant.
Hoyt McMillan, of Mullins, for respondents.

WATTS, J. This action was for damages to real estate, for cutting and removing timber therefrom, and other acts of trespass. Plaintiffs claimed that they owned four undivided thirteenths of the land and timber. The answer was a general denial, and that the defendant was the owner of the timber and trees and other easements on said lands, and that they were the owners of nine undivided thirteenths of timber and trees and necessary rights of way and easement, and that they only took their interest from said lands, leaving the plaintiffs their undivided interest still, on said property, doing this after negotiations had failed for the purchase of plaintiffs' claim. The cause was tried before Judge Rice and a jury at the April term of court, 1918, for Horry county, and the jury returned a verdict in favor of plaintiffs for \$3,000 actual and \$500 punitive damages. From this judgment defendant appeals.

[1, 2] Exception 1 alleges error in the admission of certain letters written by defendant to plaintiffs' attorneys and letters written by plaintiffs' attorneys to the defendant. Defendant contends that these letters should have been excluded as an offer of settlement or compromise. This exception cannot be sustained, as the letters and correspondence were written long before any suit was brought, or, as far as record discloses, was ever contemplated or thought to be necessary. While this court was held, and reiterates the doctrine, which is so wholesome, that—

"The policy of the law is to encourage parties to settle out of court. Therefore, they are not to be prejudiced in subsequent litigation by proof of unsuccessful efforts to settle." Ma-

chine Co. v. Johnston, 102 S. C. 130, 86 S. E. 480.

These letters do not show an offer to compromise nor anything in relation thereto. They give notice of title, and offer to sell, and admission of defendant of title. At that time, no timber had been cut, and there was no dispute as to the property rights between the parties. Later, when the alleged trespass was made, it was competent to go to the jury in an action for actual and punitive damages, that these acts were committed after full notice of plaintiffs' claim. This exception is overruled.

[3] Exception 2, alleging error in excluding the evidence of Johnson Floyd, is overruled. It was clearly obnoxious to section 438 of the Code of Civil Procedure and under Jones v. Kelly, 94 S. C. 349, 78 S. E. 17.

[4] Exception 3, as to admitting tax duplicates of the county treasurer: This is overruled, as being harmless, as witness Davenport testified he had paid taxes on the land for a number of years for the plaintiff, and there was other evidence that the heirs at law, plaintiffs herein, of Augustus Floyd, had been paying the taxes for a number of years, and the tax duplicate was competent to show in whose name the property was listed, and amount of taxes assessed.

Exceptions 4, 5, and 6 are overruled as being without merit. There was ample evidence to submit the case to the jury for their determination on these issues, and it would have been error on the part of the court not to have done so.

Appellant's remaining exceptions complain of error in his honor's charge, and as to the liability and measure of damages. Taking the judge's charge, as a whole, we see no error. There was nothing in it that was prejudicial to the appellant, and we see no reason why the judgment of the circuit court should be disturbed. All exceptions are overruled. Judgment affirmed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 398)

**JOHNSON v. METROPOLITAN LIFE
INS. CO. (No. 10140.)**

(Supreme Court of South Carolina. Jan. 28, 1919.)

INSURANCE — 668(15) — FALSE REPRESENTATIONS — WAIVER — QUESTIONS FOR JURY.

In action on life policy, defended on the ground of false representations of insured that she did not have tuberculosis, and had not been under the care of physicians for more than two years, whether defendant by issuing policy waiv-

ed misrepresentations held, under the evidence, for the jury.

Hydrick, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Edward Johnson, as administrator of Nellie T. Johnson, deceased, against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Elliott and James H. Fowles, both of Columbia, for appellant.

Richard E. Carwile and James S. Verner, both of Columbia, for respondent.

WATTS, J. This is an action for the recovery of \$500 under a policy of insurance on the life of Nellie T. Johnson. The case was tried before Judge Memminger and a jury, and resulted in a verdict in favor of plaintiff for \$500. At close of plaintiff's evidence the defendant made a motion for nonsuit, which was refused. When all the testimony was in, the defendant made a motion for a directed verdict in its favor, which was refused. After verdict a motion for new trial was made and refused. After entry of judgment defendant appeals, and imputes error to his honor in overruling defendant's motion for a directed verdict; both of these motions being on the ground that "the undisputed evidence was that the insured procured the policy because she represented to the insurer that she and her husband were free from tuberculosis, and knew these representations were false," and further "that she had not been under the care of a physician for more than two years, and she knew these representations were false" and in his honor's charge "he left it to the jury as a question of fact whether or not the defendant by the issuance of the policy waived misrepresentations made in order to procure it where there was no evidence that the defendant's agents knew the representations to be false or in any way colluded with the insured." If there was any competent evidence in the case, it was the duty of his honor to send the case to the jury. Bouknight, a witness for the defendant, testified:

"I delivered this policy to Nellie Johnson, and was present at the time the application was signed. I delivered the policy to the same woman who signed the application. This all happened at College street house, although she gave her address as Lincoln street. A photograph of the application is attached to the policy. I heard all of the questions read over to her, and her answers were properly recorded by Mr. Gregory."

Further witness testifies:

"Harry Johnson applied for a policy in the Metropolitan about the same time his wife,

Nellie, applied. The company passed favorably on both applications, but when Harry's policy came and was taken down to his house to be delivered it was discovered that he was sick in bed. For this reason the policy on Harry's life was never delivered. We understood that he had consumption."

This testimony, with other evident facts and circumstances in the case, was sufficient for the case to be submitted to the jury under *Gamble v. Metropolitan Insurance Co.*, 95 S. C. 196, 78 S. E. 875; *Baker v. Metropolitan Life Ins. Co.*, 106 S. C. 419, 91 S. E. 324; *Patrick v. English*, 91 S. E. 295; *Wingo v. Insurance Co.*, 99 S. E. 436.

The exceptions are overruled, and judgment affirmed.

GARY, C. J., and FRASER and GAGE, JJ., concur.

HYDRICK, J., dissents.

(111 S. C. 430)

SENTELL v. NORRIS COTTON MILLS.
(No. 10147.)

(Supreme Court of South Carolina. Feb. 1, 1919.)

MASTER AND SERVANT §153(3)—INJURIES TO SERVANT—LIABILITY OF EMPLOYER—INEXPERIENCED OPERATOR.

Cotton mill which solicited farmer to work for it was liable for injuries to him, uninstructed of dangers of work, after 2½ days' service, causing loss of arm, if it was guilty of lack of due care towards him, and he was not negligent and had not assumed risk, which was hidden.

Appeal from Common Pleas Circuit Court of Pickens County; John S. Wilson, Judge.

Action by A. J. Sentell against the Norris Cotton Mills. From judgment for plaintiff, defendant appeals. Affirmed.

Carey & Carey, of Pickens, and Haynsworth & Haynsworth, of Greenville, for appellant.

Martin & Henry, of Greenville, for respondent.

GAGE, J. The plaintiff had a verdict for \$3,000 for the loss of his left arm by the teeth of a carding machine in a cotton mill.

There are eleven exceptions; but the one issue argued at the bar and in the printed points arises out of the refusal of the court to direct a verdict for the defendant: (1) Because there was no proof of negligence by the defendant; (2) because the plaintiff assumed the risk of the task he was at; (3) because

the injury to the plaintiff was caused by a fellow servant of his.

The complaint charged as many as seven delicts by the defendant. Of course if there was testimony tending to prove one sufficient delict which was a proximate cause of the injury, and not affected by the three defenses above stated, then the court ought to have sent the case to the jury. There will be no need, therefore, to consider all the seven delicts charged, nor in such event to consider perhaps all the defenses above stated.

The gist of the action, and of all such, is that under all the instant circumstances the defendant failed in the performance of its whole duty towards the plaintiff. Duty is the test of responsibility. There is no need to recite the testimony.

The truth of the postulate which next follows will not be denied. If the plaintiff, hitherto a farmer by life long practice and a man of 50 years, was solicited by the defendant more than once to quit his farm and enter the service of the mill, because of the scarcity of help there, and if the plaintiff yielded to the solicitation and entered such service, and if the plaintiff was put to strip cards with but a meager experience in cotton mills, and met with this accident after 2½ days' service, and if no instructions had been given him about the difficulties and dangers of that work, about which he was not practiced, and if he was put to labor on a cloudy and rainy day, in a mill darkened on the side he worked at by the state of weather and by a precipitous elevation of the ground there so as to conceal the dangers there present, and if as the proximate result of all this the man lost his hand by the revolving card cylinder while wiping off a carding machine, incident to stripping the cards, then the defendant is liable to the plaintiff, if the jury should conclude that the circumstances recited convicted the mill of a lack of due care towards the plaintiff, and should further find that the plaintiff had not defeated his right by a lack of due care on his part, and should further find that the risk was hidden and had not been assumed by the plaintiff as a part of his contract of service.

The testimony tends strongly to make such a case, and it was properly sent to the jury.

In this view, the issue of fellow servant goes out of the case; for there is no dispute but that the master put the plaintiff to work where he was hurt.

Judgment affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 391)

WHITLOCK v. TOWN OF JONESVILLE et al. (No. 10138.)

(Supreme Court of South Carolina. Jan. 27, 1919.)

MUNICIPAL CORPORATIONS ¶655 — **CHANGE OF STREET—AUTHORITY OF TOWN COUNCIL.**

Under Civ. Code 1912, §§ 1932, 2951, the town council had the right to alter a road pursuant to agreement whereby lot owner dedicated a strip of land on the east side of her lot in consideration that old street on west side of lot be abandoned to her.

Appeal from Common Pleas Circuit Court of Union County; J. W. De Vore, Judge.

Action by Ida E. Whitlock against the Town of Jonesville and others. Demurrer to complaint sustained, and plaintiff appeals. Reversed.

J. C. Otts and Sanders & De Pass, all of Spartanburg, for appellant.

Wallace & Barron and J. A. Sawyer, all of Union, for respondents.

FRASER, J. The appellant alleges that she is the owner of a lot of land in the town of Jonesville, through the western portion of which there ran a street of the town; that by agreement with the town council, she dedicated to the city for a street a strip of land on the eastern side of her lot and in consideration thereof the town council agreed to abandon to her the old street through the western side of the lot; that in pursuance of said agreement, she turned over to the town the 50 feet on the eastern side, and it was accepted by the town and put in condition to be used as a street; that with full knowledge and consent of the town council she erected fences around her lot and across the ends of the old street and inclosed the same in her lot; that her son gave some offense to the town council, and that in consequence thereof the mayor and aldermen blocked the new street which they had already accepted, and wilfully, unlawfully, and in a high-handed manner tore down her fence across the old road. This action is brought against the town and mayor and aldermen officially and as individuals.

The defendants demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that the town of Jonesville had no power to discontinue the street, and, as the fence obstructed the street, they had a right to remove it. The demurrer was sustained on that ground and this appeal was taken by the plaintiff. There is one exception with several subheads, but really only one question, as the whole case depends upon the power of Jonesville to discontinue a street.

The complaint asks no damages against

the town of Jonesville, but an injunction against interference with plaintiff's possession of the abandoned street.

Section 2951, Code of Laws of South Carolina, vol. 1, gives city councils the same rights in the management of its streets as are given to county boards of commissioners.

Section 1932 of said Code gives to the county boards of commissioners the right "to discontinue such roads, bridges and ferries as shall be found useless, and to alter roads so as to make them more useful."

According to the allegations of the complaint, the town council had the right to alter the road. We have been cited to no authority, and we know of none, that requires the alteration to be made by a formal ordinance.

The order appealed from is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 424)

NEWSOM v. F. W. POE MFG. CO. (No. 10146.)

(Supreme Court of South Carolina. Feb. 1, 1919.)

1. MASTER AND SERVANT ¶289(13) — **CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

Whether a 14 year old employé was guilty of contributory negligence when injured by putting his hand inside a machine which he was helping to clean, in order to remove cotton, is a question for the jury.

2. MASTER AND SERVANT ¶278(2) — **INJURY TO SERVANT—CLEANING MOVING MACHINERY.**

Evidence held to show that a 14 year old servant was directed to clean moving machinery in which he was caught and injured.

3. TRIAL ¶256(10) — **INSTRUCTIONS — REQUESTS.**

In an action by a father against employer for loss of services of minor son, an instruction that it was the duty of the servant to obey the orders of the master was in general correct, and if defendant wished a further instruction, he should have requested it.

4. MASTER AND SERVANT ¶153(1) — **MINOR SERVANT—WARNING.**

The master is held to a stricter account to a servant of tender years than to an adult, since the master is required to warn such servant of dangers.

5. TRIAL ¶296(3) — **INSTRUCTION—CONSTRUCTION WITH OTHER INSTRUCTIONS.**

An instruction that the duty of the master to furnish a safe place to work is nonassignable, and that it would be liable for any injury resulting to the servant from working in an

unsafe place at the direction of any one authorized by the master, was not error, where there was a further instruction that, if the danger was open and a person of ordinary prudence would have seen it, then the blame was on the 14 year old, servant and not on the master.

6. MASTER AND SERVANT §286(2)—INJURIES TO SERVANT—NEGLIGENCE—VIOLATION OF MASTER'S RULES AND OF STATUTE.

Where a minor servant was by the direction of one authorized by the master, employed at cleaning moving machinery, such, being in violation of the master's rules and of the statute, was negligence as a matter of law.

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by K. E. Newsom against the F. W. Poe Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Haynsworth & Haynsworth, of Greenville, for appellant.

Martin & Henry, of Greenville, for respondent.

FRASER, J. This is an action for damages for personal injury. It is the second action for the same injury. The first action was brought by Forest B. Newsom, a minor under 14 years of age, for the injury to himself, and is reported in 102 S. C. 77, 86 S. E. 195. This action is brought by K. E. Newsom, the father of Forest B. Newsom, for loss of his son's service, etc.

The evidence in the two cases is practically the same, and in the former case is stated:

"Forest Newsom, a boy between 13 and 14 years of age, was employed in appellant's mill as a sweeper. On the morning of the injury, he was sweeping not only his own section, but the section of another sweeper, who was that day out of the mill.

"There is evidence to show that Mr. Whisnant was overseer of the section assigned to the absent sweeper; that after Newsom had finished his sweeping and was talking to another employé, Mr. Whisnant called him to get a bag and help in the cleaning of the machines in Mr. Whisnant's section. These machines were cleaned only at long intervals, not oftener than four times a year. Some of the operatives who had been in the mill for years said they had never seen them cleaned. In order to clean the machines an iron door was opened, exposing the gear, and a broom was put into the machine through the open door, and the loose cotton was swept from the machine through the door. The plaintiff was holding a bag at the open door to catch the refuse as it was swept from the machine."

"Mr. Whisnant was a new man in his position. He stopped the first two machines while he was cleaning them. He then, under the advice of another operative, undertook to clean the machines while they were in motion. After cleaning several moving machines, he left Newsom at an open door to close another door, and Newsom saw a piece of cotton inside of the ma-

chine and undertook to pick it up with his hand. Newsom's hand was caught and severely injured."

[1] I. The first and second exceptions complained of error in the refusal of the presiding judge to direct a verdict as to negligence and willfulness. There was no error here. The reasons are fully stated in the former case, and need not be restated here.

[2] II. The appellant's fundamental error is contained in its seventh exception, which complains of error in his honor's failure to charge that the uncontradicted evidence showed that Forest Newsom was not put to work in cleaning moving machinery. The uncontradicted evidence shows that Forest Newsom was put to work in cleaning moving machinery. At the time of the injury Mr. Whisnant and Forest were together cleaning moving machinery. Mr. Whisnant was handling the broom, and Forest was placing the bag to catch the lint that Mr. Whisnant swept from the machine, and Forest was injured in catching the lint which Mr. Whisnant swept from the cogwheels. It was decided in the former case that this was in violation, not only of the rules of the company, but of the statute, and was negligence, and it was negligence as a matter of law.

[3] III. The third exception complains that the trial judge committed error in charging the jury that it is the duty of a servant to obey the orders of the master. As a general proposition, the charge is correct, and if the appellant desired further instruction, it should have requested it. The charge later qualified the statement.

[4] IV. The fourth exception complains of error in that his honor erred in charging the jury that the master is held to a stricter account to a servant of tender years than to an adult. There is no error there. The master is required to warn a servant of tender years of the dangers. The appellant's fourth request to charge admits the proposition. That request was:

"(4) The master is bound to warn a servant only when the servant, on account of youth and inexperience, does not know the danger attending upon the work."

[5] V. The fifth exception is:

"He erred in charging plaintiff's tenth request as follows: 'One of the nonassignable duties of the master is to furnish a safe place to work, and the master would be liable for any injury resulting to the servant from working in an unsafe place at the direction of any one authorized by the master, either directly or indirectly, to assign the servant to such a place of labor'—it being submitted that by said request the master is charged with liability, irrespective of the question of his negligence, and irrespective of the question as to whether the servant might not have assumed the risks involved."

This exception cannot be sustained. His honor charged the jury that, if the danger was open and a person of ordinary prudence would have seen it, then blame was on the servant, and not on the master.

[6] VI. The next complaint was that his honor erred in charging the jury that it was negligence per se to violate the rules of the company. The rules and the statute both forbid the employment of minors in cleaning moving machinery, and it has already been held that it was negligence as a matter of law.

The judgment is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 400)

EQUITABLE SURETY CO. v. ILLINOIS SURETY CO. et al. (No. 10141.)

(Supreme Court of South Carolina. Jan. 28, 1919.)

1. APPEAL AND ERROR ¶1213—RETRIAL AFTER REMAND—DIRECTED VERDICT.

Order overruling demurrer to complaint having been sustained on appeal, and plaintiff on trial after remand having offered evidence to prove every essential fact alleged, a verdict for defendant could not be directed.

2. APPEAL AND ERROR ¶1099(6) — SUBSEQUENT APPEAL—RES ADJUDICATA.

Decision on former appeal that complaint was not demurrable *held* res judicata of contention of surety on bond of foreign insurance company, filed with insurance commissioner, that plaintiff was primarily liable and surety only secondarily liable, since if contention was true, complaint did not state cause of action.

3. APPEAL AND ERROR ¶1099(6) — SUBSEQUENT APPEAL—RES JUDICATA.

Decision on former appeal that complaint was not demurrable *held* res judicata of contention that plaintiff and surety on bond of foreign insurance company filed with insurance commissioner were at most cosureties on the bonds in question.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by the Equitable Surety Company against the Illinois Surety Company and others. Directed verdict for plaintiff, and the United States Fidelity & Guaranty Company appeals. Affirmed.

See, also, 108 S. C. 364, 94 S. E. 882.

Robert Moorman, of Columbia, for appellant.

D. W. Robinson, of Columbia, for respondent.

FRASER, J. The Illinois Surety Company was for a while doing business in this state. The statutes of this state require a foreign surety company, doing business in this state, to file with the insurance commissioner an approved bond or approved securities, in the sum of \$10,000. The Illinois Surety Company filed a bond with the United States Fidelity & Guaranty Company as surety. A suit was brought in the federal court in this state upon a contract upon which the Illinois Surety Company was surety, and judgment was obtained against the company. The company appealed, first to the Circuit Court of Appeals (Illinois Surety Co. v. United States, 215 Fed. 834, 131 C. C. A. 476) and then to the Supreme Court of the United States (240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609). The company lost in both appeals. In both appeals the plaintiff herein signed the appeal bonds. The Illinois Surety Company became insolvent, and the plaintiff was required to pay the judgments. The statutes provide that the bonds and securities filed with the insurance commissioner shall be a fund out of which repayment may be had. The plaintiff took an assignment of the interest of the judgment creditors, and brought this suit against the Illinois Surety Company and United States Fidelity & Guaranty Company. United States Fidelity & Guaranty Company demurred to the complaint, on the ground, among other grounds of demurrer, that the complaint did not state facts sufficient to constitute a cause of action, in that it appears as a matter of law that the plaintiff was substituted as surety for United States Fidelity & Guaranty Company, and that this company was no longer liable. The demurrer was overruled, and on appeal to this court the order overruling the demurrer was sustained. The judgment of this court is found in 108 S. C. at page 371 et seq., 94 S. E. 882.

The case was remanded for trial. The appellants answered. On the trial of the case the plaintiff proved the facts alleged in the complaint without objection. The defendant offered no evidence. Both plaintiff and defendant moved for a direction of verdict in their favor. The presiding judge directed a verdict in favor of the plaintiff and the defendant appealed on three exceptions.

[1] I. The first exception merely states that his honor erred in directing a verdict for the plaintiff and not for the defendant. A verdict for the defendant could not have been directed, as it had been conclusively held that the complaint stated a cause of action, and the plaintiff had offered evidence to prove every essential fact alleged.

[2] II. The second exception complains that his honor erred in not holding that the plaintiff was primarily liable and the defendant only secondarily liable, and that the

plaintiff was Mable to the exclusion of the defendant. If this proposition is true, then the complaint does not state facts sufficient to constitute a cause of action. The former opinion held to the contrary. It is *res adjudicata*.

[3] III. "Because his honor, the presiding judge, erred in not holding that the plaintiff and said defendant were at most cosecurities on the bonds in question, and in not directing a verdict accordingly." This exception cannot be sustained. Mr. Justice Watts, delivering the opinion in the former case, said:

"Payment by the surety subrogated the surety to all the rights and privileges of such plaintiff in a judgment or decree against the principal debtor, and to all the securities, equities, rights, remedies, and priorities held by such creditor. Code of 1912, § 3942; *Brandt on Suretyship* (2d Ed.) § 309; *Muller v. Wadlington*, 5 S. C. 345; *Garvin v. Garvin*, 27 S. C. 472, 4 S. E. 148.

"Whatever rights the creditors in judgment had against the bonds filed with the insurance commissioner were, by virtue of the statutory laws of this state, transferred to the plaintiff upon payment by it of the judgment. The judgment creditors formally and duly assigned to the plaintiff all of their rights, equities, and interests under the judgment to plaintiff."

This is also *res adjudicata*.

The judgment appealed from is affirmed.

HYDRICK and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(111 S. C. 416)

THOMAS v. SHEA. (No. 10143.)

(Supreme Court of South Carolina. Jan. 29, 1919.)

JUSTICES OF THE PEACE \S 75(1)—TITLE TO REAL PROPERTY—EFFECT OF DISMISSAL—DISCONTINUANCE.

Magistrate, in whose court plaintiff sued for trespass by cutting timber, after dismissing complaint, on motion of defendant's attorneys, on answer of title to real property, pursuant to Code Civ. Proc. 1912, §§ 87-89, had discretion to grant order allowing plaintiff to discontinue.

Appeal from Common Pleas Circuit Court of Spartanburg County; Thomas S. Sease, Judge.

Action by E. C. Thomas against J. E. Shea. From an order discontinuing the cause, defendant appealed to the Circuit Court, which set aside the order, and plaintiff appeals. Order of the Circuit Court reversed.

John Gary Evans and R. B. Paslay, both of Spartanburg, for appellant.

Carson, Boyd & Tinsley, of Spartanburg, for respondent.

FRASER, J. The agreed statement of facts shows:

"This action was commenced July 21, 1917, in the court of Magistrate Jennings, for the recovery of \$50, actual and punitive damages. On August 21st the case was by Magistrate Jennings transferred to Magistrate E. E. Corry on defendant's motion, made on the grounds that the defendant did not believe he could get a fair and impartial trial before Magistrate Jennings. On the call of the case by Magistrate Corry on August 22, 1917, plaintiff referred to his summons for complaint as follows:

"Complaint having been made unto me by E. C. Thomas that you are indebted to him in the sum of \$50, actual and punitive damages, for cutting down and hauling away several cords of wood from lands of plaintiff without his knowledge or consent and against his will, for willfully knocking down certain stakes placed on said lands by plaintiff, and for otherwise maliciously trespassing on said lands, the same having been done in the years 1916 and 1917:

"These are, therefore, to require you, the said defendant, to appear before me in my office in Spartanburg, 117½ Magnolia street, on the twenty-first day after service hereof, at 10 o'clock a. m., to answer to the said complaint, or judgment will be given against you by default."

"To which the defendant filed answer as follows:

"The defendant, answering—

"(1) Denies each and every allegation of the complaint.

"(2) Alleges that all the matters and things alleged to have been done by the defendant relate to a strip of land lying along the line between the plantation of the defendant and the plantation of the plaintiff, which has been in the actual possession of the defendant, and to which the plaintiff has recently made a claim of title, and made an effort to exclude the defendant therefrom; that the trees cut and alleged to have been hauled away by the defendant, and the stakes alleged to have been placed on said land by plaintiff, and the occupancy of the defendant alleged to have been trespassing, were all on the strip of land possessed and claimed by the defendant, and claimed by the plaintiff; that the determination of all matters referred to is dependent upon a determination of the issues of title to the real estate; that the title to real estate is involved in all the issues in this case, and this court is without jurisdiction to try the same."

"Along with this answer, the defendant filed a statutory bond, and the answer was countersigned by the magistrate and delivered to plaintiff's attorney. Upon hearing thereon, the magistrate passed the following order:

"It appearing to satisfaction of court that the question of title to real property comes into question, and on motion of defendant's attorneys, it is ordered that the complaint be dismissed in pursuance to sections 87, 88, and 89, Code of Civil Procedure.

"E. E. Corry, Magistrate. [Seal.]"

"On September 6th, plaintiff served the following notice:

"Please take notice plaintiff will move before his honor, E. E. Corry, magistrate, at his office at Spartanburg, South Carolina, on Monday, September 10, 1917, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order discontinuing said case upon the payment of costs.

"You are respectfully invited to be present."

"On hearing this motion, the same being argued for plaintiff and in opposition for the defendant, on September 10, 1917, Magistrate Corry passed the following order:

"This action was commenced in the magistrate's court by plaintiff against the defendant. The plaintiff having paid the cost of said action, and having served due and legal notice on the defendant's attorneys of his intention to discontinue said action:

"Now, on motion of plaintiff's attorneys, it is ordered that the said action be, and the same is hereby, dismissed and discontinued, without prejudice to the rights of the plaintiff herein."

"From this order the defendant served notice of appeal to the circuit court as follows:

"You are hereby notified of our intention to appeal on behalf of the defendant from the rulings and order of Magistrate E. E. Corry, September 10, 1917, whereby he ordered this case discontinued, upon the following ground:

"That the magistrate erred in holding that he had jurisdiction to order a final discontinuance of the case; whereas, it is respectfully submitted that his previous order, discontinuing this case in the magistrate's court, had, by virtue of the statute, transferred this case to this court, and the magistrate was without jurisdiction to enter final dismissory, upon the ground of which we will move this court to set aside the said order appealed from."

"On hearing this appeal, the circuit court sustained the same with the following order:

"This is an appeal from an order of magistrate's court discontinuing the cause, the appeal being filed by the defendant on exceptions. It appears to the court that the previous order of the magistrate (dated August 22, 1917) was formal and in compliance with the statute, the exceptions are therefore sustained and the order appealed from set aside."

"Due notice of plaintiff's intention to appeal from the order of the circuit court was served, and plaintiff does now appeal and move the Supreme Court to set aside and reverse the same upon the following exceptions."

There are three exceptions, but only one question, to wit: Did the magistrate have the right to allow the plaintiff to discontinue his action? The case of *High v. Wingo*, 84 S. C. 246, 66 S. E. 185, is cited to sustain the order of the circuit court. *High v. Wingo* does not sustain the order appealed from. In that case there was no order by the magistrate allowing a discontinuance. In this case there was such an order, and it was within the discretion of the magistrate to grant it.

The order appealed from is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

(83 W. Va. 226)

Ex parte VELTRI.

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. HABEAS CORPUS \S 3—DISCHARGE—ACTION OF EXAMINING COURT.

Where a court or justice having jurisdiction, on a warrant regular and valid on its face determines that there is probable cause for holding the accused to answer for the crime charged, and his mittimus committing the prisoner to the custody of the sheriff to await the action of the court having jurisdiction to try the accused is also regular and valid on its face, habeas corpus is not available to review the action of the examining court or to discharge the prisoner from custody on grounds purely defensive, as twice in jeopardy, or failure to indict, or to prosecute an indictment previously found for the same offense, within the time prescribed by the statute, not relied on or made the foundation for his discharge before the examining court.

2. HABEAS CORPUS \S 25(1) — DISCHARGE FROM CUSTODY—DENIAL OF RIGHT.

Nor is habeas corpus available to procure the discharge from custody of one so accused and held to answer for a crime, until the court having jurisdiction has by some affirmative action denied him some legal or constitutional right, and when the record shows that any order or judgment other than discharge from further prosecution would be absolutely void.

Habeas corpus by Bill Veltri to secure discharge from detention in jail by John L. Dougan, Sheriff of Monongalia County. Writ refused.

Lazzelle & Stewart, of Morgantown, for petitioner.

Cox & Baker, of Morgantown, for respondent.

MILLER, P. By habeas corpus petitioner seeks his discharge from imprisonment in the jail of Monongalia County upon a charge of murder, upon the ground that he is being illegally detained by respondent, the sheriff, for reasons hereinafter to be considered.

The return of the respondent, not controverted, is that he is holding petitioner under and by virtue of a warrant and mittimus issued on December 2, 1918, by W. L. Boughner, a justice of said county, charging him with the murder of one Tony Selario on the — day of December, 1917, and also by virtue of another commitment issued by the same justice on the same charge on the 30th day of December, 1918.

The warrant and mittimus are in due form and charge an offense of which the justice had jurisdiction as an examining court; and his transcript, also made a part of the return, shows that on the return day of the warrant the body of the petitioner was pro-

duced before him by the officer to whom the writ was directed, and that the petitioner waived a preliminary hearing and was thereupon by the order and mittimus aforesaid committed to the jail of said county to await the action of the circuit court touching the charge aforesaid.

Upon the face of this record no question of right, want of authority or jurisdiction of the justice appears, but the petitioner alleges as grounds for his release that the charge on which he is being held is identical in all respects with the crime with which he was accused in an indictment found by the grand jury attending said circuit court, on January 18, 1918. The October term, 1918, of said court, being the third term after the said indictment had been found, was still in session at the time of the issuance of the original warrant and mittimus by virtue of which petitioner was being held by respondent at the time he applied for and was awarded the present writ by this court. And his contention is that although before the end of the said third term, on December 3, 1918, the prosecuting attorney with the consent of the court entered a nolle prosequi as to said original indictment, and he was discharged from further prosecution thereon, and in as much as the court adjourned the said term without having brought him to trial on said indictment, he is now entitled to be discharged from further custody by virtue of section 25 of chapter 159 of the Code (sec. 5601), containing what is known as the three term rule.

[1] The question is thus presented, whether the petitioner is now entitled on this writ to be discharged from the custody of the sheriff, who is holding him not on the original indictment but on the new warrant and commitments by the justice exhibited with the return.

We have reached the conclusion that he is not; that habeas corpus is not available, at least at the present stage of the proceeding. Petitioner, as the record shows, was brought before the justice on the new warrant, waived examination, and was sent on to the circuit court to await the action of the grand jury. The justice thereby perhaps exhausted his jurisdiction over the petitioner and the subject matter of the accusation. The former charge and the indictment of the grand jury and the former proceedings of the court thereon were not before the justice in the last proceeding or in any way made the ground of a motion to discharge the petitioner. So the sole question presented on this writ is whether the warrant and commitment are in due form and sufficiently charge an offense. The jurisdiction of the justice and the formality and regularity of the writs are conceded.

The authorities hold almost without exception that the matters relied upon by petitioner are defensive in character and that

they must be set up by proper motion or plea in the proceeding in which he is held to answer, and that former jeopardy, or any constitutional right occurring pending the proceeding, not involving the constitutionality of the act or statute, under which he is accused, must be asserted by way of defense and that habeas corpus is not available to review any error of judgment of the trial court. So hold the standard text books on this subject, and the decisions of the courts supporting them are legion. 1 Bailey on Habeas Corpus, § 40, page 118 et seq.; Hurd on Habeas Corpus (2d Ed.) page 178 et seq.; Hovey v. Sheffner, 16 Wyo. 254, 93 Pac. 305, 15 L. R. A. (N. S.) 227, 125 Am. St. Rep. 1037, 15 Ann. Cas. 318, and cases cited in note at page 327; State v. Smith, 138 Ala. 111, 35 South. 42, 100 Am. St. Rep., note at page 29 et seq. See especially State ex rel. Noonan v. Sheriff of Hennepin County, 24 Minn. 87; Ex parte Ruthven, 17 Mo. 541; Gillespie v. Rump, Sheriff, 163 Ind. 457, 72 N. E. 138; Ex parte Bigelow, 113 U. S. 323, 5 Sup. Ct. 542, 28 L. Ed. 1005; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; and the many other cases cited in the note referred to in 15 Ann. Cas., supra.

Moreover, the proposition is fully supported by the principles of our own decisions and the decisions of the courts of Virginia. Ex parte Mooney, 26 W. Va. 36, 53 Am. Rep. 59; Ex parte Evans, 42 W. Va. 242, 24 S. E. 888; Ex parte Eastham, 43 W. Va. 637, 27 S. E. 896; Dudley v. State, 55 W. Va. 472, 47 S. E. 285; Ex parte Mylius, 61 W. Va. 405, 56 S. E. 602, 10 L. R. A. (N. S.) 1098, 11 Ann. Cas. 812; Jones v. Commonwealth, 20 Grat. 848 (Va.); Ex parte Rollins, 80 Va. 314.

[2] Furthermore, the law undoubtedly is, according to our own decisions and the decisions of other states, that until the court having jurisdiction of the charge under which the petitioner is held has been called upon and has acted by some order or judgment of sentence denying defendant's right to be discharged and subjecting him to further imprisonment, habeas corpus is not available. In most cases we find that the writ has not been applied for until after judgment and sentence in the trial court, but our decisions are that one unlawfully restrained of his liberty may after the trial court has denied him his rights by some affirmative action and it fully appears that no judgment or order of the court except discharge from prosecution could lawfully be pronounced against him, the writ of habeas corpus may be resorted to, to restore him to his liberty. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; In re Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Ex parte Bigelow, supra; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; 1 Bailey on Habeas Corpus, supra, at page 131; Ex parte Chalfant, 81 W. Va. 93, 93 S. E. 1082; Ex parte Anderson, 81 W. Va. 171,

94 S. E. 31; Ex parte Bracey, 82 W. Va. 69, 95 S. E. 593.

These conclusions render it unnecessary if not improper to consider the other questions presented. Therefore, we are of opinion to deny the writ and to remand the petitioner to the custody of the respondent.

(83 W. Va. 205)

CARROLL-CROSS COAL CO. v. ABRAMS CREEK COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS ⇨399(1) — AUTHORITY OF GENERAL MANAGER—SCOPE.

The implied authority of a general manager of a corporation extends only to such matters as come within the scope of its ordinary business.

2. MINES AND MINERALS ⇨105(2)—MINING CORPORATIONS — AUTHORITY OF GENERAL MANAGER—LEASE.

The general manager of a corporation operating coal mines on leased territory has no implied authority to give, sell, trade, or release to another such corporation any part of the leasehold estate.

3. APPEAL AND ERROR ⇨1012(1)—FINDING OF FACT—REVIEW.

In the absence of a preponderance of evidence against the finding of a trial court on an issue as to whether such corporation conferred upon its general manager express authority so to dispose of a part of its leasehold, or ratified his unauthorized attempt to make such disposition thereof, the appellate court cannot disturb the finding.

4. MINES AND MINERALS ⇨105(2) — UNAUTHORIZED LEASE BY AGENT—ESTOPPEL—RECOVERY OF COMPENSATION—ENFORCEMENT OF PENALTIES.

An unauthorized and unratified agreement made by a general manager of such a corporation with another, under which the latter has mined coal within territory covered by a lease owned by the former, does not estop it from recovery of compensation for the coal so mined nor from enforcement of the statutory penalties inflicted for mining within a prohibited area along the boundary line between the leases under which the two companies are respectively operating.

5. PRINCIPAL AND AGENT ⇨156—SILENCE OF AGENT—ESTOPPEL OF PRINCIPAL.

Silence and inaction of an agent as to a matter not within his authority do not estop his principal.

6. ESTOPPEL ⇨95 — KNOWLEDGE OF TRESPASS—ACTION FOR INJURY.

Knowledge of a trespass or wrong perpetrated by one fully cognizant of the right invaded, and silence respecting it after notice, do

not estop the injured party from asserting his right of action for redress of the injury done.

7. APPEAL AND ERROR ⇨1043(6) — IRREGULARITY IN TAKING DEPOSITION—CROSS-EXAMINATION—WITNESSES—REVERSAL.

An irregularity in the taking of depositions fully developing the merits of the cause, at which all of the litigating parties appeared and examined and cross-examined the witnesses, constitutes no ground for reversal of the decree founded upon them.

(Additional Syllabus by Editorial Staff.)

8. INJUNCTION ⇨26(6)—ACTIONS—DEFENSES AVAILABLE AT LAW—LIMITATIONS.

As the statute of limitations, if applicable, may be relied upon in action at law for value of coal mined by defendant therein on plaintiff's leasehold and to enforce statutory penalties for mining within certain distance of boundary line, as effectively as in a suit to enjoin such action, the statute is no ground of jurisdiction or relief in injunction suit.

Appeal from Circuit Court, Mineral County.

Suit for injunction by the Carroll-Cross Coal Company against the Abrams Creek Coal & Coke Company. From a decree dissolving an injunction and dismissing the suit, complainant appeals. Decree affirmed.

D. L. Sloan, of Cumberland, Md., and Wm. MacDonald, of Keyser, for appellant.

Warder & Robinson, of Grafton, for appellee.

POFFENBARGER, P. The decree, pronounced on a full hearing and brought up for review by this appeal, dissolved an injunction and dismissed bills the object of which was restraint by an injunction of two actions at law instituted against the plaintiff herein by the defendant; one for the recovery of statutory penalties for mining coal within the area along a boundary line in which mining, without the consent of the adjacent owner in writing, is prohibited by statute, and the other for the recovery of the value of coal mined by the plaintiff beyond the boundary line and in an area covered by the lease of the defendant in this case, as well as the value of additional coal rendered inaccessible by the operations beyond the line and so lost to the lessee.

Neither party actually owned the coal in the land on which it was operating. The plaintiff was the lessee of the West Virginia Central & Pittsburgh Railway Company, by assignment of a lease made to the Denman Coal Company, and the defendant the lessee of H. C. Homan, as to the tract of land encroached upon. The declaration in one of the actions at law claims right of recovery of fifteen \$500 penalties, on the theory of fifteen separate violations of the statute inhibiting mining operations within five feet of a

boundary line, without the consent in writing of the adjacent owner. In the other declaration, compensation for 6,900 tons of coal alleged to have been mined by the plaintiff in this bill, out of the Homan lands, of the value of \$9,660, is sought and, in addition thereto, \$2,068.00, as the value of 4,136 tons of coal, rendered inaccessible by the wrongful operation.

By way of equitable defense to the two actions at law, the original bill alleges two grounds of relief, an agreement between the two companies permitting the plaintiff to mine not only within five feet of the boundary line, but also beyond it, so as to form a connection between its works and those of the defendant, and, in the event of failure of proof of the agreement, conduct on the part of the defendant inducing such action by the plaintiff and constituting estoppel to enforce the penalties for violation of the statute and to have compensation for the coal taken out beyond the boundary line, in excess of a reasonable royalty thereon. An amended bill relies upon the statute of limitations, as to the penalties, and alleges facts constituting ground of necessity for a survey to determine the exact location of the boundary line and the quantity of coal removed.

[8] Since the statute of limitations, if applicable, may be relied upon in the action at law, as fully and effectively as in this suit to enjoin that action, it obviously constitutes no ground of jurisdiction or relief here. Whether there was such an agreement as the original bill alleges, or such conduct as constitutes an estoppel in equity, are the only material inquiries in the cause. The lease under which the plaintiff operates was executed July 1, 1903, and the Denman Coal Company had conducted mining operations under it for a number of years, prior to May 6, 1912, on which date it assigned the lease to the plaintiff. While the Denman Coal Company was conducting its mining operations under its lease, the Abrams Creek Coal & Coke Company, the defendant here, was mining under its lease of the adjacent Homan land. The evidence well establishes the fact that the general manager of the defendant company carried on some negotiations with the Denman Coal Company, for disposition to it of the area of coal in question here, about three acres, as well, possibly, as some other small portions, because they were so situated as to prevent ready and economical mining under the plan of operations contemplated by him; and that, after the Carroll-Cross Coal Company took over the works of the Denman Coal Company, these negotiations were continued. A. Spates Brady, who was general manager of the Abrams Creek Coal & Coke Company from April, 1910, until September, 1913, testified that, when he took charge of the property, its plans of operation were unskill-

ful, ineffective, wasteful, and unsatisfactory; and that he altered them by dispensing with some of the openings and reducing their number and so connecting them up as to effect a great saving in expenses; and that the plan he adopted contemplated disposition of certain small portions of the coal to adjoining operators who could take them out more economically, by exchanges of coal property, mutually advantageous to the parties. He says he prepared the plans of operation, as contemplated, and furnished a copy thereof for the use of the president and board of directors, and that it indicated purpose and intention to dispose of the coal in question here to the Denman Coal Company. The reason assigned by him for this purpose was the impracticability of profitable mining thereof, because of the necessity of mining it towards the "dip," in consequence of which the headings, entries, and rooms filled with water, as the work progressed, which had to be removed by pumping, and the existence of a squeeze or breaking down of the roof, which made it necessary to abandon the headings through which the coal from that area had to be taken out. It appears from other evidence in the cause that the cost of a new entry so made as to give access to this coal and drain certain portions of the workings would have been altogether out of proportion to the value of the coal to be taken out through it. In view of this situation, A. Spates Brady says he intended, as general manager, to let the Denman Coal Company take that coal out through its workings, in exchange for some of its coal, to be taken out through the workings of the Abrams Creek Coal & Coke Company, so as to relieve the latter of the obligation imposed by its lease to take it out and pay the royalty thereon, and also afford means of draining his company's mines through the workings of the Denman Company. He swears that, some time in 1912, in pursuance of this plan, which the president and directors of this company had approved, he approached representatives of the Carroll-Cross Coal Company and endeavored to trade to them this "fag end" for an equal area of coal lying in front of some other works of his company. His proposition was not accepted at that time. In the fall of 1913, M. P. Gannon succeeded him, as general manager, and the proof is that he, being familiar with the plan by reason of his having previously held a subordinate position under Brady, had conversations with representatives of the Carroll-Cross Coal Company, some time in 1914, which are relied upon in the evidence as constituting an agreement authorizing the plaintiff to mine the coal in question. Carroll Pattison, president of the plaintiff company, says Spates Brady discussed his plan with him on several occasions and sometimes in the presence of Gannon, and that,

after Brady left, Gannon renewed the proposition and he accepted it for his company. As to the terms of the arrangement, he is very indefinite, not saying whether the coal was to be exchanged or to be taken out on a royalty basis; but he says the proposition previously made by Brady was one of exchange. Howard Cross, superintendent of the Carroll-Cross Coal Company, says Gannon came over to his mine and, together with himself and his brother Harry Cross, sat down on a pile of props at the mouth of the mine and proposed that the plaintiff company take out the coal and pay a royalty for it not exceeding six cents per ton. Harry H. Cross says he heard Gannon tell his brother to go ahead and take out the coal and it could be settled for afterwards on a royalty or exchange basis satisfactory to both parties. Pattison says they began to act upon this request or agreement in January, 1914; but Howard Cross says they did not begin to do so until about June 1st of that year. The mining within the prohibited area and beyond the line continued until about June, 1916, when it was ascertained by an auger hole bored beyond the workings that a point within five or six feet of the old workings of the Abrams Creek Coal & Coke Company had been reached. This fact having been communicated to the superintendent of that company, James Christopher, and an inquiry made as to the identity of the heading approached, he reported it to Samuel D. Brady, president of the company, who, professing surprise at the conduct of the Carroll-Cross Coal Company, in crossing the line with its operations, immediately filed a protest against further operations and a demand for satisfaction for the alleged trespass upon the property of his company. As evidence of probability that Spates Brady's plan and the alleged negotiations in conformity therewith were known by S. D. Brady, the plaintiff relies upon correspondence between the latter and Pattison, in 1915. In a letter dated April 10, 1915, Brady said he believed some kind of an arrangement could be made by which some of the coal adjoining the Carroll-Cross Company's property could be mined by it and the drainage more economically handled for both companies, and requested a blueprint showing the workings of the company, with a view to joining up the maps of the two companies and working out a plan for discussion. Pattison replied in a letter dated April 14, 1915, saying he was unable then to find a map of the old Denman Coal Company workings, but the proposition would suit him, if he could arrange for permission by the railroad company, to take the coal out through their property. Brady says this correspondence related to other coal lying beyond the rock fault. As showing improbability of this it is noted that Brady

had not then commenced work at the place he mentions.

Some of the claims relied upon by the plaintiff, as showing the desirability and practical necessity of the disposition of the coal in question, which A. S. Brady says he contemplated, are disputed and put in issue by numerous contentions of the defendants. Gannon, with whom the agreement is alleged to have been made, died in December, 1915, wherefore his testimony either to affirm or deny that of the witnesses of the plaintiff cannot be had. S. D. Brady says the correspondence between Gannon from Oakmont, at or near which the mines were operated, and the principal office, located at Fairmont, W. Va., contains nothing pertaining to the alleged agreement; and James Close, the clerk at the Oakmont office of the company during the period of management by Gannon, and having charge of the correspondence, swears there was no correspondence between the general manager and the president of the company relating to any such agreement or the subject-matter thereof. S. D. Brady and Christopher, the superintendent, and other witnesses, admit that there was some water in the rooms or headings of the Abrams Creek Company, abandoned about the year 1910, and up to which the plaintiff extended its operations between June, 1914, and June, 1916; but all of them swear it did not constitute a serious obstacle to mining operations in that section, because it could be disposed of with a small pump and did not have to be carried any considerable distance by means of the pump. The coal actually mined beyond the line by the plaintiff was not all the coal the defendant had in that section. All of the impediments to the mining of that coal applied to a considerably larger area of which it constituted a part; and S. D. Brady attributes the abandonment of the operations in that section to a cause entirely different from the circumstances mentioned and relied upon by the plaintiff. The defendant held leases upon two adjacent tracts of land, one belonging to Homan, the other to Kalbaugh and Ambrose. The minimum amount of coal to be mined annually under the Homan lease was 25,000 tons, and that to be taken out of the other lease 15,000 tons. As to the Homan lease, the company was largely in default; but, as to the other, the obligation of the lease respecting the amount of coal to be mined had been fully complied with. This situation made it necessary or desirable to direct the efforts and energies of the company more fully to the development of the operations on the Homan lease, to avoid the necessity of payment of royalties for coal not mined. As a circumstance tending to contradict this plausible theory, the plaintiff relies upon the fact that the coal actually taken out by it was on the Homan lease and not on the Kal-

baugh and Ambrose lease. But it is to be observed that, notwithstanding this fact, the coal actually taken out was near the boundary line between the two leases, and successful operations in that section may have required operations on both leases, while the exigencies of the situation may have required all of the energies and efforts of the company to be directed to the mining of coal on the Homan lease. As to the squeeze mentioned by A. S. Brady, other witnesses deny its existence. Christopher, the superintendent, swears that neither Spates Brady nor Gannon ever informed him that the Carroll-Cross Coal Company was mining over the line so as to connect with the old workings of the company, and that he had no knowledge of their having done so until he was informed that these headings had been actually tapped by such mining.

The final decree merely dissolving the injunction and dismissing the bill gives no indication of the ground upon which the decision rests. From argument found in the briefs, it may be inferred that the trial court proceeded upon the theory of lack of authority in Gannon to make the agreement claimed and, for that reason, ignored the evidence tending to establish it. On the other hand, the trial judge may have deemed the evidence insufficient, in view of its indefiniteness and the uncertainty as to its terms and the facts and circumstances tending to contradict it. A loose conversation does not always amount to a contract. If the former suggestion is sound, the trial court's view of the evidence becomes immaterial, unless it tends to prove ratification in some way. In other words, if Gannon had no authority to make such an agreement as the plaintiff claims and his making thereof was not ratified in any way by his principal, it amounts to nothing in law.

[1, 2] Though the powers of a general manager are large and extensive (Fletcher, Ency. Corp. §§ 2096 and 2098), they are not unlimited. It is the province or function of a general manager to supervise and conduct the ordinary business of his principal, and whether an act falls within his implied powers depends upon whether or not it is within the ordinary business intrusted to his management. Fletcher, Ency. Corp. § 2102; Varney & Evans v. Hutchinson Lumber & Manufacturing Co., 70 W. Va. 169, 73 S. E. 321; Laing v. Price, 75 W. Va. 192, 83 S. E. 497; Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518. In all the instances in which this court has sustained the theory of implied authority in a general managing officer of a corporation, the subject-matter of his act has been something that arose in the conduct of the ordinary business of the corporation. Thomas & Moran v. Kanawha Valley Traction Co., 73 W. Va. 374, 80 S. E. 476; Union Bank & Trust Co. v. Long Lumber Co.,

70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663; Producers Coal Co. v. Mifflin Coal Mining Co., 95 S. E. 948. The subject-matter of the alleged agreement between Gannon and the plaintiff was not within the course and conduct of the ordinary business of the corporation he represented. It was his business to conduct the mining operations of his principal, the digging and selling of coal, employment and direction of the necessary labor, payment of wages, and the like; and the gift, sale, or release of a portion of the mining territory to another corporation was clearly not within his province. The leasehold of his corporation was a part of its permanent plant which he could not dispose of. Whether it was of such character as would enable him to make a profit out of it for his principal was a question pertaining to the general policy of the company, not one arising in the course of the conduct of its business, as defined by its charter, by-laws, and nature. The act imputed to him was not in any sense analogous to the employment of another corporation to mine the coal for his principal. At the best, it was a sale of the coal in place or of the right to mine it, at a price that would yield no profit to the owner. As interpreted by the witnesses who testify to it, the agreement was to yield no more than sufficient money to pay the royalty to the lessor, in exoneration of the lessee's obligation to take out the coal and pay the royalty. The only other benefit suggested was the advantage of drainage through the adjacent leasehold, and it was clearly not within his authority to obtain that advantage by a gift, sale, or barter of a part of the permanent plant of the corporation. Whether he could purchase such right, paying money for it, is a question of an entirely different character, which does not arise.

[3] On the question of express authority in Gannon to make the agreement, the evidence does not preponderate in any degree against the finding of the trial court. On the contrary, there is a very decided preponderance in favor of it. S. D. Brady swears neither he nor the directors ever conferred it or knew it was claimed or asserted. The clerk in charge of the correspondence between the office at the mines and the principal office never heard of it. Nor has any evidence of it been found in any of the correspondence which was produced and offered to one of the plaintiff's attorneys for examination. Moreover, the exchange of letters in April, 1915, several months after the plaintiff claims to have commenced work under the agreement, imports lack of such knowledge on the part of S. D. Brady. Whether it related to the coal in question or not, it seems to have carried an original proposition from Brady, and not an additional one. It is also significant that no report of the amount of coal taken out through a period of about two

years was ever made and that royalties on it were paid to plaintiff's lessor, as if the coal belonged to it, instead of the defendant to whom they belonged. In this state of the evidence, the finding of the trial court cannot be disturbed.

Nor is there any evidence of ratification of the unauthorized agreement, if made. Though it might have been beneficial to the defendant, if accepted, it has not been a recipient of the benefit thereof in any way. It has declined compensation for the coal in money and forbidden the connection which would have given it the benefit of drainage through the plaintiff's workings.

[4-8] Gannon's lack of authority respecting the subject-matter of the alleged agreement is the rock on which the argument of estoppel breaks. His lack of authority to make a representation concerning it is as clear as his want of authority to make an agreement. The party claiming the benefit of an estoppel must have acted upon some representation in such manner as to work an injury to himself, in the event of the failure of the representation relied upon. Being a matter of law, Gannon's lack of implied authority is deemed to have been known by the plaintiff, and action upon the mere assumption of his express authority, without evidence of it, was action at the peril of the plaintiff. It was bound to know he had no authority, unless expressly conferred, and also to ascertain whether it had been so conferred. *Thompson v. Mercantile & Mfg. Co.*, 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311. Assuming constructive knowledge of the encroachment on the part of the defendant through Gannon, its general manager and director, this does not amount to an estoppel, for mere silence operates as an estoppel only because it is sometimes a form of representation. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; 14 Am. & Eng. Ency. L., 643. There is no proof of any reliance of the plaintiff upon the silence of the defendant, in ignorance of the rights of the latter. Its title, as well as Gannon's lack of authority, was beyond question and fully known. Hence the plaintiff could not have been misled by the silence of the defendant after notice of the trespass, and one claiming a right by estoppel must show that he has been misled by the words, acts, or conduct of the other party, while ignorant of his rights. He must be governed by his own knowledge, even though a representation to the contrary may have been made by the other party. In other words, he must have been misled to his injury, and it is impossible that he should have been, when he was fully informed as to the facts. *Norfolk, etc., R. Co. v. Perdue*, 40 W. Va. 442, 21 S. E. 755; *Water Co. v. Brown-Ing*, 53 W. Va. 436, 44 S. E. 267; *Akinson v.*

Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; *Dawson v. Grow*, 29 W. Va. 333, 1 S. E. 564; *Thor v. Oleson*, 125 Ill. 365, 17 N. E. 780; *Bartlett v. Kauder*, 97 Mo. 356, 11 S. W. 67; *Crest v. Jack*, 3 Watts (Pa.) 240, 27 Am. Dec. 353; 10 R. C. L. p. 694, § 21, Estoppel.

[7] The defendant's depositions having been taken before it filed its answer, a motion to suppress them was interposed, but not passed upon. In view of the probability that the motion would be sustained, it retook them, and, on the hearing, a motion to suppress those taken after the filing of the answer was made, on the ground of lack of right to take them while the former motion was pending and without leave to retake. The court sustained the first motion and overruled the second in the final decree, reciting that the parties had been advised, before the depositions were retaken, that the first motion would be sustained and leave granted to retake the depositions. At the retaking thereof, the plaintiff appeared and cross-examined the witnesses. The error, if any, was clearly harmless and does not call for a reversal of the decree. The merits of the cause were as fully developed as if the procedure had been strictly regular.

Perceiving no error in the decree, we will affirm it.

(83 W. Va. 180)

PIEDMONT GROCERY CO. v. HAWKINS
et al. (No. 3715.)

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS §189(7½) — APPROPRIATION BY OFFICER—REMEDY.

The appropriate action to recover money improperly appropriated to his own use by an officer of a corporation is assumpsit for money had and received.

2. EQUITY §23—JURISDICTION—ACTION—EX CONTRACTU—ATTACHMENT.

Section 1 of chapter 106 of Code 1913 (sec. 4455), properly construed, confers upon courts of equity jurisdiction to entertain suits to recover on causes of action ex contractu where an attachment, supported by proper grounds therefor, is sued out as a basis of such jurisdiction.

3. ATTACHMENT §32—"FRAUDULENTLY CONTRACTING A DEBT"—"INCURRING A LIABILITY"—STATUTE.

An officer of a private corporation intrusted with its funds and property, who improperly converts the same to his own use, is guilty of "fraudulently contracting a debt" or "incurring a liability" to such corporation which will be the basis of an attachment under the provisions of section 1 of chapter 106 of the Code of 1913 (sec. 4455).

4. ATTACHMENT \S 114, 115—GROUNDS—AFFIDAVIT—STATEMENT IN DISJUNCTIVE.

Where an attachment is sued out and reliance is had upon two or more distinct grounds for support thereof, they should be joined in the conjunctive; but, where only one ground of attachment is relied upon and two or more phases of the same fact which constitutes such ground are stated, the joining of such different phases in the disjunctive will not invalidate the attachment affidavit.

5. ATTACHMENT \S 232—GROUNDS—AFFIDAVITS—DISJUNCTIVE.

An attachment sued out upon the eighth ground given by section 1 of chapter 106 of the Code of 1913 (sec. 4455), that the defendant fraudulently contracted the debt or incurred the liability for which the action or suit is about to be, or is brought, will not be quashed because the attachment affidavit states that the debt was fraudulently contracted or the liability incurred. This is but the declaration of two phases of the same fact which constitutes the basis of the attachment.

Appeal from Circuit Court, Mineral County.

Suit in equity with attachment by the Piedmont Grocery Company against A. F. Hawkins and others. Demurrer to bill and motion to quash the attachment sustained and suit dismissed, and plaintiff appeals. Reversed and remanded.

F. C. Reynolds and H. G. Fisher, both of Keyser, for appellant.

Arthur Arnold, of Piedmont, for appellees.

RITZ, J. The defendant was for many years the treasurer of the plaintiff, and it is alleged that, during the time he was such officer, of the money coming into his hands he improperly appropriated large sums thereof to his own use, and that likewise during said time he, without authority, converted to his own use certain goods of the plaintiff. Upon the discovery of this alleged improper conduct on the part of defendant, the plaintiff brought this suit in equity, and at the same time sued out an attachment against the property and effects of the defendant, upon the ground that he fraudulently contracted the debt or incurred the liability set up. A demurrer to the bill and motion to quash the attachment were sustained, and the suit dismissed.

The ground of the demurrer is that the plaintiff's demand is a purely legal one of a tortious nature not cognizable in equity, even when accompanied by an attachment, and the grounds for quashing the attachment are that the facts set up in the affidavit do not show that the liability was fraudulently incurred, and further that the affidavit is void for uncertainty, inasmuch as it alleges that the defendant fraudulently contracted the debt or incurred the liability, so that it is impossible for the defendant to determine

whether it is claimed that he contracted a debt or incurred a liability.

[1-3] The jurisdiction in equity is sought to be sustained solely upon the ground that it is conferred by section 1 of chapter 106 of the Code (sec. 4455), giving courts of equity jurisdiction of suits where an attachment is ancillary thereto. As this statute has been construed by this court in the cases of *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 79 S. E. 723, and *Mable v. Moore*, 75 W. Va. 761, 84 S. E. 788, jurisdiction is only conferred upon courts of equity to entertain such suits when the cause of action is one *ex contractu*. In those two cases it is asserted that the jurisdiction does not exist where the cause of action is *ex delicto*. After reviewing the history of our statute, we think the doctrine of those decisions is correct, and that wherever a plaintiff has a cause of action upon which he can maintain a suit in form *ex contractu* he may, if he have grounds therefor, sue out an attachment and prosecute a suit in equity. If, however, his cause of action is one upon which he must sue in tort, equity will not have jurisdiction. The defendant insists that the cause of action set up in the bill is one *ex delicto*, while the plaintiff asserts that it is in its nature *ex contractu*. The charge in the bill and in the attachment affidavit is full and complete as to the items of money and property appropriated by the defendant, and it seeks to recover a judgment for the amount of money so appropriated and the value of the property. It is contended by the plaintiff that this is purely an action on contract; that when the defendant received into his custody money or property of the plaintiff, as its officer, there was an implied contract that he would account for the same and return it when required so to do; and that his failure to do this renders him liable in an action for money had and received. For the defendant it is contended that, inasmuch as the allegations are that he is guilty of a criminal offense in converting this money and property to his own use, his acts are necessarily wrongful acts, and that the suit is no more than an action for damages for his wrongful conduct. It seems to be very clearly established by the authorities that for money misappropriated, or even for money stolen, an action of assumpsit for money had and received is the appropriate remedy. An act of misappropriation in the case of one intrusted with funds in an official or fiduciary capacity raises an implied obligation on his part to repay such funds, and even where money has been stolen it is uniformly held that the owner of the money may sue in assumpsit to recover the same. In *Cooley on Torts*, § 109, the author says:

"No question is made of this doctrine, where, as a result of the tortious act, the defendant

has come into possession of money belonging to the plaintiff. The law will not permit him to deny an implied promise to pay this money to the party entitled."

This text is fully supported by the authorities cited in the note. In the case of *Walker v. Norfolk & Western Railway Co.*, 67 W. Va. 273, 67 S. E. 722, this court held that an action of assumpsit would lie against one who appropriates the property of another to recover the value thereof. In that case the plaintiff, a contractor, left a pump stored temporarily on the right of way of the defendant, and the defendant appropriated this pump to its own use, and a recovery for the value thereof in an action of assumpsit was allowed. Many cases might be cited to support the doctrine that for money wrongfully converted or stolen an action of assumpsit will lie to recover against the wrongdoer. *Gould v. Baker*, 12 Tex. Civ. App. 669, 35 S. W. 708; *Howe v. Clancey*, 53 Me. 130; *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Spencer v. Towles*, 18 Mich. 9; *Beardslee v. Horton*, 3 Mich. 560; *Royce v. Oakes*, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845; *Downs v. Baltimore City*, 111 Md. 674, 76 Atl. 861, 41 L. R. A. (N. S.) 255, 19 Ann. Cas. 644. The fact that the defendant may be guilty of a criminal offense in misappropriating the fund sought to be recovered in no way changes his civil liability to the plaintiff. If there were no statute making the misappropriation of these funds criminal, could it be doubted for a moment that there was an implied contract to repay them? The defendant would stand in no different position from the man who had borrowed money from another with an express promise to repay it. The law will not permit him to secure the funds of another in his capacity as agent, and then use them for himself without also raising a promise upon his part to repay. We are clearly of opinion that the cause of action set up in this case is one *ex contractu*, and such as gives jurisdiction to a court of equity to entertain a suit under the provisions of section 1 of chapter 106 of the Code, where an attachment is sued out upon sufficient grounds.

[4] But the defendant insists that no ground for the attachment sued out in this case is shown by the affidavit, and further that the affidavit is fatally defective. The affidavit was sued out upon the eighth ground specified in section 1 of chapter 106, and that is that the defendant fraudulently contracted the debt or incurred the liability for which the action or suit is brought. His contention is that the conversion of this money to his own use, he having come into possession of it lawfully, does not make him guilty of any fraud in incurring the liability or contracting the debt set up in the bill. It is quite true that, so far as the funds embezzled are concerned, they came into the possession of the defendant lawfully; so far

as the goods appropriated by him to his own use are concerned, this cannot be said. The allegation in this regard is that he abstracted certain goods from the store of the plaintiff, used them himself, and charged the value thereof to various customers of the plaintiff, seeking in this way to conceal his own misconduct. But can the fact that he secured possession of the funds lawfully make any difference? So long as he retained the lawful possession of them as an officer of the company, there was no cause of action against him. The cause of action set up in this case arose when he appropriated these moneys to his own use, and can it be said that the deliberate taking of another's funds held for a particular purpose, and applying them to an entirely different purpose, is not a fraudulent act? It seems to us that this is clearly fraudulent. The defendant cites the case of *Goss v. Board of Commissioners*, 4 Colo. 468, in support of his contention, and that case does in a measure lay down the doctrine contended for by him; but a reading of it shows that the decision is largely based upon an entirely different proposition. In that case the party from whom the money was sought to be recovered was not a direct agent of the plaintiff, but was an employé of the treasurer of the plaintiff, and the court held that the extent of the plaintiff's rights were fixed by its contract with the treasurer, and recovery on the treasurer's bond was the appropriate remedy for it to pursue. We are not prepared, however, to approve the doctrine laid down in that case that, where a deputy or employé of the treasurer misappropriates funds intrusted to him as such employé, the owner of such funds cannot sue in an action for money had and received to recover a judgment for the same. In the case of *Downs v. Baltimore City*, 111 Md. 674, 76 Atl. 861, 41 L. R. A. (N. S.) 255, 19 Ann. Cas. 644, it is held that the wrongful conversion of funds by an officer constitutes fraudulently contracting an obligation which will sustain an attachment, and the reasoning of the court in that case seems to us to be entirely sound. Many cases are cited in support of the text at page 78 of 6 Cor. Jur., holding that attachment lies for goods or money embezzled or stolen, or obtained by other species of fraud. The doctrine of that text is also authority for the proposition that an action of assumpsit is an appropriate remedy in such case.

[5] The remaining ground for quashing the attachment is that the statement "fraudulently contracted the debt" is joined in the disjunctive with the statement "incurred the liability." Does this make the attachment affidavit bad? It is quite true that, where inconsistent or separate grounds of attachment are joined in the same affidavit, they must be joined in the conjunctive, for the reason that if the disjunctive is used the defendant is not apprised of which one of

the grounds is relied upon; and then, too, the affidavit may be said not to contain an allegation that any ground exists, for the reason that the affiant only swears that one or the other of two or more grounds exist, but does not say which one. But this doctrine has no application where the statement contains but two or more phases of the same fact, or different facts of the same nature which constitute a single ground for the attachment. So it has been held that an affidavit is not defective because it states in the alternative different modes of effecting a stated purpose or intent, especially where in so doing it follows the language of the statute. 6 Cor. Jur. 136; 2 R. C. L. 833; Sandheger v. Hosey, 26 W. Va. 221; Shinn on Attachment & Garnishment, § 146; Drake on Attachments, § 102; Waples on Attachments & Garnishments, § 136. In this case the ground of attachment relied upon is that specified as the eighth ground in section 1, c. 106, and the fact that the defendant's alleged liability is charged to have arisen by fraudulently contracting the debt or incurring the liability is but two ways of stating the same substantive proposition, and under all of the authorities does not vitiate the affidavit.

Our conclusion therefore is to reverse the decree of the circuit court of Mineral county and remand the cause for further proper proceedings.

(83 W. Va. 197)

RAMSEY v. REID. (No. 3607.)

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

LICENSES. § 63—REVOCATION—EFFECT—REMOVAL OF STRUCTURES OR MOVABLES.

Though a license, conferring rights over the land of another, accepted and acted upon in good faith, may be revoked at the option of the licensor, the revocation effects only a discontinuance of the right to the future exercise and enjoyment of the privilege, and does not, in the absence of facts or circumstances indicating a contrary intention, prevent the licensee from removing structures or other movable articles placed thereon by him in reliance on the license, especially where such right has been recognized by the licensor, provided he causes the removal within a reasonable time after the revocation.

Error to Circuit Court, Tucker County.

Detinue by W. W. Ramsey, Trustee, against P. J. Reid. Judgment for plaintiff, and defendant brings error. Affirmed.

A. R. Stallings, of Parsons, D. E. Cuppett, of Thomas, and Chas. D. Smith, of Parsons, for plaintiff in error.

Melvin G. Sperry, of Clarksburg, D. H. Hill Arnold, of Elkins, and A. Jay Valentine, of Parsons, for defendant in error.

LYNCH, J. Plaintiff sued in detinue to recover possession, if it can be had, and, if not, the value, of steel railroad rails, and obtained the judgment which defendant seeks to reverse. Rulings upon the admissibility of testimony admitted, instructions given, the statute of limitations pleaded, and the right of the plaintiff to a judgment on the merits of the cause of action averred in the declaration form the basis of the writ.

The Clover Run Lumber Company, owner of a large boundary of timber land in Tucker county, entered into negotiations with Welch Brothers of Gowanda, N. Y., owners of a neighboring or adjoining tract, for the purpose of acquiring a right of way through it for a railroad for the transportation of lumber manufactured from the timber on the lumber company's land for shipment to market over the railroad of the West Virginia Central Railroad Company, now owned and operated by the Western Maryland Railway Company. To establish the grant of such right or privilege to construct and operate the lumber railroad over the Welch Brothers' land, that being a fact material to a correct determination of the issue raised by the pleadings, plaintiff, over objection, was permitted to and did introduce in evidence two letters, the body of each of which, and the signature of Welch Brothers, and the initials "T. F. W." or "T. F. Welch," thereto subscribed were typewritten. The letters apparently were written at Gowanda, N. Y., on July 17 and 26, 1902, mailed where written, and addressed to L. Hansford, attorney at law, Parsons, W. Va., the county seat of Tucker county. Hansford and Welch Brothers died before the trial of the action, and of course did not testify.

The letters, it is true, were part only of the correspondence between Welch Brothers and Hansford for permission to use the land owned by the former in the manner indicated, the ground of the objection to their admissibility being the failure of the plaintiff to introduce all of the correspondence on that subject. The first letter introduced purports to be a reply to a request in writing by Hansford, acting presumably for the Clover Run Lumber Company, for a statement of the conditions upon which the grant of the right of way would be given or could be secured, and the second to explain or offer some modification of the conditions embodied in the first.

Omitting the formal and unnecessary portions, the July 17th letter says:

"We will give the parties of whom you speak, if they wish it, the right or [of] way to build a tramroad across our land on the following conditions: They are to cut as little timber as possible in laying their tram, and they to pay us

the full value in cash for all timber cut; they also to pay any damage done to the land; second, they are to allow us or our assigns to use the tramroad at any time on fair terms, and if they refuse to do so, we are to cancel the right of way. After they have finished with the tramroad, the same is to remain on the land for our use until we remove our timber. We think that this will probably be satisfactory, as we certainly mean it to be fair. If they wish to build the tram, please advise us."

The second says:

"We have your favor of the 23rd inst. The objection to the terms of the right of way which you mention is a good one. We would hardly expect them to leave such a road as you say they are going to lay there, after they finish, for an indefinite length of time. We would like to have the privilege of using it for a reasonable length of time, which we no doubt can agree upon."

The genuineness of the letters and authenticity and competency as proof seems to be attested and established fully and completely by what subsequently was done pursuant to the negotiations, and upon the faith and belief implied in and based upon them, and from the fact that Welch Brothers consented to permit the use of their lands for the construction and operation of the road, and that if Hansford did not disclose the name of the person or client in whose behalf he wrote the letters, replied to by Welch Brothers, acts later done identified the Clover Run Lumber Company as the applicant for the right of way. It built the road over its own land and over other land severally owned by Welch Brothers, Dasher, Williams, and Phillips to intersect with the road of the Western Maryland Railway Company at or near Parsons, with which it obtained switch connection, and began and continued to operate the railroad over all the tracts of land mentioned for the transportation and delivery of lumber manufactured by it from the timber on its lands until in March, 1905, when it sold and conveyed all its property, real and personal, in Tucker county, including the sawmill, equipment, and appliances of every kind and description, and the railroad and railroad rights of way, to the Snowden-Gardner Lumber Company, and as did this company also during several years thereafter, and until plaintiff acquired the property, as hereinafter set forth.

In 1906 Welch Brothers sold and conveyed to J. M. McLaughlin the tract owned by them over which the railroad was built and operated, and also another tract not involved in this action. The deed of grant, after describing the tract first mentioned as being in Tucker county, W. Va., contains this paragraph:

"This conveyance of the above-described tract is made subject to a right of way across the same heretofore given to the Clover Run Lumber Company for a railroad upon terms and

conditions, but all the rights of the parties of the first part under the agreement for said right of way are hereby conveyed to the party of the second part hereto."

By the express terms of this deed McLaughlin acquired the property subject to the right of way across the same, but he was also granted the privilege mentioned in the correspondence on the part of Welch Brothers, as shown by the two letters admitted in evidence; that is, the right of Welch Brothers and their assigns to use the railroad so constructed and operated in hauling the lumber cut from the timber on the Welch Brothers' tract to the Western Maryland Railway for shipment to market, for which use the lumber road was to remain a reasonable time after the Clover Run Lumber Company or its assigns should complete their lumber operations.

Another significant fact bearing upon the same question is the action of Welch Brothers to recover of the Clover Run Lumber Company for damage done and timber removed by them in the construction of the road in violation of the agreement, for which by way of compromise the Clover Run Lumber Company paid to the plaintiff thereon \$338. Another confirmatory circumstance of the same general character is that after McLaughlin had acquired Welch Brothers' title, and after the plaintiff in this action had acquired the title to the land and equipment formerly owned by the Clover Run Lumber Company, McLaughlin sold the timber on the Welch tract to Wildman, who applied to the plaintiff and was given the right to use the railroad over the Welch tract to haul the timber cut by him thereon to the main line of the Western Maryland, thus recognizing plaintiff's ownership and control of the railroad and railroad rails, the latter being the subject-matter of this action. Wildman availed himself of the right given by the plaintiff, and, before this cause of action arose, had completed the cutting and hauling of the lumber sold to him by McLaughlin.

As still further establishing the genuineness of the letters referred to before and the connection of Hansford and the Clover Run Lumber Company with them, there is the letter of Welch Brothers to A. J. Valentine, the attorney who represented them in the sale of their tract to McLaughlin. It is dated November 10, 1906, and was in reply to a letter written by Valentine to them, asking concerning the rights of the Clover Run Lumber Company over the tract. In it they say:

"There was no former [formal] contract for right of way with the Clover Run Lumber Company. We simply gave them by letter the right to run their railroad over the land to remove their timber, they to cut as little timber as possible in doing it, and to pay for all timber cut in doing it, to pay us all damages and we have the right to use the railroad in getting

off our timber on fair terms, but they were not obliged to let their railroad remain after done with it. You can get the letter from Mr. Hansford."

These facts seem to foreclose any and all questions that might arise as to the grant of the permission or privilege, if not a right of way, over the Welch tract, the nature and character of which is reserved for later discussion.

The title to the property, real and personal, of every character and description owned by the Clover Run Lumber Company, including the rails in dispute, all of which the latter had conveyed to the Gardner-Snowden Lumber Company, March, 1905, for which it executed its notes for the deferred payments, plaintiff acquired through the decrees of sale and confirmation, entered in a suit in which he was the plaintiff, to enforce the lien reserved in the deed, and at which sale he became the purchaser, and the commissioners appointed to sell and authorized to convey the property executed to him a deed June 20, 1908. This deed granted the land, the buildings thereon, sawmill, lumber, tools, appliances, improvements, and specifically "the railroad extending from the Western Maryland Railroad near Parsons to the sawmill located on said land, with the appliances, locomotives and everything belonging thereto or used in connection therewith, with all rights of way used in connection with said railroad, or belonging to the Clover Run Lumber Company or the Gardner-Snowden Lumber Company, and all property of every kind and character whatsoever belonging to the said Clover Run Lumber Company or to the Gardner-Snowden Lumber Company, and by the decree of sale hereinbefore referred to decreed to be sold." Thus the plaintiff became vested with the title to every item of property owned and used by either of the two companies named in the deed to him; and, what is important now, the right, whatever it may properly be denominated, to operate the railroad over the Welch Brothers' land, or, if not to operate it, the right to remove the rails used in its construction, unless, as the defendant contends, that right has since been lost because of the statutory bar.

The statute of limitations has not and cannot have any application to the facts proved. McLaughlin took title to the land acquired by him with full knowledge and notice of the existence of the railroad thereon, a visible incumbrance on the property, and with the information imparted by the Welch Brothers' deed that he took it subject to the Clover Run Lumber Company's right of way, though he acquired Welch Brothers' rights therein, i. e., the right to use the same upon fair terms. *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W. Va. 685, 60 S. E. 890. McLaughlin's vendee of the timber obtained from the plaintiff the right to use the railroad, and did use it to haul the lum-

ber manufactured from the timber purchased by him to the railroad for the purpose of further transportation to market, and such use continued until well within the statutory period.

Nor has there been an abandonment of the lumber road by the plaintiff or by those through whom he derived title to the property, since which time he has always asserted a right to its enjoyment, and through his agent, McDonald, kept it under his surveillance, protection, and dominion.

There is some discussion as to the effect of the right conferred upon the Clover Run Lumber Company to use the lands of Welch Brothers for the purpose of the construction and operation of a lumber road, a road owing no duty to the public, a mere private way to haul lumber; that is, whether the grant or concession of the right created an easement or constituted a license only. It has some and does not have other characteristics of an easement, although the parties evidently so considered it. It was described as a right of way in the deed to McLaughlin and in the decrees in the chancery cause referred to, and in the deed to the plaintiff; and it may be, but we do not say, because not necessary, that the doctrine of estoppel applies. The right, however, seems also to partake of the nature of a license or of a mere temporary privilege to be exercised for a particular purpose subject to termination when that purpose is accomplished. Indeed, the difference between an easement and a license is subtle, shadowy, and elusive. Whether the one or the other, this much is beyond cavil or dispute; the right given was accepted apparently and acted upon in good faith by the Clover Run Lumber Company, and in pursuance thereof it made expensive outlays preparatory to the performance of the intended service, and when so prepared used it with the knowledge and acquiescence of the landowners and their privies in title, and by some of the latter permissively, until the defendant at the direction of McLaughlin removed and sold the rails in question.

Even if plaintiff's rights over the Welch tract constituted merely a license, a question which we do not decide, the rule that a licensee is entitled to remove his property and a reasonable time within which to cause its removal seems well settled. A license may be revocable at the option of the licensor, but the revocation effects only a discontinuance of the privileges granted by the license so far as their future exercise and enjoyment are concerned, and does not prevent the licensee from removing structures or other articles of value which he has constructed or placed on the land in reliance on the license, in the absence of facts or circumstances indicating an intention that the structures or articles should not be removed, especially where the licensee's right to remove has been expressly recognized. *Fischer v. Johnson*,

106 Iowa, 181, 76 N. W. 658; *Watson v. Empire Engineering Corp.*, 77 Misc. Rep. 543, 137 N. Y. Supp. 231; *Dame v. Dame*, 33 N. H. 429, 75 Am. Dec. 195; *Shipley v. Fink*, 102 Md. 219, 229, 62 Atl. 360, 2 L. R. A. (N. S.) 1002; *Pitzman v. Boyce*, 111 Mo. 387, 398, 19 S. W. 1104, 33 Am. St. Rep. 536; *G. F. W. W. Co. v. G. N. Ry. Co.*, 21 Mont. 487, 504, 54 Pac. 963. In *Putnam v. State*, 132 N. Y. 344, 30 N. E. 743, the court required compensation to the plaintiff for an injury to his property by acts amounting to the revocation of a parol license, the court saying:

"He was entitled to reasonable notice and opportunity to remove the boats, and, unless it appeared that in some way he had waived or surrendered such rights, he had a valid claim for damages against the state."

In view of all the circumstances detailed, the expenditures occasioned by the exercise of the permission granted, the compensation rendered, the benefits accruing to McLaughlin and to his assignee of the timber, in that the road afforded an available means to convey it to the railroad and thence to market, an opportunity which doubtless enhanced the value of the land and timber, his failure to revoke the license, if revocable, and give notice of the revocation, and the fact that the right to remove the lumber road is expressly recognized in the letters to Hansford, we are of opinion that the judgment is so clearly right that it ought to be affirmed, notwithstanding the peremptory instruction of which defendant complains withdrew from the jury the main fact of ownership, and left for their determination only the question of value.

Judgment affirmed.

(83 W. Va. 216)

BARNA v. GLEASON COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. EVIDENCE ⇨528(2)—DAMAGES.

In an action for damages for personal injuries the opinion evidence of a physician or surgeon as to the nature of the injuries, and whether permanent or temporary, is competent on the question of damages recoverable in the action.

2. EVIDENCE ⇨470—INCOMPETENT EVIDENCE—ADMISSIBILITY.

Opinion evidence of non-expert witnesses as to matters of which the jury are as competent to judge as the witness on facts given in evidence is not as a general rule competent to go to the jury.

3. APPEAL AND ERROR ⇨1053(1)—ADMISSION OF EVIDENCE—STRIKING EVIDENCE—PREJUDICE.

The admission of evidence, oral or documentary, subject to future rulings of the court

in the progress of the trial, and subsequently stricken out and not allowed to be read or considered by the jury, does not constitute prejudicial error calling for reversal of the judgment, when it does not clearly appear that the objecting party has been prejudiced by such rulings of the court thereon.

4. APPEAL AND ERROR ⇨1066—HARMLESS ERROR—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The giving of an instruction when there is any appreciable evidence tending to support it does not as a general rule constitute reversible error. If there is no evidence on the subject of such instruction the rule is otherwise.

5. TRIAL ⇨252(2) — EVIDENCE — INSTRUCTIONS.

If there is any appreciable evidence tending to support the theory of an instruction, the giving of it does not constitute reversible error, though it turns out on the final test that such evidence is not sufficient to support the verdict.

6. NEGLIGENCE ⇨136(5) — EVIDENCE — DIRECTED VERDICT.

Where the evidence of negligence on which recovery is sought is so indefinite and uncertain as not to warrant a verdict thereon, the court should on motion of defendant direct a verdict in his favor, and not to do so constitutes error calling for reversal and the award of a new trial.

7. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTIONS—MODIFICATIONS.

Where an instruction proposed is modified so as not to change its meaning or effect, and given as modified, such modification does not constitute reversible error.

8. WAR ⇨10(2)—ALIENAGE—PLEADING.

The fact appearing during the trial that the plaintiff, who has resided in this country for many years, was born in a country against which since suit brought this country has declared war, does not prove alienage. The fact that plaintiff is an alien enemy is defensive and ordinarily unavailing without timely plea.

Error to Circuit Court, Mineral County.

Action by Ambros Barna against the Gleason Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and a new trial awarded.

Taylor Morrison, of Keyser, and Albert A. Daub, of Cumberland, Md., for plaintiff in error.

Arthur Arnold, of Piedmont, and W. C. Grimes, of Keyser, for defendant in error.

MILLER, P. Writ of error to the judgment of the circuit court of Mineral county in favor of the plaintiff for the sum of \$7,583.33½. The action was one in case for alleged injuries sustained by plaintiff while employed as a miner in defendant's coal mine, due to the alleged negligence of de-

fendant pleaded in the declaration. The only plea by defendant on which issue was joined was not guilty.

The only grounds of action, averred in the two counts, or paragraphs, of the declaration are the neglect of the general duty of defendant to use reasonable care and skill in providing plaintiff with a reasonably safe place to work, and to use all due care, caution and diligence to prevent danger, accident and injury to him while so employed, and to that end to cause all loose coal, slate and slack, stone and sand overhead in the rooms, air courses, drifts, passage ways and working places in said mine to be removed or carefully secured with sufficient props and stays to keep the coal, slate, slack, stone and earth hanging loosely about the roof of said mine from falling upon him, and negligently, carelessly and knowingly assigning and directing him to work in a place in said mine known to be dangerous, and whereby he sustained his injuries.

[1-3] To reverse the judgment several points of error are relied on. The first relates to certain opinion evidence of Dr. Kemp, as to the permanency of plaintiff's injuries, and that he would never again be able to pursue his occupation of coal miner to the evidence of plaintiff that if he had been allowed to put down additional track as he desired, he would not have been injured, and to the striking out of certain of the evidence of defendant's witness Rinker, who after describing the condition of the mine previous to plaintiff's injuries, undertook to give it as his opinion that the mine where plaintiff was at work was in fine condition, the court ruling that all his evidence describing the condition of the mine should remain, but that his opinion evidence should be excluded. The alleged discrimination against the defendant in these rulings is emphasized by counsel for defendant as prejudicial.

The exception to Dr. Kemp's testimony is clearly without merit. Proper elements of damages in such cases are the nature of the injuries, and whether permanent or only temporary. Who is better qualified to speak on this subject than an attending physician and surgeon? That such evidence of a medical expert based on actual knowledge of the facts or facts proven by others is admissible is supported by the great weight of authority. *Norfolk Ry. & Light Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *Perkins v. Monong. Tract. Co.*, 81 W. Va. 781, 95 S. E. 797; *Holman v. Union St. Ry. Co.*, 114 Mich. 208, 72 N. W. 202; 2 Enc. Evidence, 848; *Carthage Tpke. Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865; *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314, 68 Am. Dec. 271.

Respecting the evidence of the plaintiff, that if he had been permitted to lay the track he desired he would not have gotten hurt, while he was an experienced coal miner, his opinion was hardly competent. Besides, the facts as to how and where he proposed to lay the track are very poorly developed, and how the laying thereof would have prevented his injury does not appear from the facts proven. If upon another trial the question becomes material, which we do not now see, he should be confined to stating all the facts and allow the jury to draw their own conclusions from them. On the same principle we see no error in the ruling of the court in respect to the opinion evidence of defendant's witness Rinker.

The next point urged is that after defendant had admitted on the record that it was in default to the Workmen's Compensation Fund at the time of plaintiff's injuries, the court over its objection permitted plaintiff to prove by the witness Topping of the Compensation Commissioner's office the same fact, and to introduce the record and also the correspondence with defendant relating to such default. It is admitted that this documentary evidence, admitted subject to the future ruling of the court, was not read to the jury, and that by defendant's instruction No. 7 given to the jury, all this evidence except the bare fact that the defendant had defaulted to the Workmen's Compensation Fund and was not a member thereof in good standing at the time plaintiff was injured, and also the fact that defendant had continued to deduct from plaintiff's wages his share of the premium, was stricken out and was not allowed to go to the jury. Nevertheless it is insisted that all of the facts got to the jury's ears to the prejudice of defendant, and that the verdict ought to be set aside on this account. We cannot agree with counsel on this proposition. How this evidence not read to the jury could have prejudiced defendant does not sufficiently appear. Courts frequently in the course of trials are obliged to admit evidence subject to future rulings. When better advised the course is to modify the rulings thereon. We are cited to no authority supporting the point and we find none.

[4, 5] Next in order are the several points as to the giving and refusing of instructions. And first respecting plaintiff's instructions, twelve asked, ten only given. It is affirmed of them generally that they are not complete and are not predicated upon the pleadings and proofs in the case. Respecting Nos. 1, 2, and 3 it is said as of the rest of those given, that they too much assume negligence, that they are abstract. It is not denied that each states correctly the general law of negligence. The objection is that they are objectionable in not limiting their application to the acts of negligence alleged and as to

which there was at least some degree of proof. We do not find that it has ever been held reversible error to give an instruction general in terms if there is any evidence to which it may be applied. The rule invoked by defendant's counsel is applicable where the instruction is so indefinite as to be misleading and there is no evidence in the case on which such instruction can be properly predicated. *Bond v. Balto. & Ohio R. R. Co.*, 96 S. E. 932; *Suttle v. Hope Nat. Gas Co.*, 97 S. E. 429, 432; *Lawrence v. Hyde*, 77 W. Va. 639, 645, 88 S. E. 45; *Blashfield's Instructions to Juries*, chap. VIII. See, also, 7 Enc. Dig. Va. & W. Va. 720, and the numerous cases there digested. Although the evidence of negligence may not be sufficient to justify a verdict, yet if there be any evidence to which the instructions may apply, the trial court may submit them to the jury. Of course if there is no evidence at all to which they can go, they should be refused as misleading. *Squillace v. Tidewater Coal & Coke Co.*, 64 W. Va. 337, 349 et seq., and cases cited at page 350, 62 S. E. 446. We have no hesitation in saying however that the practice ought in all cases to limit the instructions to the facts pleaded and claimed to have been proved. Stating the law in the abstract is calculated to mislead and bring about verdicts not warranted by allegata and probata.

Of instruction No. 5 it is pointed out not only that it is too general and abstract on the question of negligence but that by the language "and if you believe from the evidence that the defendant failed to do what, under the circumstances and facts in evidence *the jury may believe was incumbent on its part to do*, in order to keep the room or place in which plaintiff worked in a reasonably safe condition in that nature of business, and that the injury to the plaintiff was directly caused by such failure then the jury should find for the plaintiff," the court left it to the jury to say what is negligence, a question for the court, and not alone whether there was negligence. This exact instruction was approved in *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. It limits the finding of the jury to the facts and circumstances in evidence. It defines negligence and then tells the jury in the language quoted what the law is if they find the facts proven show neglect of duty. If there is any degree of evidence supporting the theory of an instruction, it is not error to give it, although it turns out on the final test not sufficient to support the verdict. *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, syl. 6; *Snedeker v. Rulong*, 69 W. Va. 223, 226, 71 S. E. 180; *Jones v. Riverdale Bridge Co.*, 70 W. Va. 374, 380, 73 S. E. 942.

Instructions Nos. 6 and 7 were predicated on the theory that there was evidence tending to show defendant had negligently allow-

ed coal to hang loose in the roof of the mine over the working place where plaintiff was employed, rendering the place unsafe, which fell on him and caused his injuries. On this theory and the very slight evidence thereof, the instruction may not be erroneous. No. 6 seems to have been approved in *Hansell-Elcock F. Co. v. Clark*, 115 Ill. App. 209, 212, affirmed by 214 Ill. 399, 73 N. E. 787. No. 7 is substantially the same as No. 6, and if supported by the facts proven, would justify a finding in favor of plaintiff, since the enactment of section 26, chapter 15P of Barnes' Code (Code 1913, c. 15P, § 26 [sec. 682]), *De Francesco v. Piney Mining Co.*, 76 W. Va. 756, 86 S. E. 777; *Yates v. Coal & Coke Co.*, 76 W. Va. 50, 84 S. E. 626.

Is plaintiff's instruction No. 8 erroneous? It is predicated on the theory of negligence in failure to have a competent mine foreman and negligence in the performance of his duties, a fact not alleged in the declaration as the basis of recovery. It is contended for plaintiff that failure to employ a competent mine foreman is comprehended in the general allegation of neglect to furnish a safe place to work, and to use all due care, caution and diligence to prevent danger, accident and injury to plaintiff, and failure to operate said mine with reasonable safety and ordinary care. We do not think so. But as the law now is, since the enactment of the Workmen's Compensation Law, whether or not the defendant employed a competent mine foreman is immaterial, and the instruction in its final paragraph tells the jury that the negligence of the mine foreman no longer excuses a defendant who has failed to comply with the Workmen's Compensation Act (Code 1913, c. 15P, §§ 1-55 [secs. 657-711]). *De Francesco v. Piney Mining Co.*, supra.

Plaintiff's instruction No. 9 was erroneously given. It is predicated on the theory that Brown, superintendent, directed plaintiff to work in a dangerous and unsafe place, knowing it to be dangerous, as a result of which he sustained his injuries. If it was true, which Brown denies, that he gave such direction, plaintiff's own evidence is that he was not at work at the place where Brown is alleged to have directed him, namely, on the right side of the entry, but on the left side contrary to such directions. So there was no evidence to support this theory. The instruction is based on the principles enunciated in *De Francesco v. Piney Mining Co.*, supra, and *Louis v. Smith-McCormick Const. Co.*, 80 W. Va. 159, 92 S. E. 249, and other cases that if the master with knowledge thereof directs his servant to work in a dangerous place resulting in his injury, the master is liable. But as the evidence justifies no such theory, the instruction was erroneous and misleading, and ought not to have been given. Instruction No. 10 is substantially the same as No. 9 and amenable to the

same criticism, and the court erroneously gave that instruction to the jury.

[8, 7] We have next to consider the defendant's instructions. Instruction No. 1, directing a verdict for defendant, was refused. We are of opinion on the record now presented that the evidence was insufficient to warrant the verdict. Plaintiff's case rested mainly if not entirely on his own evidence. The main if not the only theory on which his counsel relies to sustain the judgment is that he sustained his injuries by the fall of coal from the roof over the place in the mine where he was at work loading slate and stone into cars placed on the track for that purpose, which should have been discovered and removed by defendant, and not at the face of the coal which had been undercut and which he was required to take out. Slight evidence given by plaintiff on his examination in chief tends in some slight degree to support this theory. When asked where the bad place was in the roof with reference to the track, he answered, "Just above the track," but he immediately says that the place could not have been propped up because he could not put a prop in the middle of the track, that he could not put a post where he had to shovel coal. He admits he had been directed to work on the right side of the entry, but when he was injured he was working on the left side. His evidence is that if he had been allowed to shoot down the loose coal and to have put the track up, he would have escaped injury. He says however that the condition of the mine was good on Monday but had become dangerous by Saturday by reason of the coal which he wanted to shoot down becoming loose. Whether this loose coal was coal left by him in the roof back of his working place and over the track already built or at the face of the upper of the two seams from under which he had shot down the lower seam and the slate and stone binders of the two seams existing in the mine, his evidence in chief leaves in grave doubt. But on cross-examination he seems to make it clear that the coal that fell upon him was not the coal left by him over previous cuttings, but the upper seam of coal lastly undercut for him, which had become loose in his mining out part of the under seam and the binder of stone or slate and shot down and removed by him; for he says distinctly that it was not rock which fell on him, but coal. When asked if he had not taken out the coal itself, he said "Yes," and had loaded it onto the cars, and that the upper seam described by him as "big coal" fell on him. He does say it was roof coal that fell on him, but his evidence clearly indicates that the roof coal referred to was the upper seam of coal which it was his duty to mine out as well as the lower seam. The evidence shows that the machine man a day or two before plaintiff was in-

jured undercut the lower seam to the depth of six feet, and then it was the duty of the plaintiff to shoot down the lower seam and load it, and then the binder and remove it, and then to shoot down the upper seam and load it, and the manner of doing this was to pick it out and not go under where the coal was liable at any time to fall on him. It is conceded that if it was the upper seam of this coal which fell and did the injury, as one or two witnesses for defendant positively swore, defendant was guilty of no negligence, but plaintiff's injuries were due solely to his own negligence in going under the overhanging coal. The plaintiff admits that the coal could not be propped up while mining it out. So that as the facts now appear on the record, we must hold that no negligence was shown on the part of defendant on which a verdict for plaintiff can stand. Whatever the facts on another trial may show, there is no evidence in this record on which a verdict for plaintiff can safely be predicated.

Respecting defendant's instruction No. 5, modified by the court and given as No. 8, we see no error in the modification prejudicial to defendant's rights. The instruction as asked and as modified mean one and the same thing. As offered it would have told the jury that if plaintiff's injuries were caused *wholly* by his own conduct, he could not recover. The amendment introduced the words "and was not contributed to by negligence on the part of the defendant company or its officers, agents or employes." Of course if plaintiff's injuries were caused wholly by his own act, they could not have been contributed to by defendant. The instruction was good as offered and was not changed in meaning by the modification, although the modification was not necessary.

The next point to be considered is the action of the court in overruling defendant's motion to set aside the verdict of the jury and award it a new trial. The first ground was that the verdict was without evidence to support it. As we have decided in disposing of the defendant's instructions that the evidence was not sufficient to warrant a verdict for plaintiff, we are of opinion that the point was well taken and should have been sustained. The other grounds assigned for a motion for a new trial, we have already considered and disposed of.

[8] Lastly, the point is made that plaintiff is an alien enemy and that any judgment in his favor ought not to prevail on principles of international law and public policy. This point was not raised by the pleadings or otherwise by proof except on cross-examination by defendant plaintiff answered that he was born in Austria. Defendant excuses itself for not having pleaded this fact at the trial on the ground of ignorance thereof and want of opportunity. But this is an untenable po-

sition, for under our practice pleadings may be amended at any time during the trial if substantial justice will thereby be promoted. The fact admitted, that plaintiff was born in Austria, does not prove alienage, and though an alien, if residing in this country since 1904, as plaintiff proved he had been, and conducting himself properly, he is not precluded from maintaining suits in the courts to vindicate his rights. *Mittelstadt v. Kelly*, 202 Mich. 524, 188 N. W. 501; *Arndt-Ober v. Metropolitan Opera Co.*, 182 App. Div. 518, 169 N. Y. Supp. 944; *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851. But we need not consider this question further, for if the fact is as alleged by defendant, and it becomes material, it can upon the new trial be ordered be presented by proper plea.

For the errors found in the rulings of the trial court, the judgment will be reversed, the verdict set aside, and a new trial awarded.

(83 W. Va. 136)

JENNINGS v. McDOUGLE, Judge, et al.
(No. 3785.)

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. DIVORCE ⚡77—VENUE—PROCESS—STATUTE.

The option granted by section 7, c. 64 (sec. 3642) Code Supp. 1918, to the plaintiff in a divorce suit, of suing in a county other than that of the residence of the defendant, in case the parties last cohabited in the county so selected, carries with it by necessary implication the right to direct process to the sheriff of the county where defendant resides for service upon him there.

2. DIVORCE ⚡66—VENUE—STATUTE.

The general jurisdiction of a circuit court to grant divorces is circumscribed and limited by that part of section 7, c. 64 (sec. 3642) Code Supp. 1918, which provides that, if the defendant is a resident of this state, "the suit shall be brought in the county in which the parties last cohabited, or (at the option of the plaintiff) in the county in which the defendant resides."

3. DIVORCE ⚡66—VENUE—OPTION—STATUTE.

By section 7, c. 64 (sec. 3642) Code Supp. 1918, there is but one circumstance or condition the existence of which confers upon the plaintiff in a divorce suit the right to compel the defendant to go out of the county of his or her residence to defend a suit for divorce brought in some other county.

4. DIVORCE ⚡90—JURISDICTIONAL FACTS—PLEADING.

Where the jurisdiction of a court to grant a divorce depends upon the existence of certain facts, such facts must be pleaded, and, if not

pleaded, the court has no right or power to proceed or act in the cause.

5. DIVORCE ⚡90—VENUE—PLEADING.

The mere allegation of separation, abandonment, desertion, and refusal of cohabitation in a county is not the equivalent of an allegation that the parties last cohabited in such county.

6. DIVORCE ⚡66—JURISDICTION—VENUE—"IN THE COUNTY IN WHICH THE PARTIES LAST COHABITED."

The phrase "in the county in which the parties last cohabited," used in the statute, necessarily means the place where the parties ceased to live together as husband and wife in the same house, and ordinarily carries with it the idea of a substantial measure of continuity and regularity.

7. PLEADING ⚡290(5) — VERIFICATION — AMENDMENT—STATUTE.

When a statute requires all pleadings to be verified by the party in whose name they are filed (section 8, c. 64 [sec. 3643] Code Supp. 1918), an amendment of a pleading, especially if material and necessary to confer jurisdiction, must be verified, and, if not verified, will be disregarded.

8. PROHIBITION ⚡10(2)—JURISDICTION IN DIVORCE SUIT—PLEADING AND PROOF.

Where the allegations of a bill in a divorce suit are sufficient to show prima facie jurisdiction, the rulings of the lower court upon facts offered to prove the allegations are, at most, only erroneous, and therefore not correctable by writ of prohibition; but where, as in this case, the allegation of essential jurisdictional facts is omitted, the lower court is wholly without jurisdiction in the cause, and where the court is assuming and continuing to act without such allegations, prohibition will issue to restrain such action.

9. PROHIBITION ⚡17—JURISDICTION IN DIVORCE SUIT—PLEADING AND PROOF.

Nor in such a case will the writ be delayed to give plaintiff time to correct the bill by proper amendment.

10. PROHIBITION ⚡3(1)—OTHER REMEDIES—ACTION OF COURT WITHOUT JURISDICTION.

When a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies.

Petition for prohibition by Charles P. Jennings against Hon. Walter McDougale, Judge, etc., and others. Writ awarded.

A. F. McCue, of Clarksburg, and Smith D. Turner, of Parkersburg, for petitioner.

Chas. E. Hogg, of Point Pleasant, for respondents.

LYNCH, J. The petitioner, husband of the respondent Beryl Jennings, plaintiff in a divorce suit brought against him in the circuit court of Wood county, prays in his petition for a writ of prohibition to prevent her from further prosecuting the suit in that county,

and Hon. Walter E. McDougle, judge of the circuit court in which the suit was brought, from the continued assumption of judicial authority to hear and determine issues arising therein; the ground for the writ being want of jurisdiction to entertain the cause.

After their marriage in Cincinnati September 5, 1912, petitioner and his wife began and continued to cohabit together as husband and wife in Doddridge county until some time in December, 1914, a fact the truth of which is not anywhere controverted, "at which time," according to the allegations of the bill, "they separated, and have not since cohabited, that said separation took place in Parkersburg, and that the said defendant has during the greater portion of time since said separation resided in Doddridge county," and also "that on the ——— day of December, 1914, in Wood county, the said defendant willfully, without any just cause therefor deserted and abandoned this plaintiff, and has ever since, and doth now, willfully refuse to live and cohabit with this plaintiff as her husband." The process to answer was issued by the clerk of the circuit court of Wood county and directed to the sheriff of Doddridge county, and by him served on the defendant at his place of residence in Doddridge county. Indeed, his residence elsewhere either permanent or temporary seems manifestly doubtful.

[1-4] These are the sole facts alleged by the plaintiff in the divorce suit to empower the circuit court of Wood county to take cognizance of the cause averred for relief and to determine the matters in controversy and decree divorce from the matrimonial bonds; the grounds assigned therefor being willful abandonment and desertion without just cause and disloyalty to the marriage vows. Nowhere in the bill is there any other statement or declaration which shows or tends to show such or any cohabitation as warranted the bringing of the suit in any county except the county of defendant's residence. The statute prescribing the jurisdiction of circuit courts in divorce cases (chapter 64, § 7 [sec. 3642] Code Supp. 1918) is:

"The suit shall be brought in the county in which the parties last cohabited, or (at the option of the plaintiff) in the county in which the defendant resides, if a resident of this state; but, if not, then in the county in which plaintiff resides."

This provision circumscribes and limits the jurisdiction of circuit courts to grant divorces by three specific conditions—two where defendant resides in this state; one where he is a nonresident of the state. As between the first two plaintiff had the option or the right to select in which of two counties she should prosecute the suit, the first in the county in which she and her husband last cohabited together as husband and wife, if such cohabitation last occurred in a county other than that in which he resided; but, if

it did not, then she could sue only in the county of his residence. The statute is susceptible of no other construction. Its language is imperative, unambiguous, and specific. It designates the forum and limits the jurisdiction to two counties, and only two, where the party in default is a resident of the state, notwithstanding the general jurisdiction of circuit courts. There is but one circumstance or condition the existence of which confers upon the plaintiff in a divorce suit the right to compel the defendant to go out of the county of his or her residence to defend a suit brought in some other county for a divorce, or to defend against charges such as are lodged against defendant, except when and as allowed by statute; and to bring her cause within the statutory requirements she must allege and prove the existence of the fact prescribed by the statute in order to maintain her suit in such other county.

The obvious purpose section 7 had in view was to save the plaintiff the embarrassment, annoyance, and expense necessarily incident to the pursuit of a resident defendant, should he or she abandon or desert the other or otherwise disregard the marriage vows or duties and depart from the county where they last cohabited. The right given by it is one of the few exceptions to the general rule fixing the residence of the sole defendant, or the place where he may be found and served with process, as the situs of the forum where an action or suit may be maintained against him; and to bring herself or himself, as the case may be, within the exception, and to warrant the assumption or retention of jurisdiction of a divorce proceeding against a resident defendant, the plaintiff must allege in the bill the essential jurisdictional fact or facts. "When the jurisdiction of a court depends upon the existence of facts, it has no right or power to proceed or act upon a pleading which does not substantially set forth such facts." *City of Charleston v. Littlepage*, 73 W. Va. 156, 164, 80 S. E. 132, 51 L. R. A. (N. S.) 353; *Burke v. Superior Court*, 7 Cal. App. 178, 93 Pac. 1058; *Hogan v. Superior Court*, 16 Cal. App. 783, 791, 117 Pac. 947. Otherwise the cause is *coram non judice*. Acts done by a court which has no jurisdiction over the person, the cause, or the process are void. *St. Lawrence Co. v. Holt & Mathews*, 51 W. Va. 352, 363, 41 S. E. 351. Such, indeed, is the practically universal rule. See 13 C. J. 1235, and cases cited.

[5, 6] The mere allegation of separation, abandonment, desertion, and refusal of cohabitation in Wood county, an allegation relied on as the legal equivalent of an allegation of the last actual cohabitation, as contended for by counsel, falls far short of alleging such jurisdictional facts as warrant the assumption of jurisdiction by the circuit court of Wood county to entertain the cause. The place of separation, abandonment, deser-

tion, and refusal of cohabitation and the place of the cessation of cohabitation by husband and wife need not necessarily be, and frequently are not, in the same county, and probably were not in this instance. No allegation of the bill shows the fact to be otherwise. A separation may occur anywhere, though the parties may have ceased to cohabit at some other place. The phrase "in the county in which the parties last cohabited," used in the statute, necessarily means the place where the parties ceased to live together as husband and wife in the same house, and ordinarily carries with it the idea of a substantial measure of temporal continuity. *Calef v. Calef*, 54 Me. 385, 92 Am. Dec. 549. There is no such inseparable and essential connection between the language used in the statute to designate the jurisdiction in divorce cases and the allegations of the bill as warrants the sanction of the substitution of the latter for the former. Abandonment, desertion, and the discontinuance of cohabitation and refusal to renew it are grounds prescribed by the statute for the dissolution of the marriage; but they do not singly or conjointly suffice to determine the forum within the meaning of the statutory provision. In them inheres no such conception as justifies their adoption as the legal equivalent of the statutory phrase "in the county where the parties last cohabited," and therefore it clearly appears that the fact necessary to confer jurisdiction upon the circuit court of Wood county has not substantially or effectually been alleged in the bill.

[7, 8] Plaintiff's counsel, in her absence and on the day petitioner applied for the writ, did attempt to supply this defect by an order entered of record amending the bill by supplying the necessary allegation, but, though the bill was verified as required by the divorce statute, the amendment was not. Amendments of pleadings become part thereof, and where, as in cases of this sort, the statute requires that "all pleadings shall be verified by the party in whose name they are filed" (section 8, c. 64 [sec. 3643] Code Supp. 1918), the attempt to amend the bill in the manner indicated necessarily proved abortive. Where pleadings are required to be verified, an amendment thereto, especially if material and necessary to confer jurisdiction, must be verified, and an amendment not verified will be disregarded. *Foy v. Foy*, 35 N. C. 90. Where a statute requires a pleading to be verified, an amendment must also be verified. *Bland v. State* (Tex. Civ. App.) 36 S. W. 914; *Gregg v. Brower*, 67 Ill. 525; *McDougald v. Dougherty*, 11 Ga. 570, 593; 1 Stand. Ency. of Proc. 904. To hold otherwise would enable a party by amendment to incorporate in a bill already sworn to certain facts essential to his case to which he may not be willing to give the sanction of an oath. Thus the whole purpose of verification could be defeated.

Clearly, therefore, the writ should go if the right thereto depends solely upon the bill of the plaintiff in the divorce proceedings. It does not make out a case cognizable in the circuit court of Wood county, and equally clearly defendant's demurrer to the bill should have been sustained, not overruled, as it was, and the cause dismissed if the bill was not amended properly by allegations sufficient to show jurisdiction in the lower court.

The defendant tendered and was permitted to file a paper called and purporting to be a plea in abatement to the jurisdiction. This plea the court adjudged to be defective on plaintiff's demurrer. The basis for the abatement was that, as the petitioner was the only party defendant and resided in Doddridge county, the process to answer could not lawfully be issued, directed to and served on him in any other county.

Whatever may be the rule upon the right put in issue and denied by the plea upon issuance of process in other cases, it seems necessary to observe only that, as the statute grants to plaintiff the option of suing in a county other than that of the residence of the defendant, in case they last cohabited in the county so selected by her, certainly the Legislature meant to authorize what was done to bring defendant before the court, provided it had jurisdiction of the cause of action, notwithstanding the construction of section 2, c. 123 (sec. 4735) Code 1913, indicating the contrary. If there be no such authority, as counsel contend, section 7, c. 64, Code Supp., granting the option to prosecute the suit where the parties last cohabited, is meaningless. The right of selection given by the statute carries with it the right to pursue the procedure necessary to convene the parties to the litigation.

And further, section 2, c. 124 (sec. 4738) Code, provides that "process from any court, whether original, mesne or final, may be directed to the sheriff of any county," excepting only such process as is issued under the provisions of section 2, c. 123, Code, which may not be directed to an officer of any other county than that wherein the action is brought; this still being upon the supposition of complete jurisdiction to determine the cause. *Lawrence v. Hyde*, 77 W. Va. 639, 88 S. E. 45. See, also, *Marsh v. O'Brien*, 96 S. E. 795. Thus by this statute (section 2, c. 124) original process, as well as mesne or final, may be directed to the sheriff of any county, unless the action be brought under section 2, c. 123, in which case it cannot be directed to the officer of any other county than that in which the action is brought, unless the defendant be a railroad or other corporation specified in the statute. In no wise does it qualify section 7, c. 64, Code Supp., under which this proceeding was instituted; hence process under it may be directed to a sheriff in the county where defendant resides

or may properly be served. As the plea filed by defendant in abatement of the suit and his motion to quash the summons and return of service raise this and no other question, the ruling of the court was not improper.

But the plea and, as we have said, the demurrer to the bill sufficed to direct the court's attention: First, to the fact of the nonresidence of defendant within its territorial jurisdiction; and, second, to the absence from the bill of an allegation of such cohabitation of the parties as gave it jurisdiction of the cause and of the parties. They required such an examination of plaintiff's pleadings as must, except by inadvertence, have demonstrated the defects inhering in them, because of the omission to state therein a material and necessary fact.

Furthermore, it is said that, if the court has general jurisdiction of the subject-matter of the controversy, it has the power and may of right determine all other questions affecting jurisdiction, and that, when these are to be determined upon contested facts which the inferior tribunal is competent to inquire into and decide, prohibition will not be granted, though the court should be of opinion that the questions of fact have wrongfully been determined by the court below, and, if rightly determined, would have ousted the jurisdiction. Circuit courts, it is true, are courts of general jurisdiction, and as such may hear and determine suits for divorce. They do not have authority, however, or power to exercise jurisdiction in any divorce case if the defendant resides in a county outside of the circuit, unless the parties last cohabited in the county where the suit is brought, and unless such jurisdictional fact is made reasonably apparent by the bill itself, there is no occasion for the application of the rule contended for, because there are no contested facts to be determined. The bill vouches the fact of defendant's residence in Doddridge county at the time the suit was brought, and hence put the court upon its guard as to the second fact necessary to empower the court to proceed with the cause to final decree, the place of the last matrimonial cohabitation. There is no more real issue for the determination of the circuit court than there would be if it were conceded that the grounds upon which to rest the jurisdiction claimed had no existence as a matter of fact; for nothing can be more clear than that the lower court was powerless to entertain the bill because it did not allege a fact without which it could not proceed at all. It had no jurisdiction to determine any fact in controversy except that it was powerless to act in the absence of a showing of the grounds necessary to give it cognizance of the suit.

[9] It may be urged that plaintiffs should be given time to correct this defect in her bill by a proper amendment. That question, however, has been answered decisively by Judge Poffenbarger in *City of Charleston v. Little-*

page, 73 W. Va. 156, 164, 80 S. E. 131, 135 (51 L. R. A. [N. S.] 353), where he says:

"That allegations of fact, when necessary to vest jurisdiction in a court, must be sufficient is an obvious corollary of the proposition just asserted. To say the court may act upon insufficient allegations, because they may be made sufficient by amendment, is clearly inconsistent with the rule or principle. The facts stated do not confer jurisdiction, and ability to amend is mere matter of surmise and conjecture. Nothing in the view of the court establishes it. Hence it is not a fact within the knowledge of the court. If it is permitted to act under such circumstances, it clearly acts without jurisdiction. To permit action upon such a bill or pleading will enable the court at any time to exercise jurisdiction in cases in which it has none. If it has power to retain for amendment and act upon the pleading, pending the process of amendment, the time allowable for amendment would be within its discretion and not reviewable. It might take a week, a month, or a year, during which there would be action without jurisdiction shown. The power to proceed at all depends upon certain facts, and they are not shown and may never be. If a court could act upon such a pleading, there would never be any lack of jurisdiction except in those cases in which it is denied by some statute or principle of law and is in no sense dependent upon facts."

See, also, *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666, pt. 2, Syl.

It is further stated in the opinion in *Charleston v. Littlepage*, supra, 73 W. Va. 162, 80 S. E. 134, 51 L. R. A. (N. S.) 353:

"The rule is that, in passing upon the question of its own jurisdiction, a court always acts at its peril. Its decision upon that question affords it no protection from supervisory process from a higher court and confers no right upon the parties in whose favor the decision was rendered."

As in that case the court had acted upon the prayer of the bill in granting an injunction, when the allegations of the bill were insufficient to make out a case therefor, so here the circuit court of Wood county has assumed jurisdiction of the case and has acted thereon in awarding temporary alimony and suit money, and in referring the cause to a commissioner, as permitted by section 18, c. 64, and for the purposes therein specified, when the bill fails to aver facts essential to confer jurisdiction upon it. At page 163 of 73 W. Va., at page 135 of 80 S. E. (51 L. R. A. [N. S.] 353), in the opinion in *Charleston v. Littlepage*, supra, it is said:

"To warrant interposition by the writ of prohibition, it is only necessary to show that the inferior tribunal is actually proceeding or about to proceed in some matter in which it has no rightful jurisdiction. * * * Thus stated by courts everywhere, the terms of the rule preclude right to time for consideration after action, and authorize prevention of action without any allowance of time for consideration."

Because the circuit court has acted in awarding temporary alimony and suit money, with a petition now pending before the court to double the monthly allowance of the former and increase the latter, it readily appears that the remedy by the ordinary appellate process is inadequate. When such is the case, the remedy is by writ of prohibition. *Swinburn v. Smith*, 15 W. Va. 483, 501; *State v. Clark* (Tex. Cr. App.) 187 S. W. 760, 767. But, irrespective of the adequacy or inadequacy of other remedies, when a court is attempting to proceed in a cause without jurisdiction, prohibition will issue as a matter of right regardless of the existence of other remedies. Chapter 110, § 1 (sec. 4518) Code; *Marsh v. O'Brien*, 96 S. E. 795; *Wayland Oil & Gas Co. v. Rummel*, 78 W. Va. 196, 88 S. E. 741; *Weil v. Black*, 76 W. Va. 685, 688, 86 S. E. 666; *Charleston v. Littlepage*, supra. As in the cases last cited, so in this the lower court has decided to permit plaintiff and to require defendant to proceed with the cause, notwithstanding the apparent want of authority on its part so to do. Depositions have been taken, apparently for the purpose of supplying omissions in the bill; at least the contention is that the proof taken shows the last place of cohabitation to have been in Wood county, payment of alimony and counsel fees required, and a second application pending for an increased amount of both, as if all questions affecting the court's jurisdiction were adjudicated, settled, and determined formally and completely.

[16] In awarding this writ we do not base our action upon the sufficiency or insufficiency of the proof adduced to show cohabitation in Wood county, and we express no opinion upon the evidence. That is a disputed question of fact, and plaintiff had not yet concluded her taking of depositions. But it is well settled that facts necessary to the conferring of jurisdiction in a divorce suit must be pleaded as well as proved, and proof cannot be considered to supply the omission of an allegation necessary to show jurisdiction. *Stansbury v. Stansbury*, 118 Mo. App. 427, 84 S. W. 566; *Robinson v. Robinson*, 149 Mo. App. 733, 129 S. W. 725; *McGee v. McGee*, 161 Mo. App. 40, 143 S. W. 77. In the case first cited the jurisdictional facts were indisputably established by the uncontradicted evidence, but, because not pleaded, the cause was reversed, and the whole proceeding held to be coram non iudice for lack of jurisdiction over the subject-matter. It is essential that the jurisdictional facts be adequately pleaded. *Holton v. Holton*, 64 Or. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779; *Miller v. Miller*, 55 Ind. App. 644, 104 N. E. 583; 2 Bishop, Marriage & Divorce, §§ 589-594. If the allegations of the bill had been sufficient to show prima facie jurisdiction, the ruling of the lower court upon the facts

could have been, at most, only erroneous, and therefore not correctable by writ of prohibition.

Writ awarded.

(83 S. Va. 169)

BAILEY et al. v. TRIPLETT et al.
(No. 3544.)

(Supreme Court of Appeals of West Virginia.
Jan. 21, 1919.)

(Syllabus by the Court.)

1. ARBITRATION AND AWARD ⇨57—AWARD—VALIDITY.

In making an award upon matters in controversy arbitrators are bound by the terms of the agreement submitting the questions to them. Such agreement is their charter of authority, and, if they make an award which violates or disregards some of the terms thereof, the same will not be upheld.

2. ARBITRATION AND AWARD ⇨29—AUTHORITY OF ARBITRATORS.

Where, in an agreement submitting to the determination of arbitrators the proper location of a disputed boundary line, the parties agree upon the method to be pursued in order for the proper location of such line, neither such arbitrators nor an umpire selected by them, in case they fail to agree, have authority to make an award arrived at by disregarding the agreements of the parties as to the method of solving the dispute, and substituting for such agreement in this regard the opinion of the arbitrators or the umpire as to the proper method therefor.

3. ARBITRATION AND AWARD ⇨65—CONFIRMATION OF AWARD.

Where the proper location of a disputed boundary line is submitted by the interested parties to arbitrators, with the provision that in case of their disagreement an umpire selected by them shall make the award, and they do disagree, and such umpire so selected makes an award in the alternative, finding that in his judgment the disputed boundary line properly located is at a certain place, but that if he follows the directions contained in the agreement signed by the parties the disputed boundary line is at a certain other place, the circuit court, upon being asked to enter judgment upon such award, will disregard the award made by the umpire based on his own opinion, and will enter judgment confirming that award, made in accordance with the methods agreed upon by the parties for the location of the disputed line, in the absence of fraud, mistake, or adventitious circumstances.

Error from Circuit Court, Mineral County.

Arbitration agreement entered of record, in circuit court between Susie M. Bailey and others and John J. Triplett and others for the determination of a disputed boundary line. From a judgment disregarding the umpire's award on his own opinion and confirming his

award in the alternative according to directions contained in articles of submission, John J. Triplett and others bring error. Affirmed and remanded.

W. H. Griffith and R. A. Welch, both of Keyser, for plaintiffs in error.

W. C. Grimes, of Keyser, for defendants in error.

RITZ, J. On the 6th day of March, 1789, James Dawson procured a patent for a tract containing 396 $\frac{1}{4}$ acres of land. This land is bounded by four lines of equal length, to wit, 252 poles each, intersecting each other at right angles, thus making a tract of land in the form of a square. Dawson conveyed the land to Thomas Bond in the year 1792. In the year 1801 Thomas Bond conveyed a part of this tract of land to one Edward McCarty. The part so conveyed was the northwestern portion thereof, and was separated from that remaining by a straight line running from a point in the southern line of the original tract 70 poles from the southwest corner thereof to a point in the northern line of said tract at a distance of 12 poles from the northeast corner thereof. The description in the deed to McCarty gives slightly changed courses from those contained in the original patent. The description of the 396 $\frac{1}{4}$ -acre tract in the original patent is as follows:

"Beginning at a hickory, corner to O'Neal; thence N., 88° E., 252 poles; thence N., 2° W., 252 poles; thence S., 88° W., 252 poles; thence S., 2° E., 252 poles, to the beginning."

The beginning corner, which is referred to as a hickory, corner to O'Neal, is established and is not in dispute. The land conveyed by Bond to Edward McCarty in 1801 is described in the deed as follows:

"Beginning at a hoopwood tree standing by a point of rocks about 20 poles E. from the North branch of the Potomac river and corner to Nicholas Seaver; thence with his line N., 85° E., 70 poles, to the three chestnut oaks on the ridge called 'Bond Ridge'; thence with the top of said ridge N., 40° E., 86 poles, to a large white oak in a hollow; the same course continued N. 296 poles, to two small hickories on the side of a hill in John Ravenscraft's line; thence with it S., 85° W., 240 poles, to his corner; thence S. 252 poles to the beginning."

The point referred to in this description as the beginning corner is the same as the beginning corner referred to in the patent to Dawson, and is not in dispute. The next corner called for on top of Bond ridge is likewise not in dispute, and it is the location of the line extending from this corner, being the next line referred to in the description, that is disputed. The Triplett's now own the southern part of the land conveyed to McCarty by the deed of 1801, and the Baileys own the land which was retained by Bond when he made the deed to McCarty, which is the land lying southeast of the disputed line.

It will be observed that the Triplett's do not own the land along the entire course of this line, but its correct location solves the matter in dispute between the parties. It will likewise be observed that the line called for in the McCarty deed corresponding to the line in the Dawson patent with a course of N. 88° E., has a course N., 85° E., and that the other corresponding lines have this variation of 3°. The parties, not desiring to resort to litigation in the establishment of the disputed line, entered into an agreement by which they submitted the question of its location to the determination of two surveyors mentioned in the agreement, and provided, further, that if the arbitrators did not agree they should select an umpire, and that this award should be final and binding on the parties, and should be entered as the judgment of the circuit court of Mineral county. This agreement was entered upon the records of the circuit court of Mineral county, and the arbitrators proceeded to act under it. They failed to agree, and selected an umpire. This umpire made an award finding that in his opinion the true location of the line was as found by arbitrator Harr, and which is the line contended for by the Triplett's; but he also found that, if this line was to be located in the manner pointed out in the arbitration agreement, that is, by locating the northern end of it, and then running a straight line between that point and the point agreed on as the other end of the division line, it was as located by arbitrator Hott. This award was presented to the circuit court of Mineral county, and that court asked to enter a judgment thereon. The court took the view that the terms of the agreement directing the arbitrators how the northern end of the disputed line should be ascertained were final and binding upon the arbitrators, and that they could not depart from these terms. He therefore disregarded the award made by the umpire based on what he believed to be the correct line, and entered a judgment on the alternative award, fixing the location of the line by following the directions contained in the articles of submission, and from this judgment this writ of error is prosecuted.

The agreement of submission contains certain stipulations of the parties as to how the arbitrators selected by them shall determine the proper location of the disputed line. The provisions of the agreement in this regard, which are pertinent to this discussion, are as follows:

"It is further mutually agreed that the southwest corner of the lands now owned by the said John J. Triplett and Nannie Triplett, which corner was formerly known as the 'O'Neal Corner,' and also as the 'Nicholas Seavers Corner,' now the corner of said Triplett to Alkire and Ravenscraft (and described in deed from Bond to McCarty as 'beginning at a hoopwood tree, standing by a point of rocks about twenty poles E. from North branch of the Potomac'), is the recognized and established

corner of the said patent made to said James Dawson; and the corner on top of Bond's ridge, in line of original survey, N., 85° E., 70 poles from said southwest corner of said original survey, according to the calls of said conveyance from Thomas Bond to Edward McCarty, July 10, 1801, is now a recognized, established, and undisputed corner, the beginning of said line in dispute between said lands and which line is to be established hereunder.

"For the further aiding and guiding the said surveyors, it is mutually agreed that the following lines shall, for the purposes hereunder, be recognized and treated as fully established lines of the original survey, patented to James Dawson, March 6, 1789:

"Beginning at the southwest corner of said patent, the corner hereinbefore described, and recognized as the undisputed southwest corner of the said Triplett lands, and running thence N., 88 E., 252 poles, according to the calls of said original survey of said patent, at the end of which distance, only for the purpose hereof, a corner shall be treated as fully established and recognized, according as the survey made by said arbitrators may show; thence N., 2° W., 252 poles, according to calls of said patent to said James Dawson, to a corner of said original survey, probably now gone, but for the purpose contained herein shall be recognized and fully established as the northeast corner of said patent to said James Dawson, according as the survey of said arbitrators may show; thence S., 88° W., 252 poles, at the end of which distance shall be treated as the fully established and recognized northwest corner of the said patent for the purposes contained herein; thence S., 2° E., 252 poles, to the beginning; and, for the purposes of establishing said boundary or division line in dispute between the parties hereto, it is mutually agreed that beginning at said northeast corner of said patent, running thence, according to calls of said original survey of said patent, S., 88° W., 12 poles, and S., 85° W., 240 poles, reversed, according to the calls of said deed from Thomas Bond to said Edward McCarty, from the northwest corner of said patent, in the line of said original survey, is the end of said original boundary or division line in dispute between the lands of the parties hereto, and which line is described in deed from Thomas Bond to Edward McCarty, which deed is dated July 10, 1801, and of record in Deed Book No. 12, page 340, Hampshire County Records, as follows:

"[Beginning] to three chestnut oaks, on a ridge called Bond's Ridge; thence with the top of said ridge N., 40° E., 86 poles, to a large white oak in a hollow; the same course continued all 296 poles to two small hickories on the side of hill in John Ravenscraft's line."

"It is further agreed that for the purpose of making and surveying any of said lines necessary to be surveyed and establishing any corner necessary to be established, in order to properly and truly locate said boundary or division line in dispute, the following rules shall govern said surveyors: First. Recognized and established, natural, and artificial monuments, corners, and marked lines shall govern over courses and distances. Second. Where natural monuments or marked lines do not exist or cannot be established, the course and distances

called for shall govern, except: Third. In determining lost corners or lines, the lost lines shall be run according to courses and distances in the original survey, unless the lines so run do not close the survey with the corners remaining, in which case the courses shall be followed, and distances disregarded; but, if the original survey cannot be made to close, the courses shall be deviated from so as to make said survey close according to the right and the true intent of said survey; and the gap, if any, shall be closed as seems most consistent with all the calls."

[1, 2] It will be seen from the part of the agreement thus quoted that the parties thereto fixed upon the means which the arbitrators should use in determining the disputed line, and that was to begin at the recognized corner, being the southwest corner of the Dawson patent, as well as the southwest corner of the Triplett land, and then run a line 252 poles on the course contained in the Dawson patent, which point, for the purpose of locating the line in dispute, was to be treated as the southeast corner of the Dawson patent; thence to proceed from that point upon the course called for in the Dawson patent a distance of 252 poles, which point should be considered, for the purpose of locating the disputed line, as the northeast corner of the Dawson patent, and so running around the Dawson patent upon the courses and for the distance therein contained, and the corners thereof located in this way were to be treated as the true corners of that patent for the purpose of the arbitration. Then, for the purpose of locating the northern end of the disputed line, it was agreed that the arbitrators should start from the northeast corner of the Dawson patent as above located, and run with the courses given in the Dawson patent, to wit, S., 88° W., 12 poles, at the end of which 12-pole line would be the northern end of the line in dispute, and which point is to be 240 poles on the course S., 85° W., reversed from the northwest corner of the McCarty land. It will be observed from this that the agreement of the parties was that the northern end of the line in dispute was in the northern line of the Dawson patent at a point 12 poles from the northeastern corner of said patent, and all that was necessary for the arbitrators to do to carry out the agreement was to locate the lines of the Dawson patent, then to locate a point 12 poles west from the northeastern corner thereof, and fix this as the northern end of the line in dispute, and run a straight line from that point to the beginning of the division line between the parties, and so much of this line as separated the lands of the one party from the other would be the line agreed upon. One of the awards made by the umpire in this case was made in this way, and this is the one which the court adopted. The other award made by the umpire is based upon evidence taken before him, and by other facts which he observed

upon the ground, to the entire disregard of the directions contained in the agreement of the parties as to the manner of ascertaining and locating the disputed line; and the only question is whether the arbitrators, or rather the umpire, had any authority to locate any line except as directed by the agreement of submission; and, second, if he did not, whether the court could enter a judgment upon such an alternative finding, or whether all of the findings of the umpire should have been entirely disregarded and the parties left to settle the dispute some other way. The agreement of submission entered into by the parties is the authority for the arbitrators and the umpire to act. Without that, anything that they do is entirely without authority. It is their charter of authority, and can it be said that, where matters in dispute are submitted to them for determination, they have authority to decide that dispute in any manner which they see fit, in utter disregard of the provisions of the agreement of submission? Where the parties themselves agree upon the manner of the submission of the dispute, and upon what shall be considered by the arbitrators, and what shall be done by them in order to a settlement of the dispute, it is part of the agreement, and is as binding upon the arbitrators as any other part, and they have no authority to make an award in violation of, or not in accordance with, such stipulations. Such an award cannot be binding upon the parties, and would be entirely beyond the authority given to the arbitrators. In 5 Cor. Jur. at page 126, it is said:

"To adopt a different rule of decision from that which the terms of the authority require the arbitrators to apply is as much a departure from the submission as to pass upon a matter not submitted, or to omit to consider a matter embraced in the submission."

It is also laid down in 2 R. C. L. p. 374, that the powers and duties of arbitrators are determined by the order of submission. Where the parties themselves limit the arbitrators in the manner of their proceeding, such limitations in the agreement of submission are as binding upon the arbitrators as any other provision of the agreement. So in *Insurance Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679, it is held that arbitrators cannot act beyond the authority conferred by the submission, and, if they do so any award made will not bind the parties. In *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9, which was a cause submitted to arbitration for the purpose of determining a disputed line, it was held that, where the agreement of submission provided that the arbitrators should determine the line by the deeds and other evidence deemed necessary to enable them to arrive at a just and fair settlement, they were not authorized to determine such dispute in such manner as they may deem just and fair, but that they must determine it in accordance with the title

papers of the parties and the evidence submitted to them, as provided in the order of submission. Similar holdings are found in the cases of *Mathews v. Miller*, 25 W. Va. 817; *Austin v. Clark*, 8 W. Va. 236; *Dunlap v. Campbell*, 5 W. Va. 195; and *Swan v. Deem*, 4 W. Va. 368. We are clearly of the opinion that the agreement of the parties as to the methods to be pursued by the arbitrators and the umpire in locating the disputed line is as binding upon them in doing the work as any other part of the agreement, and that the parties could not be bound by any award not made in accordance therewith. There is no real dispute in this case but that the conclusion adopted by the judgment of the court is the only one which can be reached by following the directions given in the agreement of submission; but one of the arbitrators does not agree that that is the proper way to locate the disputed line, and declined to agree to it for that reason. This necessitated the appointment of the umpire. The umpire was likewise of the opinion that the agreement made by the parties as to how the line should be fixed and determined was not the proper way for deciding it, but he, as before stated, in addition to finding this, also found as an alternative award that, if the agreement in this particular was binding upon the arbitrators, then the line finally established by the circuit court of Mineral county is the true division line. Much evidence was taken tending to show that the other line is the correct one. This evidence was all improper and immaterial. There is no showing that any fraud was practiced upon either of the parties in entering into the agreement to submit the question to arbitrators. They were anxious to get the line in dispute between them settled, and without knowing just where the same would run on the ground they, from the title papers and the information they possessed, freely and fairly entered into the agreement. The policy of the law is to settle disputes by arbitration, and when contending parties submit a matter of this character, or of any other character, to arbitrators for the purpose of determining their differences, and agree upon the method to be pursued by such arbitrators, and there is no fraud or mistake in the making of such agreement, an award made thereunder will be final and binding upon the parties. On the other hand, an award made in disregard of the agreement entered into, even though it may be the opinion of the arbitrators that such is the correct solution of the matters submitted to them, will be set aside as having no authority for its basis.

Attention is called to the fact that it is impossible to form the northern line of the Dawson patent in the manner indicated in the agreement of arbitration, for the reason that the 12-pole line therein referred to is on a course of S., 88° W., 12 poles, while the continuation of the line to the northwest

corner of the McCarty line is on a course of S., 85° W., 240 poles. This is quite true, but it will also be observed that it is provided that, in case the original survey could not be made to close on the courses given, the gap should be closed as seems most consistent with all the courses. It is apparent that the intention of the parties was to locate the lines of the Dawson patent, and to fix the northern line of that patent as a monument in which the northern end of the disputed line would be found at a point 12 poles from its eastern end and 240 poles from its western end, and the only way to fix this line was to make the course S., 85° W., which is the course given in the McCarty deed, correspond with the course of the corresponding line of the original patent, and this was what the umpire did in his alternative award.

It is also contended that to locate the line in dispute as it was located by the circuit court of Mineral county changes the course given in the McCarty deed. This is true, but it is likewise true that it is provided in their submission that, where a monument was called for by their agreement, courses and distances must yield to such monument. The point in the northern line of the Dawson patent is a monument when that northern line is fixed and established. *Vandal v. Casto*, 81 W. Va. 76, 93 S. E. 1044. So that, when the northern line of the Dawson patent was fixed in the manner pointed out by the parties in their agreement, it became a monument, and their agreement that the northern end of this disputed line should be in this northern line of the Dawson patent at a point 12 poles from its eastern end made it necessary to change the course given in the McCarty deed for the disputed line, which was done, not only in accordance with the terms of the agreement of the parties that such should be the case where such a contention arose, but also in accordance with the law governing the question of reconciling contradictory descriptions in deeds.

[3] In view of the fact, however, that the umpire made two awards, and made their validity depend upon whether the court came to the conclusion that the parties were bound by the stipulations of the agreement of submission, did the circuit court of Mineral county have the authority to adopt that one of such awards that was in accordance with the terms of the agreement of the parties? We think the court not only had the power, but that it was his duty to disregard the award confessedly made in violation of the agreement entered into, and adopt the other award made by the umpire as the only one which had a real basis for its existence. This was the course taken by the circuit court which we think was clearly right.

We therefore affirm the judgment complained of, and remand the cause to the circuit court of Mineral county, in order that said judgment may be executed.

(23 Ga. App. 193)

BURGESS v. TORRENCE. (No. 9683.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ⇨85(1)—RECOVERY ON MARRIED WOMAN'S NOTE—FRAUD.

B. W. Torrence brought suit against Mattie L. Burgess, a married woman, on a promissory note signed by her and given under her written rent contract with plaintiff. The defendant admitted signing the note sued on, but filed a defense setting up: (1) That she was not indebted to the plaintiff, and received no consideration or benefit from the signing of the note sued on; that the note was given for the rent of a farm rented by the plaintiff to defendant's husband, Gilliam Burgess; that she was forced by the plaintiff, acting through her husband, to sign the note; that her husband "threatened her until she was by fear forced to sign the said note; that she would not have signed the same had it not been for such threats and such other frauds and menaces heaped upon her by the plaintiff, B. W. Torrence, through her ignorant and unlearned husband"; and (2) "that it is not her debt or obligation; that she is not responsible to the plaintiff in any sum whatever; that she is now, and at the time of signing the note, was a married woman, and she wishes to take advantage of the statute making her exempt from the payment of her husband's debts in such cases; that the note was secured through fraud, force, and threats and fears." Upon the trial of the case the jury returned a verdict in favor of the plaintiff. Defendant made a motion for a new trial, which was overruled, and defendant excepted. *Held:*

"Fraud voids all contracts" (Civ. Code 1910, § 4254), and the free assent of the parties being essential to a valid contract, duress, either by threats or other arts, by which the free will of the party is restrained and his consent induced, will void the contract (Civ. Code 1910, § 4255). But in order for a married woman to defeat a recovery by the payee on a promissory note made by her, upon the ground that her signature thereto was procured by the fraud and duress of her husband, she must not only show that such was the fact, but must also show that the payee of the note was either a party to such fraud and duress, or that he had knowledge thereof. *Pate v. Allison*, 114 Ga. 651, 40 S. E. 715; *Johnson v. Leffler Co.*, 122 Ga. 670, 50 S. E. 488 (3); *Bateman v. Cherokee Fertilizer Co.*, 21 Ga. App. 158, 83 S. E. 1021. The court therefore did not err in charging the jury as complained of in the first ground of the amendment to the motion for a new trial.

2. HUSBAND AND WIFE ⇨80, 85(1, 6)—WIFE'S ASSUMPTION OF HUSBAND'S OBLIGATION—LIABILITY—HUSBAND AS WIFE'S AGENT.

While under our law a married woman cannot assume the debts of her husband (Civil Code of 1910, § 3007), still the issue as made by the evidence in this case was not one in which this principle was involved. Even if it should appear that the plaintiff in the first instance rent-

ed the land to the husband, and subsequently entered into a new and different agreement with the wife, whereby she was to take over the land and become the tenant instead of the husband, such a procedure could not properly be called an assumption by the wife of the husband's obligation, but would be an original undertaking on her part; and unless it be shown that the new contract was brought about by fraud or duress practiced upon the wife by the plaintiff, or by another with his knowledge, there would be nothing to render such an agreement on her part invalid. The consideration going to the wife in such a case is not the incidental extinguishment of the prior promise of the husband, but the taking over by her of the land itself under the rent agreement. *Simmons v. International Harvester Co.*, 22 Ga. App. 358, 96 S. E. 9 (5), and cases there cited. That the negotiations leading up to the signing of the rent notes by the wife were had through the husband would not change the rule. *Longley v. Bank of Parrott*, 19 Ga. App. 701, 92 S. E. 232 (1).

3. VERDICT—CHARGE OF COURT.

The verdict was authorized by the evidence, and the charge of the court is not subject to the exceptions taken.

Error from City Court of Nashville; C. A. Christian, Judge.

Suit by B. W. Torrence against M. L. Burgess. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

R. A. Hendricks and Wm. Story, both of Nashville, for plaintiff in error.

W. R. Smith, of Nashville, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 174)

WHITES v. STATE. (No. 9602.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1918.)

(Syllabus by the Court.)

INTOXICATING LIQUORS —251— CONDEMNATION OF VEHICLE—RIGHTS OF CONDITIONAL SELLER.

In a statutory proceeding to condemn or confiscate a vehicle employed in the illegal transportation of liquor, contrary to the provisions of section 20 of the act of 1917 (Acts 1917 [Ex. Sess.] p. 16), where the owner of the vehicle had previously sold it to the party engaged in the illegal transaction, but reserved title to it until full payment of the purchase price, part of which purchase price was represented by a retention of title note duly recorded, and the remainder of which was by agreement to be covered by a similar note, in case the vendee failed to pay the remainder on or before a date

specified, and where the evidence disclosed that the vendors were wholly without knowledge of the illegal intent or acts of the vendee, and the property was seized in behalf of the state before the agreed time when the second note reserving title was to be executed in the event that the amount to be covered thereby had not been previously paid, the owner would be entitled to the full amount of the purchase money due, as might appear from the evidence, including both the amount covered by the note actually given and the note agreed to be given.

Error from City Court of Dublin; R. D. Flynt, Judge.

Statutory proceeding by the State against O. E. Beachman to condemn or confiscate a vehicle employed in the illegal transportation of liquor, with intervention by Whites, a partnership. Judgment of condemnation and sale, with order for payment of part of proceeds to interveners, and interveners bring error. Reversed.

Burch & Daley and J. B. Green, all of Dublin, for plaintiffs in error.

S. P. New, of Dublin, for the State.

WADE, C. J. This case arose under the act of 1917 (Acts of 1917, Extraordinary Session, § 20, pp. 16, 17), which provides that—

"All vehicles and conveyances of every kind and description which are used on any of the public roads or private ways of this state, and all boats and vessels of every kind and description which are used in any of the waters of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law, shall be seized by any sheriff or other arresting officer, who shall report the same to the solicitor of the county, city or superior court having jurisdiction in the county where the seizure was made, whose duty it shall be within ten days from the time he received said notice to institute condemnation proceedings in said court by petition, a copy of which shall be served upon the owner or lessee if known, and if the owner or lessee is unknown notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. If no defense is filed within thirty days from the filing of the petition, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court. Should it appear upon the trial of the case that said vehicle, conveyance, boat or vessel was so used with the knowledge of the owner or lessee, the same shall be sold by order of the court after such advertisement as the court may direct."

The case was determined by the trial judge, without the intervention of a jury, upon the following agreed statement of facts:

"(1) That V. Chavous, a policeman of the city of Dublin, Ga., did on the 19th day of January, 1918, arrest one O. E. Beachman and seize one automobile, same being described as

follows: Oakland roadster automobile No. 3702124, motor No. 10751—and that, at the time the said V. Chavous seized the said automobile and arrested the said Beachman, the said Beachman was carrying in said automobile whisky, over the highways of Laurens county and into the city of Dublin, Ga.; that the said V. Chavous made said seizure and arrest without a search warrant, state warrant, or any legal process whatever.

"(2) That the said O. E. Beachman is the conditional owner of the said automobile, having purchased the same from Whites, the interveners herein; that he owes the said firm the sum of \$815 and interest on the purchase price of said automobile, and executed to the Whites a note reserving the title in them until they were paid; said note being for the amount of \$515 and interest.

"(3) That, in addition to the sum represented by the above-stated note, Beachman is due on the purchase price of said automobile the sum of \$300, which said sum he agreed to pay on the 21st day of January, 1918, or, in lieu of making said payment, he was to give a note reserving title to said automobile in the Whites for the principal sum of \$300.

"(4) That the said sums as above set forth are now due and unpaid.

"(5) That the following is a true and correct copy of the said reservation title note given by said Beachman to the said Whites, to wit:

"\$515. Dublin, Ga., January 14, 1918.
"On Feb. 10th after date I promise to pay to Whites, or order, five hundred fifteen and no/100 dollars, payable as follows: \$200 on Feb. 10, 1918, \$165 on March 10, 1918, and \$150 on April 10, 1918, with interest from date at 8 per cent. per annum, interest payable annually, for one Oakland roadster, No. 3702124, motor No. 10751.

"The title to said property to remain in said payee, his heirs and assigns, until fully paid for. If said property is lost or destroyed in any way, I am still to pay this note, and all costs and attorney's fees incurred in its collection, which costs and fees I hereby agree to pay. And to secure the payment of this note — hereby mortgage and convey unto said payee, his heirs and assigns, the following property, to wit: —

"I hereby waive for myself and family all rights or benefits of homestead or exemption of personalty as against this debt or any renewal thereof. Witness my hand and seal the day and year above written.

"O. E. Beachman. [L. S.]
" [L. S.]

"Witness: C. A. Shepard, Com. N. P. L. Co. Ga.

"Postoffice, — County.

"State of Georgia, Laurens County.

"Clerk's Office, Superior Court.

"Filed for record at 8 o'clock a. m. this 23d day of Jan'y, 1918, and recorded in Book 90, folio 684, this 25th day of Jan'y, 1918.

"E. S. Baldwin, Clerk."

"(6) That the Whites had no knowledge of the fact that said automobile was being used as a whisky carrier by the said O. E. Beachman; neither did they know, at the time they sold said automobile to the said O. E. Beachman, that he intended to use said automobile for said purpose.

"(7) That V. Chavous said that he would pay the Whites the amount of its written reservation title, which was refused."

The court rendered judgment, condemning the automobile which had been seized, and ordering that it be sold, and that from the proceeds of such sale the sum of \$515, principal and interest, be paid on the claim of Whites, the partnership, composed of certain named persons, which had filed the intervention, claiming a total sum of \$815 as purchase money thereof. This judgment was excepted to generally as being contrary to both law and evidence, and more specifically upon the ground that the court was without authority to order the sale of the automobile without providing for the payment to Whites of not only that portion of the purchase price included in the retention of title note of record, but the full amount due that firm upon the purchase price. The judgment was further specially excepted to upon the ground that the lien of the plaintiffs in error under its reservation of title note was superior to any lien which the state of Georgia might obtain by reason of the illegal use of the automobile by the vendee, O. E. Beachman, for the full amount due on the purchase price thereof, and because the judgment was contrary to law, in that it condemned the interest of Whites in said automobile, without showing any knowledge on their part that the same was to be used for any illegal purpose, and that the court was without authority to condemn the car, when not in its possession, custody, or control.

It is agreed in the brief of counsel for the state that no construction of the act of 1917, supra, is necessary for the determination of this case, since, under the agreed statement of facts and the assignment of errors in the bill of exceptions, but one question is really presented, and that is, should Whites have had a judgment for \$515 or for \$815.

In the case of Shrouder v. Sweat, 148 Ga. 378, 96 S. E. 881, the Supreme Court held:

"Where an automobile was sold on credit to one who gave his note for the purchase price, securing it by a mortgage upon the car, and where subsequently, before payment of the note, the purchaser being engaged in conveying intoxicating liquors in the car, a sheriff arrested and took him and the car into custody, and thereupon instituted proceedings to condemn the car under the provisions of section 20 of the act of the General Assembly of this state, passed at its extraordinary session of March, 1917, relating to prohibition of intoxicating liquors, approved March 28, 1917 (Acts of General Assembly, Extraordinary Session, March, 1917, p. 7), a court of equity, upon a petition for injunction brought by the holder of the mortgage, who did not participate in any way in the criminal enterprise of the purchaser, should have enjoined the condemnation proceeding until provision was made for application, after the final hearing, of the funds arising from the sale of the vehicle to the lien of the mortgage."

In the decision the court said further:

"We are of the opinion that the judge erred in so refusing. The condemnation proceedings should have been enjoined, and the status quo preserved until the final hearing, when a decree upon the facts as then shown could have been rendered. The petitioner was the vendor of the car, and had a valid mortgage thereon for the purchase money. He had not participated in the criminal intent of the purchaser of the car, who was in possession thereof at the time it was seized while being used for the carrying out of the criminal enterprise whereby it was subject to seizure and confiscation. The vendor, the petitioner and the holder of the valid mortgage, could not intervene in the statutory proceeding instituted in the city court for the purpose of condemning the car and to procure an order for its sale. His only redress for the enforcement of a clear equitable right was through an equitable petition, such as he filed in this case. The mortgage had not been recorded, but that did not affect its validity. Unrecorded mortgages remain valid, but 'are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage.' Civil Code, § 3260. The provision of the section of the act of March 28, 1917, to which we have referred, and under the terms of which the condemnation proceedings were instituted, is penal in its nature. We do not think it was the intention of the Legislature to divest and destroy liens held by innocent third parties. The fact that the mortgage in this case was unrecorded may be considered in connection with any other evidence, if it should be produced on the trial, tending to show that the holder of the lien participated in the criminal enterprise or intent of the purchaser of the car; and if it should be made to appear that the vendor did participate in the criminal intent and enterprise, it may then be decided whether he had any standing in a court of equity."

In that case the petitioner, who applied for an injunction, held simply an unrecorded mortgage for the purchase money of the vehicle sought to be condemned. The act of 1917, *supra*, makes no provision for the determination in the statutory proceeding of the rights of one claiming a valid mortgage upon an automobile or other vehicle about to be confiscated and condemned; and hence, as held by the Supreme Court in the case above referred to, the doors of a court of equity should not be closed against such holder of a valid lien, and this notwithstanding the fact that the lien was not of record.

In the case under consideration, the parties filing the intervention brought themselves within the terms of the act by showing that they were the actual owners of the property sought to be condemned, and their rights could therefore be determined in that proceeding and without resorting to equity. It appears that, under the contract of sale between Whites and Beachman, \$515 of the purchase price was evidenced by a retention of title note describing the property sold, which was duly recorded, and that the remainder of the purchase money amounting to \$300, was not represented by any writing

whatsoever. Nevertheless, it was distinctly agreed, by the vendors and vendee, at the time the automobile was purchased, that the title to the same was reserved until the full sum of \$815 was paid; the agreement between them being that in the event the vendee failed to pay the sum of \$300 in excess of the note for \$515, actually signed, on or before the 21st day of January, 1918, the vendee should therefore execute a further note to the vendors, reserving title in them for said additional sum. The contract of sale between Whites and Beachman for the full amount of the purchase price of the automobile was enforceable, so far as they were concerned, whether evidenced by any writing or not. All the conditions of the contract between the parties were in fact enforceable, except as against third parties. Civil Code 1910, § 3318.

Of course, the secret understanding between Whites and Beachman touching the \$300 of the purchase price not represented by any duly recorded retention of title contract could have had no binding effect upon any third person acquiring contract rights against the property without knowledge of such understanding. Here, however, the state is seeking, not even to enforce a judgment already obtained, but to obtain a judgment binding property to which the party whose illegal use thereof rendered it *prima facie* subject to condemnation had absolutely no title whatsoever. Even had there been no written contract of any kind, but merely an oral agreement between Whites and Beachman that the title to the automobile should remain in the vendors until payment of the full purchase price of \$815 on or before a time named, and the vendee, immediately upon the delivery of the machine to him, engaged in the transportation of liquor, contrary to law, this would furnish no reason, under the provisions of the confiscation act, why the vendors, who were wholly ignorant at the time of the sale of the intention of the vendee to thus illegally use and employ their property, and who in no wise thereafter consented to such illegal employment, should be compelled to suffer its entire loss. In the case as made, however, the vendors actually retained title in a legally sufficient instrument, which was duly recorded, though it covered only a portion of the purchase price.

The agreed statement of facts discloses that Whites had absolutely no knowledge of the illegal use of the car or of the intention of the purchaser to employ it in any unlawful manner. Section 20 of the act of 1917, *supra*, provides that vehicles, conveyances, etc., shall be sold by order of the court in the event it appears upon the trial of the case that they were used in the manner prohibited thereby, "with knowledge of the owner or lessee."

Applying the principle laid down in the Shrouder Case, *supra*, the decisions of the Supreme Court being binding as precedents

upon this court, we hold, as the retention of title contract between Whites and Beachman was valid and enforceable between them for the full amount of the purchase price agreed to be paid before the title to the automobile should vest in Beachman, that Whites were entitled to all of the said agreed purchase price, and not merely to that portion represented by the recorded note. If Whites were entitled to exact the payment to them of the \$515 portion of the purchase price represented by the recorded note, they were equally entitled to the remaining \$300 of said purchase price due them in excess of said note, which under the terms of the contract of sale must also have been paid by Beachman before any title would vest in him. Clearly the state occupied no better position with respect to the portion of the purchase price not covered by any written instrument of record than a third person would occupy who had extended no credit, parted with no rights, and suffered no injury by reason of the apparent ownership by the vendee of property in fact owned by some one else.

We hold, therefore, that the court erred in rendering the judgment complained of, since, under the agreed statement of facts, fixing at \$815 the amount of the purchase price until the full payment of which title of the property was reserved in Whites, they were entitled to collect the full amount.

Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 257.)

CRAPP v. STATE. (No. 9783.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)

(Syllabus by the Court.)

1. TRANSFER OF CAUSE BY SUPREME COURT.

This case has been transferred back to this court by the Supreme Court, under the ruling of that court that the assignments of error involving constitutional grounds were too indefinite to be considered. See *Crapp v. State*, 95 S. E. 993.

2. INTOXICATING LIQUORS \S 247, 250—CONDEMNATION OF VEHICLE—INSTRUCTION.

The evidence demanded a verdict in favor of the plaintiff; and the special ground of the motion for a new trial, assigning error upon the court's refusal to charge the jury as requested, is without merit.

Error from City Court of Sylvester; C. W. Monk, Judge.

Proceeding by the State of Georgia against Adam Crapp, to condemn and sell an automobile used in conveying intoxicating liquors. Verdict for the State, motion for new trial overruled, and defendant excepts and brings error. Affirmed.

This was a proceeding instituted by the state of Georgia, through the solicitor of the city court of Sylvester, under the provisions of the act of 1917 (Ga. L. 1917, Extr. Sess. p. 16), and was maintained for the purpose of condemning and selling an automobile, which it is alleged was owned and used by the defendant in conveying spirituous, vinous, malted, fermented, and intoxicating liquors on and over the public roads of Worth county. The defendant filed a demurrer to the petition, wherein he sought to raise certain questions involving the constitutionality of the act. The court overruled the demurrer, and the questions thus attempted to be raised have been disposed of by the Supreme Court. See *Crapp v. State*, 95 S. E. 993.

Upon the trial of the case, the defendant testified:

"The morning I was arrested I was on my way to Dawson. I had people living in Terrell county, and was going up there to—I had nearly a quart of whisky with me, and afterwards plead guilty for being drunk on the public highway and having whisky in my possession; the whisky was in my grip. It was not my purpose to carry the whisky to Dawson, I only had it along with me for my own use. I was not hauling it for the purpose of delivering it to any place or to any person. I was not making the trip to carry the whisky anywhere, but had it along with me to use myself. I got this whisky the evening before in Sylvester from a colored man. Went back home in this automobile with it that night, and, after spending the night at home, took it along with me the next morning, and on my way to Dawson and Terrell county I was arrested with it, and my car was taken charge of by the sheriff. Bought one quart and a pint, and had drunk the pint and part of the quart and had the balance with me on my way up to Terrell county, where my people live. I would have taken this whisky to Dawson with me if I had not been interrupted by the officers."

The jury returned a verdict in favor of the plaintiff, whereupon the defendant made a motion for a new trial, based solely upon the general grounds, except that error is specially assigned upon the refusal of a request to charge the jury as follows:

"If the evidence discloses that the defendant in this case was transporting whisky from one point to another, and that he was using his car for the purpose of transporting or conveying the whisky, then you should find against the defendant. On the other hand, if you should find from the evidence that the defendant had some whisky with him, and that the transportation of it on the car was merely incidental to the trip, that it was [sic] primarily his purpose to convey the whisky, but that he took the whisky along with him for his own use, and that it was not his intention to carry the whisky to some other point, then you should find in favor of the defendant in this case."

The motion for a new trial having been overruled, the defendant excepted.

G. R. Nottingham and L. D. Passmore, both of Sylvester, for plaintiff in error.

Clyde Forehand, Sol., of Sylvester, for the State.

JENKINS, J. (after stating the facts as above). In our opinion, the request to charge does not contain a correct statement of the explicit terms of the law, nor does it conform to what is its plainly expressed purpose and intention. It is insisted by counsel for the defendant that, construing these portions of the act in connection with the title, it must be seen that it was not the intention of the Legislature to condemn a vehicle where the carrying of whisky was merely incidental, and that the law condemns the vehicle only when it is being used for the primary purpose of transporting or conveying liquors. In other words, if the vehicle was used for the primary purpose of conveying or transporting liquors, the provisions of the act would be operative; but if the liquors were thus being merely incidentally transported, and only because the vehicle was at the time being used for another and different purpose, then the penalty would not obtain. So much of the title of the act referred to as is material to this case is as follows:

"An act to amend and supplement the prohibition laws of this state; to make it unlawful to transport, ship, or deliver in this state, whether from without or from within the state, any spirituous, vinous, malt, or fermented liquors, or other intoxicating liquors or beverages, except alcohol and wine under certain restrictions and limitations; * * * to provide for the seizure, condemnation and sale of property used in violation of this act, and for the disposition of the funds arising from such sale."

Section 1 of the act provides that:

"It shall be unlawful for any common carrier, corporation, firm or individual to transport, ship or carry, by any means whatsoever, with or without hire, or cause the same to be done, from any point without this state to any point within this state, or from place to place within this state, whether intended for personal use or otherwise," any of the liquors or beverages therein enumerated, save as thereafter excepted.

Section 20 of the act provides that:

"All vehicles and conveyances of every kind and description which are used on any of the

public roads or private ways of this state, and all boats and vessels of every kind and description which are used in any of the waters of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law, shall be seized by any sheriff or other arresting officer, who shall report the same to the solicitor of the county, city or superior court having jurisdiction in the county where the seizure was made, whose duty it shall be within ten days from the time he received said notice to institute condemnation proceedings in said court by petition, a copy of which shall be served upon the owner or lessee if known, and if the owner or lessee is unknown notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. If no defense is filed within thirty days from the filing of the petition, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court. Should it appear upon the trial of the case that said vehicle, conveyance, boat or vessel was so used with the knowledge of the owner or lessee, the same shall be sold by order of the court after such advertisement as the court may direct."

[1, 2] Thus, it would seem that when, with the knowledge of the owner, any such vehicle is used on any of the public roads or private ways of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law, the vehicle or conveyance is subject to seizure and sale in the manner prescribed, regardless of what might have been the purpose and intent of the owner or operator of the vehicle at the time it was so employed. Under the plain and explicit terms of the act itself, the fact that the liquors or beverages thus conveyed were for the personal use of the owner or operator of the vehicle would not alter the rule, but the provision is that the mere use of a vehicle, wherein and whereby any of the enumerated liquors are conveyed with the knowledge of the owner, renders the vehicle subject to seizure and sale, regardless of what may have been the reason in thus using the vehicle, or what may have been the purpose as to the use or disposition of the liquors. To hold otherwise would entirely emasculate these provisions of the act, and in practice would defeat every purpose for which they were enacted.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 200)

SOUTHERN RY. CO. v. STEPHENS.
(No. 9847.)(Court of Appeals of Georgia, Division No. 1.
Jan. 14, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR ¶193(9) — WRIT OF ERROR—ATTACK ON PLEADING.**

A defendant who passes over, without demurring, a petition which is fatally defective, in that it does not set forth a cause of action, may still attack it by a writ of error, sued out in due time, excepting to the judgment overruling a motion for a new trial, complaining that the verdict is contrary to law.

2. CARRIERS ¶268 — PASSENGERS — DEPARTURE FROM TRAIN.

A passenger on a railway train has no legal right unnecessarily to leave the cars on personal business or pleasure at an intermediate station, where his train is detained for an unusual length of time because of a wreck elsewhere on the line; and, where he does so at his own instance and makes inquiry of the conductor as to the length of time the train is expected to remain at the station, the conductor cannot be presumed to know that it is the desire and intention of the inquirer to absent himself from the station grounds, merely to gratify idle curiosity concerning a nearby mill; and consequently the answer of the conductor, under such circumstances, expressing his opinion as to the length of the delay, apparently made in good faith, could neither increase nor diminish the duty or liability of the carrier to the passenger.

3. CARRIERS ¶268—MOVEMENT OF TRAINS—ACTION FOR DAMAGES.

The plaintiff had no legal right of recovery in this case, and the verdict in his favor must therefore be set aside as being contrary to law.

*(Additional Syllabus by Editorial Staff.)***4. CARRIERS ¶247(5) — PASSENGERS — RELATION.**

A passenger on a train which was delayed on account of wreck on line, who voluntarily left train and its vicinity, ceased to be a passenger until he again entered train or came back to premises to board train.

Error from City Court of Floyd County;
W. J. Nunnally, Judge.

Action by R. H. Stephens against the Southern Railway Company. Verdict and judgment for plaintiff, and defendant brings error. Reversed.

Hamilton & Hamilton and C. I. Carey, all of Rome, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

W. B. Mebane and McHenry & Porter, all of Rome, for defendant in error.

WADE, C. J. The following is a fair statement of the case as made by the pleadings

and the evidence: On July 19, 1917, the plaintiff boarded a train of defendant's railway at Pryor's Station, Rome, Ga., for Birmingham, Ala., and paid his fare to the conductor in charge of the train to Anniston, Ala., taking a receipt therefor. The train stopped an unusual length of time at Jacksonville, Ala., and, as it was very warm in the coach, he left the train, with several other passengers, in order to ascertain from the conductor the cause of the delay, and was informed by him that there was "a wreck down the road," and that they would be there "an hour, till 12 o'clock." Relying upon this information, the plaintiff and a fellow passenger sought a nearby restaurant, and, after lunch, thinking they had ample time, as it was then only 20 minutes after 11, they decided to inspect a mill, about a quarter of a mile distant. They stayed at the mill only a few minutes, and returned to the depot 10 or 15 minutes before 12 o'clock, when they discovered to their surprise that the train had departed. They then decided to go to Anniston, which was approximately only 12 miles away, by taxicab, and it cost them 50 cents each to make the trip in this manner, and the plaintiff reached Anniston in time to continue his journey to Birmingham by the same train he would have traveled on had he not been delayed at Jacksonville. The jury returned a verdict in favor of the plaintiff for \$250. The defendant filed a motion for a new trial, and exception is taken to the judgment overruling the motion.

"'Proving a case as laid' will prevent a non-suit, and may possibly prevent a motion for a new trial from being granted on the ground that the verdict is contrary to the evidence, but it will not authorize a recovery unless the case as laid so authorizes. *Mere proof of a fact will not in law authorize a recovery unless the existence of such fact so authorizes* [italics ours]. One of the prerequisites to a recovery by a plaintiff is that his pleadings and evidence be in substantial accord, but it is not the only prerequisite. A failure to demur does not confess the action either in law or in fact. A defendant who passes over, without demurring, a petition which is fatally defective in that it does not set forth a cause of action may still attack the same on this ground by an oral motion to dismiss the case at any time before verdict; and after verdict, by motion in arrest of judgment made during the term at which the judgment was rendered; or by assigning error on the judgment by a direct writ of error sued out in due time; or within three years from the date of the judgment, by motion to set aside. * * * On such a writ of error the whole case as shown by the record is before the court of error for inspection and revision. 'Where the defect appears on the face of the declaration, it is settled law that a court of error is bound to notice it.' When it is clear that in point of law the action will not lie, a judgment in favor of the plaintiff will be reversed on writ of error." Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280.

[1] Although in the present case, there was no demurrer to the petition, no motion was made to dismiss the case before verdict, and no motion was made after verdict to arrest judgment, the writ of error excepting to the overruling of a motion for a new trial in which motion it is complained that the verdict is contrary to law, is sufficient to raise for adjudication in this court the question whether or not the facts alleged by the plaintiff authorized a lawful recovery against the defendant. Notwithstanding the absence of any demurrer or motion to dismiss on account of the legal insufficiency of the allegations in the plaintiff's petition, and notwithstanding the proof submitted may as a whole establish without conflict every essential allegation made, if the facts alleged and proved in themselves fix no burden of liability upon the defendant, or do not charge the defendant with no responsibility for the injuries on account of which the plaintiff sought to recover damages, the total insufficiency of the facts alleged and proved can nevertheless be taken advantage of under general grounds of a motion for a new trial, and a bill of exceptions, assigning error on the judgment of the court overruling the motion for a new trial, presents for consideration and determination the question as to the existence of any cause of action based upon the allegations and proof as made.

[2-4] In order to determine whether the petition set forth a cause of action against the defendant, it is necessary to ascertain whether the defendant owed any duty to the plaintiff under the allegations set forth, which were substantially supported by proof; for, in the absence of any obligation to perform any duty to the plaintiff, no negligence on the part of the defendant could exist of which plaintiff had a right to complain. The plaintiff was a passenger on the defendant's train, under a contract, to be carried to Anniston, but on arriving at the town of Jacksonville, where the train was delayed several minutes on account of a wreck, he voluntarily left the train and its vicinity and by so doing ceased to be a passenger until he again entered the train for the purpose of being conveyed to his destination, or at least came again upon the premises of the defendant for the purpose of boarding the train. To enable the plaintiff to hold the defendant responsible for his safe carriage to Anniston, he should at least have remained at the station, or in close proximity thereto, where he could have been looked after by the officers or agents of the company. Such is the rule announced in *King v. Central Ry. Co.*, 107 Ga. 754, 757, 33 S. E. 839. Where a passenger actually leaves the premises of the company, he ceases to be a passenger. 2 Am. & Eng. Enc. L. 745; *Brunswick & Western R. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Ga. R. R. & Bkg. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 556. Elliott in his work on the Law of Rail-

roads, vol. 4, § 1592, says that where a passenger leaves the train and voluntarily walks along the track, the relation of carrier and passenger is severed. The contract of a railroad company with a passenger is to carry him to his point of destination. He is not expected to leave the cars at intermediate stations, and the carrier does not engage to afford him an opportunity to do so except at the usual stopping places for refreshments. It is not the rule that once a passenger always a passenger. *Du Bose v. Atlantic Coast Line R. R. Co.*, 81 S. C. 271, 62 S. E. 255; 10 C. J. 612. See, also, *Palmer v. Willamette Valley Southern R. Co.*, 88 Or. 322, 171 Pac. 1169, L. R. A. 1918D, 1114. It is therefore no longer an open question in Georgia, that, where a passenger voluntarily leaves the station grounds of the carrier, his status as such terminates.

However, the plaintiff contends that this general rule is inapplicable to the instant case, in view of the statement of the conductor, "We will be here an hour—until 12 o'clock." This contention is unsound. It will be observed that the conductor made no misstatement as to the facts of the existing situation, and in expressing his opinion or view that the train would remain at the station until 12 o'clock, there is nothing whatever tending to show that he then knew it would depart before that precise time, or that he made any willful misrepresentation to the passenger with intent to deceive. The train was held at the station on account of a wreck further along the line, and was directed to remain there until the way was cleared, which it was estimated or conjectured would take until 12 o'clock. Being apprised of the facts causing the delay, the plaintiff must have known, as an ordinarily intelligent man, that the future operation of the train upon which he was a passenger, and especially the time of its departure from that station, would altogether depend upon the time when the obstruction was removed from the track. Notwithstanding such knowledge, he nevertheless without any legally sufficient reason, and without the consent or knowledge of the conductor, absented himself from the vicinity of the station at which the train was delayed, in order to go a quarter of a mile distant merely to satisfy his idle curiosity as to the situation in and about a certain mill. Under these circumstances he had no legal right to rely blindly upon the purely gratuitous and casual statement of the conductor that the train would not leave until 12 o'clock, and it seems to us only reasonable that by leaving the station grounds altogether he assumed the obvious risks incident to a subsequent change in the situation which might permit the train to leave earlier than was conjectured at the time the conductor made the statement as to its prospective time of departure. If this were not true, then the plaintiff's action in leaving the sta-

tion would have made the departure of the train not only dependent upon the removal of the wreck, but upon the time he might elect to return, before 12 o'clock. In other words, to agree with the plaintiff's contention, we would have to hold that the true statement of the conductor as to the cause and possible duration of the delay (made merely from courtesy and not in the discharge of any legal duty) so changed the rights of the parties as to make any movement of the train up to the hour of 12 o'clock wholly dependent on the passenger's pleasure. It could not be required or expected that a conductor in charge of a train en route between terminal points should call the roll of his passengers at every intermediate station where the train might stop for a longer or shorter interval, before permitting it to proceed on its way, lest by some chance he might have unguardedly, though in perfect good faith, expressed his personal opinion to some one or more of his passengers, as to the probable length of stay the train would make at that station, or as to the time of its departure therefrom. A different question might possibly be presented if the passenger had acquainted the conductor with his intention to absent himself from the station or the adjacent grounds, and had been thereupon assured by the conductor that he could do so with safety, provided he boarded the train by or before a time named, anterior to which time the train would not take its departure, and the passenger returned to the station before the time mentioned and found the train had already gone.

The ruling we make is not without precedent, for in the case of *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785, where upon nearing an intermediate station a passenger asked the conductor how long the train would stop at that station, and he answered, "Five minutes," and on the arrival of the train at the station the passenger left the cars to inquire after some business matters, and had gone but a few steps when he heard the train start, and in attempting to get on it while in motion he was thrown down and injured, and it appeared that the train started in much less time than five minutes, it was held that the answer of the conductor that the train would wait five minutes created no obligation to hold the train that length of time.

It follows from what has already been said that when a conductor is merely asked how long a train will stop at a certain intermediate station, he is not presumed to know that it is the desire of the inquirer to leave the vicinity of the station and consume on pleasure or business the time of the halt. Such questions are frequently asked by passengers from idle curiosity or other motives, and it would be unreasonable to hold that by answering them the conductor assumes for the

company the obligation to watch at all times the movements of the passengers, or unnecessarily to delay the train or to make its movements coincide with answers made in good faith to such apparently idle questions. We think the obligation of the defendant to the passenger was neither increased nor diminished by the conductor's answer in this case, and therefore the verdict in favor of the plaintiff for \$250 (although he suffered in actual damages only the small amount of 50 cents) must be set aside as being contrary to law.

In view of the foregoing ruling it is unnecessary to pass upon the several special grounds of the motion for a new trial.

Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 113)

FOUNTAIN v. STATE. (No. 9978.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 23, 1918. Rehearing Denied
Dec. 13, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW §589(1), 925(1)—CONTINUANCE—MISTRIAL.

The court did not err either in refusing to continue the case, or in refusing to declare a mistrial.

2. HOMICIDE §163(2)—WITNESSES §37(4)—EVIDENCE—CHARACTER OF DECEASED FOR VIOLENCE.

"Evidence offered in a trial for murder to show the character of the deceased for violence will, as to the party making the attack, be confined to the reputation which the deceased bore in the community, and will not extend to specific acts."

(a) "Any evidence depending on the knowledge of the witness, save what he has as to the reputation of the deceased, should be excluded."

3. CRIMINAL LAW §1084(4)—APPEAL—ADMISSION OF EVIDENCE—MOTION FOR NEW TRIAL.

Grounds of a motion for new trial based upon the introduction of evidence present nothing for adjudication by this court, when the evidence is not set forth therein either literally or in substance, nor attached as an exhibit to the motion.

4. CRIMINAL LAW §1129(3)—ADMISSION OF IRRELEVANT TESTIMONY—EFFECT.

"Unless in its nature manifestly prejudicial, or the assignment of error shows wherein it was harmful, the admission of irrelevant testimony will not be sufficient ground for the grant of a new trial."

5. CRIMINAL LAW §1129(3)—ASSIGNMENT OF ERROR—INSUFFICIENCY.

"An assignment of error upon a ruling of the court excluding evidence, which does not

set forth the evidence literally or in substance, is too indefinite to present any question for consideration."

6. CRIMINAL LAW §918(5) — COLLOQUY BETWEEN COURT AND COUNSEL—PREJUDICE.

Where the attorney for a defendant in a criminal case is interrupted in his argument by the trial judge, and a colloquy between court and counsel follows, in which nothing prejudicial to the cause of client or counsel is developed, the mere fact that the argument was interrupted will not require the grant of a new trial.

7. CRIMINAL LAW §919(1)—STATEMENT OF COUNSEL TO JURY—HARMLESS ERROR.

A new trial will be granted because of a statement of counsel to a jury only when the statement is "manifestly improper and prejudicial to the rights of the opposite party. If the nature of the remark is such that it can plainly be seen that it could not have affected the result, the error would be harmless, and would afford no ground for a new trial."

8. CHARGE OF COURT.

When considered in connection with the entire charge of the court, no error appears in the excerpt quoted in the tenth ground of the amendment to the motion for a new trial.

9. CRIMINAL LAW §822(1)—MODIFYING INSTRUCTION—HARMLESS ERROR.

Where a judge in charging a jury incorrectly states in the first clause of a sentence a proposition of law, and immediately thereafter and in the same sentence says, "that is," and follows this by a second clause containing a correct statement of the law, the effect is to "specifically modify" the erroneous statement in the first clause and render it harmless.

10. CRIMINAL LAW §778(11) — HARMLESS ERROR — INSTRUCTION ON FLIGHT — EVIDENCE.

Under the facts of this case, the judge did not err in charging on flight.

(Additional Syllabus by Editorial Staff.)

11. CRIMINAL LAW §1064(1)—APPEAL—MOTION FOR NEW TRIAL—SUPERFLUOUS MATTER.

Grounds of a motion for a new trial embracing superfluous and unnecessary matter, such as lengthy colloquies, recitals of irrelevant facts, so as to render it difficult, if not impractical, for court to ascertain ruling or conduct complained of, will not be considered.

12. CRIMINAL LAW §396(1)—CHARACTER OF DECEASED FOR VIOLENCE—SPECIFIC ACTS.

That a witness offered to show deceased's character for violence testified on cross-examination, without objection, that deceased "ran when he got a chance" would not allow counsel offering him to prove specific acts of violence.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Charlie Fountain was convicted of voluntary manslaughter. His motion for new trial

was overruled, and he excepts and brings error. Affirmed.

Charlie Fountain, a white man, was indicted for the murder of Crockett Gallimore, a negro, and was convicted of voluntary manslaughter. A motion for a new trial was filed, on a number of grounds, among them that the court erred in refusing to continue the case, and in refusing to order a new trial on account of a certain occurrence during the progress of the trial. As to these two grounds the trial judge says, in a qualifying note:

"When this case was called on March 11th for trial, Mr. H. J. Quincey, of counsel, for movant, made the showing that Mr. John W. Bennett was leading counsel for the defendant. At his request the case was postponed until as late as Wednesday morning, March 20th, Mr. Quincey at that time knowing that he would be engaged in the regular term of Berrien county superior court, and not sure that he would be loose from that court at that time, Wednesday. On Wednesday morning, March 20th, the leading counsel, Mr. Bennett, and Mr. Rice, Mr. Quincey's partner, were present in court, as well as the defendant's father who, as the record shows, was in charge of the active preparation of the case on the facts. The court had summoned near 100 jurors in order that this case might be tried by a jury drawn from the box. The court, knowing that [of] all men connected with the case the defendant's father was better prepared to strike the jury than any one else, ruled the case to trial in so far as the selection of a jury on that date, and postponed the taking of testimony until the following day. Mr. Quincey came into the courtroom a few minutes after the selection of the jury had been completed, and had the opportunity of consultation with the witnesses, along with all the other counsel, during the remainder of the afternoon, from about 4 o'clock. As to the witnesses for whose absence continuance was asked John Bennett, E. D. Murray, and Dock Armatrout were secured, and were accessible to the defendant and his counsel during all of the actual trial of the case, and were not used by them. Iversen McCook was sworn. After the motion for continuance was made neither the defendant, nor his counsel, ever called on the court to procure the attendance of Sam Dixon, although he lived in the city. When the motion was overruled on Wednesday, March 20th, the court furnished a special officer with an automobile to search for Charlie Baker, and the defendant's counsel were notified that they could provide any friend or relative of the defendant to go along with this special officer to make search for Charlie Baker, and they availed themselves of this privilege. After being gone all day the officer reported that they had gone to those portions of the county designated by the defendant and his counsel, and that they were unable to find Charlie Baker, or to find any one who knew or had ever heard of him. When this report was made, defendant was asked if they desired any further search made, or could suggest where Baker might be found, and, there being no further suggestions as to the where-

abouts of Baker, further efforts to find him were abandoned.

"Note to the second ground of the amended motion: During the trial of the case the court was privately informed by the sheriff that a man under the influence of whisky had been in the witness room, and treating the witnesses to whisky. The court privately informed the sheriff to be sure as to this, and, if he found that such was the case, to arrest the offending party and bring him into court. The witness room referred to is in the corner of the courthouse building, adjacent to the front entrance door to the courtroom, that entrance door being a folding door, situated about 50 feet in front of, and in full view of, the judge's stand, the upper two-fifths of each panel of the doors being of opaque glass. There is a strong light coming through this door from the outside of the building, to such an extent that the court could see through this opaque glass movements of the bodies of parties outside the door. Anticipating that the sheriff might make an arrest, the court was on the lookout for what did occur. As soon as he saw a commotion beyond the door outside of the courtroom he divined what was coming, and immediately turned to the jury and addressed them direct, 'Gentlemen, go to the jury room.' The jurors immediately arose from their seats, and were making their way to the jury room door, which was within a few feet of the jury box, when the sheriff came through the front door with one Tom Fuller, and while he was making his way down the aisle the jurors were filing out. A few of the jurors hesitated, and the court spoke to them again, and asked them to retire to the jury room, which they did. The sheriff brought the prisoner around on the opposite side from the jury to the judge's stand, and placed a bottle partly filled with what appeared to be whisky on the judge's stand. Without making any inquiry as to what had occurred, and without anything being said within the possible hearing of the jury as to the cause of the arrest, the court, addressing the sheriff, ordered the prisoner taken to jail. In this connection the court further certifies that while the name of Tom Fuller was called as a witness for the defendant when he called his list of witnesses, Fuller did not respond, and was not brought to the bar of the court and sworn with the other witnesses, and sent to the witness room. The court being of the opinion that nothing had occurred to prejudice the defendant, or his case, and as defendant's counsel were unable at the time to point out wherein or how his case had been in any wise prejudiced, the court declined to grant the mistrial as asked for."

The motion for a new trial was overruled, and the defendant excepted.

John W. Bennett, of Waycross, and H. J. Quincey, of Ocilla, for plaintiff in error.

J. B. Wall, Sol. Gen., and A. J. McDonald, both of Fitzgerald, for the State.

BLOODWORTH, J. (after stating the facts as above). [1, 11] 1. Some of the grounds of the motion for a new trial in this case contain much unnecessary matter. The attention of counsel is called to the first headnote in

Gate City Gaslight Co. v. Farley, 95 Ga. 796, 23 S. E. 119, where it is said that:

"Grounds of a motion for a new trial * * * which embrace utterly superfluous and unnecessary matter, such as lengthy colloquies between counsel on opposing sides, or between counsel and the court, tedious recitals of irrelevant facts, statements taken from the stenographic notes of the trial, and other like things, to such an extent as to bury the point in question under a great mass of entirely needless phrasology, and thus render it very difficult, if not impracticable, for this court to ascertain what was really the ruling or other conduct of the court complained of, will not be considered."

See, also, Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672 (4); City of Atlanta v. Sciple, 19 Ga. App. 696, 92 S. E. 28 (1). Under the facts of the instant case, as shown by the record, and under the qualifying note of the trial judge, which is copied in the foregoing statement of facts, we cannot say that the ends of justice required a postponement of this case, nor that the trial judge abused his discretion in refusing a continuance, nor that he erred in refusing to declare a mistrial.

[2] 2. Grounds 3 and 4 of the amendment to the motion for a new trial present practically the same problem for solution, and will be considered together. A witness was called by the defendant, and testified to the character for violence of the deceased, saying it was bad. On cross-examination the witness testified:

"The night Gallimore was so rough I started to tell about while ago, he run when he got a chance."

After the cross-examination, counsel for defendant said to the witness to "Go ahead and tell what he did on that particular occasion at the time you said he ran;" counsel then stating that the witness would testify "In substance, that after the dispute about the overcoat he asked him if he was not afraid to dispute a white man's word, and the negro replied by saying, 'No,' that men were all the same to him, or words to that effect, and that the negro thereupon did draw his knife on him, and attempted to cut him, and that he struck him with his pistol and knocked him down, and shot at him as he was running off." The court said, "I decline to admit that." The solicitor general had objected to the attorney for the defendant asking the witness about specific acts or particular instances of violence. This ruling of the court was correct. The rule is:

"Evidence offered in a trial for murder to show the character of the deceased for violence will, as to the party making the attack, be confined to the reputation which the deceased bore in the community, and will not extend to specific acts. * * * Any evidence depending on the knowledge of the witness, save what he has as to the reputation of the deceased, should be ex-

cluded." *Powell v. State*, 101 Ga. 9, 29 S. E. 309 (1, 1b) 65 Am. St. Rep. 277.

In *Owens v. State*, 120 Ga. 210, 47 S. E. 545, Justice Cobb said:

"One's character for peace or violence is established by general reputation, and a witness will not be permitted, on direct examination, to go further than state what was the general reputation of the person in question for peace or violence. The person calling such witness will not be permitted to inquire into specific acts of violence or particular habits which might throw light upon this question. On cross-examination, however, the witness may be sifted, and inquiry may be made into the conduct of the person on different occasions or as to his different habits."

In *Andrews v. State*, 118 Ga. 1, 3, 43 S. E. 852, 853, Judge Lamar said:

"The character for violence both of the deceased and accused had been put in issue. The court properly refused to allow the defendant to prove specific acts of violence on the part of the deceased towards his wife. Ordinarily even the general character of the parties is inadmissible, and their conduct in other transactions is especially irrelevant. Civil Code, § 5159. In a trial for murder the general character of the deceased for turbulence and violence may be shown, but specific acts are inadmissible. *Pound v. State*, 43 Ga. 128; *Doyal v. State*, 70 Ga. 147; *Thornton v. State*, 107 Ga. 687 [33 S. E. 673]. On the same principle the general character of a witness for truth may be shown for the purpose of impeachment, but specific acts cannot be made the subject of inquiry (Civil Code, § 5293), and for the reason that every man is supposed to be able at a moment's notice to establish his general character for truthfulness or for peaceableness; but the best, as well as the worst, might often be unable to explain a single transaction requiring the presence, not of any one familiar with him, but only the eyewitnesses of that special transaction, in order to justify, explain, or excuse. The general character of the deceased for turbulence or violence can be shown by his neighbors generally; the state and the accused alike are put on notice that such general character may become an issue in the trial. But no one was bound to anticipate that the specific instance inquired about would be made the subject of investigation. A specific act does not necessarily tend to establish one's general character. The single transaction may have been exceptional, unusual, and not characteristic of the deceased. Where a witness has testified that one bears the character of being peaceable, it may sometimes be proper, on cross-examination, to inquire if the witness has not heard that the man whom he says was peaceable had in a particular case acted in a manner directly contrary to such reputation. *Ozburn v. State*, 87 Ga. 180 [13 S. E. 247]. But this line of questioning is intended solely to test the truthfulness of the witness, and not for the purpose of making an investigation of the other transactions. To allow proof of specific acts of violence would prolong the trial, multiply issues, and confuse the jury."

See *Thornton v. State*, 107 Ga. 683 (3), 687 (3), 33 S. E. 673, and cases cited; *Doyal v.*

State, 70 Ga. 134 (5), 147 (5), and cases cited.

[12] The fact that on cross-examination the witness, without objection, testified that the deceased at the time in question "ran when he got a chance" would not alter this rule and allow counsel introducing him to prove specific acts of violence. "There can be no equation of errors in the trial of a case." *Stapleton v. Monroe*, 111 Ga. 848, 36 S. E. 428 (2).

[3] 3. The fifth special ground of the motion for new trial alleges error as follows:

"Because the following evidence on behalf of the state was admitted to the jury over the objection of movant, to wit: 'He (movant) walked up there and just pulled the gun and stuck it up the negro's neck, and Mr. Nasworthy called him over there and told him to come over there; that he would 'run off the music.' (The foregoing testimony was delivered by Marvin Wash, a witness for the state, upon the trial of said case, and referred to a transaction between movant and a party other than the deceased, at a time prior to the killing of deceased.)"

The objection urged at the time of the introduction of this evidence was that it was irrelevant and inadmissible. Every ground of a motion for new trial must be complete within itself, and show error without reference to other parts of the record. When and to what place was it that movant "walked up"? It is stated that it was "prior to the killing of deceased," but how long prior? Under what circumstances did the movant pull the gun and stick it "up the negro's neck"? Standing alone, the evidence to the introduction of which complaint is made in this motion is too indefinite for this court to say that its introduction was harmful to the cause of plaintiff in error. "Grounds of a motion for new trial which are incomplete, and cannot be understood without resorting to an examination of the brief of evidence, fail to present any question for decision." *Copeland v. Ruff*, 20 Ga. App. 218, 92 S. E. 955, and cases cited.

[4] 4. The sixth special ground of the motion complains of the introduction by the state of that portion of the written motion made by the defendant for a continuance, which follows:

"Defendant shows that he expects to prove by said absent witness that he, the said John Bennett, was present when the difficulty occurred between Crockett Gallimore and this defendant, in which difficulty the said Crockett Gallimore was killed, and defendant expects the said Bennett to swear that upon that occasion the said Gallimore walked upon this defendant's feet, and when defendant remonstrated with him for so doing and asked him, the said Gallimore, to desist from such conduct, the said Gallimore cursed this defendant for a 'God damned white son of a bitch,' and stated that he would cut his 'God damn throat,' and actually drew his knife and attempted to cut this defendant, and that this [defendant] then and only then shot the deceased in order to save his own life."

The only objection to this testimony was that it was inadmissible, irrelevant, and immaterial. Taking this evidence as it stands alone, we cannot say that its nature is manifestly prejudicial to the cause of the plaintiff in error, and no attempt is made to point out in what respect the admission of this evidence was harmful. In *Brown v. State*, 119 Ga. 572, 46 S. E. 833, Justice Lamar said:

"An assignment of error must be complete in itself. * * * If on its face manifestly prejudicial, or if the motion discloses in what way irrelevant testimony has been harmful, a new trial may be granted for its admission over objection. But mere irrelevancy is not sufficient to upset a verdict. Such evidence cumbrous the record, sheds no light, gives no assistance, and prima facie is calculated to do no harm. If it does, the motion should disclose how it worked such a result."

See, also, *Johnson v. State*, 128 Ga. 71, 57 S. E. 84 (2).

[5] 5. The seventh special ground of the motion for a new trial is as follows:

"Because the court, having admitted the portion of the written motion for continuance set out and complained of in the sixth ground of this amendment, erred in refusing to admit in evidence the entire motion for continuance submitted by movant, a timely request that the whole record be admitted in evidence, if any portion of it was to be, having been submitted by counsel for movant, which request was denied by the court."

The court did not err in this ruling.

"An assignment of error upon a ruling of the court excluding evidence, which does not set forth the evidence literally or in substance, is too indefinite to present any question for consideration." *Danner v. Johns*, 147 Ga. 687, 95 S. E. 233 (1); *Lewis Mfg. Co. v. Davis*, 147 Ga. 203, 93 S. E. 206 (1); *Deal v. Moseley*, 147 Ga. 523, 94 S. E. 1013 (5); *Maxwell v. Rucker*, 127 Ga. 111, 56 S. E. 91; *Johnson v. Thrower*, 123 Ga. 706, 51 S. E. 636 (1); *Chamblee v. Farmers' & Merchants' Bank*, 20 Ga. App. 527, 93 S. E. 239 (4); *City of Atlanta v. Sciple*, 19 Ga. App. 696, 92 S. E. 28 (1), and cases cited.

[8] 6. Complaint is made in ground 8 of the motion for a new trial that the court, ex mero motu, twice interrupted counsel for the defendant in his concluding argument, and alleges several reasons why these interruptions were erroneous. While the interruptions may have been unwarranted, and were doubtless annoying to counsel, we cannot say they were harmful to the cause of his client. Indeed, if the interruptions by the court of counsel, and the colloquies between them which followed, had any effect on the jury we are inclined to think it was beneficial to the cause of plaintiff in error, for in both instances the judge finally admitted the correctness of the position of counsel, and each time allowed him to proceed as if no interruption had taken place. Nor can we believe

that the interruptions by the court of able and experienced counsel could have so disturbed "the line of argument of counsel" that his address to the jury "may not have been as effective as otherwise if counsel had been permitted to pursue his line of argument without the unlawful and unwarranted interference of the court." If there are any dormant powers of eloquence in the speaker, such interruptions usually arouse them. "The lion sleeping in his lair when aroused by a wound fares forth with an angry roar, and woe to the other beasts, it matters not how powerful, that cross his path." Moreover, if the conduct of the trial judge appeared prejudicial to the cause of defendant, a motion for mistrial should have been made. *Perdue v. State*, 135 Ga. 277, 69 S. E. 184 (1); *Harrison v. State*, 20 Ga. App. 157 (6), 160 (6), 92 S. E. 970, and cases cited.

[7] 7. Complaint is made of the refusal of the court to declare a mistrial because the solicitor general in his concluding argument said:

"The only thing we were able to get out of him [Marsh Wilcox] was that the negro ran."

The witness Marsh Wilcox had been introduced by the defendant to show the character for violence of deceased. On cross-examination the witness testified that on a certain occasion the deceased "ran when he got a chance." In the enthusiasm of debate the solicitor general used the language quoted above; but we do not think this error is of sufficient gravity to demand a new trial, especially as the judge, when he refused the motion to declare a mistrial, told the jury:

"I will instruct the jury that they are to consider the evidence in the case as it has been delivered by the witnesses and all other evidence as it has been admitted in the case."

While the court did not in express terms instruct the jury not to consider the statement of the solicitor general, the effect of the instructions given was to eliminate it from the consideration of the jury. Besides, a statement made by an attorney in his argument to the jury will result in a mistrial only when the cause of the opposite party would be affected thereby. *Justice Evans*, in *Taylor v. State*, 121 Ga. 354, 49 S. E. 306, said:

"What the law forbids is the introduction into a case, by way of argument, of facts not in the record, and calculated to prejudice the accused."

Judge Russell, speaking for the court, in *Moore v. State*, 10 Ga. App. 811, 74 S. E. 318, said:

"In our opinion, therefore, the question in every case turns upon whether the nature of the argument is such that it is manifestly improper and prejudicial to the rights of the opposite party. If the nature of the remark is such that it can plainly be seen that it could not have affected the result, the error would be harmless, and would afford no ground for a

new trial. For this reason, if the argument was directed to some collateral matter not directly affecting the guilt or innocence of the accused in a criminal trial, though the argument might be improper, the error would seem to be immaterial."

See *Ellis v. State*, 124 Ga. 91 (1), 93 (1), 52 S. E. 147. In the instant case, as stated by Judge Lumpkin in *McNabb v. Lockhart*, 18 Ga. 507 (4):

"The facts were rather overstated; not sufficiently so, however, to authorize a new trial on that ground."

[8] 8. When considered in connection with the entire charge, there is no error in the excerpt therefrom complained of in the tenth special ground of the motion for a new trial.

[9] 9. The judge charged the jury as follows:

"If you believe that he was justified in taking the life of Crockett Gallimore, if such you find and believe to be the truth of the case beyond a reasonable doubt from the evidence in the case, that is, if you find and believe beyond a reasonable doubt that he did take the life of Crockett Gallimore, but you believe that he was justified in so doing, then you should acquit him."

After a clear, full, and fair charge covering all the issues of the case, the judge was charging on the forms of the verdict. After telling the jury under what conditions they should return a verdict of murder, or a verdict of murder with a recommendation to the mercy of the court, or a verdict of voluntary manslaughter, the judge said:

"If you do not believe the defendant guilty of the offense of voluntary manslaughter, or if you entertain a reasonable doubt of his guilt of that offense, then you should acquit him."

Then followed that portion of the charge quoted above and alleged to be erroneous. The first clause of the sentence in the excerpt above is erroneous, but when in the same sentence the judge immediately adds, "that is, if you find and believe beyond a reasonable doubt that he did take the life of Crockett Gallimore, but you believe that he was justified in so doing, then you should acquit him," the effect of this last clause, which is a correct statement of the law, is to "specifically modify" the first and erroneous clause, and to render same harmless. The jury could clearly see that the judge was correcting the statement in the first clause, though he did not in express terms so state. It will also be noted that the erroneous clause is immediately preceded, as well as immediately followed, by a correct statement of the law, and under these circumstances the jury could hardly have been misled by the erroneous statement.

[10] 10. The judge charged the jury as follows:

"Flight, if any, and similar acts, if proven, from which an inference of guilt may be drawn, may be considered by the jury, but flight is subject to explanation; the weight to be given to it, or whether the jury will draw an inference of consciousness of guilt, or not, is for the jury. It is for the jury to determine whether the flight of the defendant, if such has been proven, was due to a sense of guilt, or to other reasons. If from other reasons, no inference hurtful to the defendant must be drawn by the jury."

We find no error in the language of the judge, nor do we think it was error harmful to the defendant that the charge was given. It appears from this ground of the motion that it was contended by the state that flight had been shown, and this charge simply left the jury to determine whether or not flight had been proven, and, if so, whether or not they would draw from it "an inference of consciousness of guilt," and this charge could not have "amounted to an expression of opinion on the part of the court that the defendant had fled, when in point of fact there was no evidence to show that such was the case."

(a) The charge was not erroneous because the court did not instruct the jury what was meant by "and similar acts, if proven, from which an inference of consciousness of guilt may be drawn."

11. There was evidence to support the verdict.

Judgment affirmed.

BROYLES, P. J., concurs. STEPHENS, J., not presiding.

(28 Ga. App. 123)

FOUNTAIN v. STATE. (No. 10001.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 23, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW — 1134(3)—APPEAL—MOOT QUESTION—DISMISSAL.

The only assignment of error in the bill of exceptions in this case is upon the refusal of the trial judge to grant an application for bail made by a defendant who had been convicted of voluntary manslaughter, and who had pending in this court a bill of exceptions to a judgment overruling his motion for a new trial. This court having this day affirmed the judgment of the lower court refusing a new trial in that case (*Fountain v. State* [No. 9978], 98 S. E. 178), the question raised in the present case became moot.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Application for bail by Charlie Fountain. Bail refused, and he brings error. Writ of error dismissed.

See, also, 98 S. E. 178.

John W. Bennett, of Waycross, and H. J. Quincey, of Ocilla, for plaintiff in error.

BROYLES, P. J. Writ of error dismissed.

BLOODWORTH, J., concurs. STEPHENS, J., not presiding.

(23 Ga. App. 195)

MITCHELL v. SOUTHERN RY. CO.
(No. 9747.)

(Court of Appeals of Georgia, Division No. 1
Jan. 14, 1919.)

(Syllabus by the Court.)

1. TRIAL \S 69 — DISCRETION OF TRIAL COURT — EXCLUSION OF ADDITIONAL EVIDENCE.

It does not appear that the court abused the discretion vested in the judge by refusing to allow additional evidence in behalf of the plaintiff after announcing that a nonsuit would be awarded; it further appearing both that counsel for the plaintiff had knowledge of the existence of the proposed additional evidence and that the same was then and there available before closing the case, and no reason being assigned why such additional evidence had not been previously presented. *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46; *Penn v. Georgia So. Ry. Co.*, 129 Ga. 856, 60 S. E. 172; *Polhill v. Postal Telegraph-Cable Co.*, 16 Ga. App. 601, 85 S. E. 936 (3); *Moore v. Dixie Fire Insurance Co.*, 19 Ga. App. 800, 807, 92 S. E. 302.

2. COMMERCE \S 27(7) — PERSONAL INJURY — FEDERAL EMPLOYERS' LIABILITY ACT.

There was no error in awarding a nonsuit on the first and second counts of the petition, as the evidence failed to establish that the defendant was engaged and the plaintiff employed, at the time of the injury, in interstate commerce. According to his testimony the plaintiff was "inspector for engines, tanks, wheels, and all such as that—engine carpenter," and inspected engines engaged in both intrastate and interstate commerce. He inspected any engine that came into the roundhouse, and an engine might run to Chattanooga, Tenn., on one day, to Jacksonville, Fla., on another day, or to Macon, Ga., on still another day. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 858, Ann. Cas. 1918B, 54. The answer of the defendant to the allegation as made in the petition (which was afterwards made more definite by amendment) that the plaintiff was injured while employed in interstate commerce was not so evasive as to constitute an admission of the truth of the alleged fact, and to supply, when introduced in evidence, sufficient proof that the plaintiff was engaged in interstate commerce.

3. REMOVAL OF CAUSES \S 2, 25(1)—REFUSAL OF APPLICATION.

The court erred in granting the second application to remove the case from the state to the federal court, after sustaining the motion to award a nonsuit as to the two counts in the

declaration, alleging that the plaintiff was employed in interstate commerce at the time of the injury, since the plaintiff did not admit any failure of proof as to the character of the employment, nor did he amend his complaint, but at all times insisted, and still insists, that the allegation was supported by the evidence, and it not appearing that the allegations as to employment in interstate commerce were made for the fraudulent purpose of evading the removal of the case from the state court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. D. Mitchell against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Colquitt & Conyers, of Atlanta, for plaintiff in error.

McDaniel & Black, of Atlanta, for defendant in error.

WADE, C. J. In the case of *Great Northern R. Co. v. Alexander*, 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713, it was said:

"It is, of course, familiar law that, the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress. *Little York Gold Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. Ed. 656; *Judicial Code*, c. 3, §§ 28, 39 (36 Stat. at L. 1094, 1099), c. 231, Comp. Stat. 1916, §§ 1010, 1021). The allegation of the complaint that the deceased was employed in interstate commerce when injured brought the case within the scope of the federal Employers' Liability Act [U. S. Comp. St. §§ 8657-8665], and it would have been removable either for diversity of citizenship or as a case arising under a law of the United States, except for the prohibition against removal contained in the amendment to the act, approved April 5, 1910 (36 Stat. at L. 291, c. 143). But this allegation rendered the case, at the time it was commenced, clearly not removable on either ground. *Kansas City Southern Ry. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210. * * *

It is also settled that a case, arising under the laws of the United States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff, or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 47 L. Ed. 76, 23 Sup. Ct. 24; *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, 26 Sup. Ct. 161, 4 Ann. Cas. 1147; *Lathrop, Shea & Henwood Co. v. Interior Construction Co.*, 215 U. S. 246, 54 L. Ed. 177, 30 Sup. Ct. 76; *American Car & Foundry Co. v. Kettelhake*, 238 U. S. 311, 59 L. Ed. 594, 35 Sup. Ct. 355.

The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, nonremovable when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion. * * * The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case, and in his brief in this court still contends, that the allegation was supported by the evidence. The first holding to the contrary was by the state Supreme Court, and the most that can be said of that decision is that the defendant prevailed in a matter of defense which he had pleaded, but, as we have seen, this does not convert a nonremovable case into a removable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant did not at any time have the right to remove the case to the federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana, and the writ of error must be dismissed."

It is not necessary to add anything further to the rulings stated in the headnotes.
Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 93)

ASHLEY-PRICE LUMBER CO. v. HENRY.
(No. 9638.)

(Court of Appeals of Georgia, Division No. 2.
Nov. 23, 1918. Rehearing Denied
Dec. 18, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 928(1), 1064(1)—
NEW TRIAL \S 128(3)—TRIAL \S 224, 423
—REQUEST FOR WRITTEN CHARGE—TIME—
STATUTE.

Where counsel for either party in any case, civil or criminal, desires the trial judge to write out his charge and read it to the jury, a request therefor must be made before argument begins. Pen. Code 1910, \S 1056; Homer v. State, 6 Ga. App. 667, 65 S. E. 701.

(a) The charge so written out and read to the jury should be filed, as soon as delivered,

with the clerk of the court. Civ. Code 1910, \S 4848.

(b) Failure of the trial judge to hand his written charge, immediately after he has read it to the jury, to the clerk of the court to be filed, is reversible error, unless the evidence demanded the verdict returned. Forrester v. Cocke, 6 Ga. App. 829, 65 S. E. 1063.

(c) Where a special ground of a motion for a new trial complains that the trial judge refused to write out his charge, after being requested to do so by counsel in the case, it must be affirmatively shown in the ground of the motion that the request was made before the argument began. However, where (as in the instant case) the complaint is, not that the judge refused the request of counsel to write out his charge and read it to the jury, but that the judge, after complying with such request, failed to hand the charge at once to the clerk of the court to be filed, and retained it in his possession until the following day, when he filed it with the clerk, it will be conclusively presumed that the request was made in due time, unless the contrary is shown affirmatively in the motion or by a certificate of the trial judge.

(d) Where such a request had been made to the judge, no waiver of the right to have the charge reduced to writing and read to the jury, or to have it filed with the clerk of the court as soon as it had been read, resulted from the fact that the counsel who made the request informed the judge that he did not insist upon the judge's writing out the charge in pen and ink, but that it would be perfectly satisfactory for the judge to dictate his charge to the court reporter, have it typewritten, and read this typewritten charge to the jury, and that the judge adopted this suggestion.

2. TRIAL \S 225(1)—CHARGE—FILING WITH CLERK.

In the instant case, instead of filing with the clerk of the court the typewritten charge as soon as it had been read to the jury, the judge retained it in his possession and did not deliver it to the clerk until the following day. This was reversible error, and a new trial of the case is required.

3. OTHER ASSIGNMENTS.

It is deemed unnecessary to consider the other assignments of error.

Error from Superior Court, Coffee County;
J. T. Summerall, Judge.

Action by Alfonso Henry, by next friend, against the Ashley-Price Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. Quincey, Levi O'Steen, and F. Willis Dart, all of Douglas, for plaintiff in error.

W. W. Bennett, of Baxley, and Dickerson, Kelly & Roberts and Chastain & Henson, all of Douglas, for defendant in error.

BROYLES, P. J. Judgment reversed.

BLOODWORTH, J., concurs.

STEPHENS, J., not presiding.

(23 Ga. App. 322)

ALEXANDER v. CHOSEWOOD.
(No. 9537.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***RULING ON MOTION FOR NEW TRIAL.**

The evidence authorized the verdict in this case, which has the approval of the trial judge. The charge of the court, when considered as a whole, is a fair and full presentation of the law applicable to the facts of the case; and, there being no assignment of error which requires a reversal, the judgment overruling the motion for a new trial is affirmed.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Suit by C. L. Chosewood against J. W. Alexander. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Blackburn and Smith, Hammond & Smith, all of Atlanta, for plaintiff in error.
Jas. L. Key, of Atlanta, for defendant in error.

LUKE, J. Affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 353)

HUSON v. DAWSON NAVAL STORES & LUMBER CO. et al. (No. 9876.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***BROKERS'—§57(1)—ACTION FOR COMPENSATION—SUFFICIENCY OF SERVICE.**

This suit was based upon a contract authorizing the plaintiff to effect a sale of land for the Dawson Naval Stores & Lumber Company to one Moulton upon specified terms as to payment, etc., so that it would net to the owner \$3.50 per acre, and to retain as compensation for this service all obtained for it in excess of that amount. The contract fixed December 20, 1913, as the time limit within which the plaintiff should "make, complete, and execute the aforesaid sale." The plaintiff on December 17, 1913, effected with Moulton an agreement of sale which provided that the owner should make, execute, and deliver bond for titles to Moulton, and that Moulton should "make, execute, and deliver to the first party [Dawson Naval Stores & Lumber Company] notes and mortgages as aforesaid, within thirty days from delivery of abstracts of title to the party of the second part." *Held:*

There was a clear variance between the contract effected by the plaintiff and that which he was authorized to make, the time for completion of the sale being extended by him beyond

December 20th, the time fixed by the owner of the property, and the owner had the right to repudiate the contract, as there was no acceptance "on the terms stipulated by the owner." Park's Ann. Civ. Code, § 3587; Robinson v. Weller, 81 Ga. 704, 8 S. E. 447 (1); Phinizy v. Bush, 129 Ga. 479, 59 S. E. 259 (4); Van Winkle v. Harris, 137 Ga. 43, 72 S. E. 424 (1); Gray v. Lynn, 139 Ga. 204, 77 S. E. 156. Neither was there such acceptance by the owner or such ratification of the changes made as would amount to a legal waiver of the variance between the terms authorized and the terms agreed upon. The trial judge therefore did not err in sustaining a general demurrer to the plaintiff's petition.

Error from Superior Court, Terrell County; W. C. Worrell, Judge.

Action by H. I. Huson against the Dawson Naval Stores & Lumber Company and others. General demurrer to plaintiff's petition sustained, and he brings error. Affirmed.

W. H. Gurr, of Dawson, and Pottle & Hofmayer, of Albany, for plaintiff in error.

M. C. Edwards and Yeomans & Wilkinson, all of Dawson, for defendants in error.

WADE, C. J. Judgment affirmed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 374)

GRIFFIN v. STATE. (No. 10123.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)*(Syllabus by the Court.)***OVERRULING OF CERTIORARI.**

The facts set out in the answer of the judge of the county court to the writ of certiorari support the allegations of the indictment, and the judge of the superior court properly overruled the certiorari.

Error from Superior Court, Putnam County; Jas. B. Park, Judge.

Proceeding by the State on indictment against Will Griffin, alias Beck. Judgment against Griffin, alias Beck, and from the overruling of his certiorari he brings error. Affirmed.

R. C. Jenkins and Roy D. Stubbs, both of Eatonton, for plaintiff in error.

Doyle Campbell, Sol. Gen., of Monticello, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., concurs.

STEPHENS, J., concurs, dubitante.

(23 Ga. App. 332)

R. L. & W. H. HALL v. ROBERTS, JOHNSON & RAND. (No. 9855.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***STRIKING PLEA—DIRECTED VERDICT.**

The original plea of the defendants in this case was subject to special demurrer, but it contained enough to overcome an oral motion in the nature of a general demurrer, and the court erred in striking it upon oral motion, and in thereafter directing a verdict for the plaintiff.

Error from Superior Court, Baker County;
W. M. Harrell, Judge.

Action by Roberts, Johnson & Rand, etc., a branch of the International Shoe Company, against R. L. & W. H. Hall. Original plea stricken upon motion, and verdict directed for plaintiff, and defendants bring error. Reversed.

W. I. Geer, of Colquitt, and Benton Odom, of Newton, for plaintiffs in error.

Peacock & Gardner, of Albany, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 392)

ECKMAN v. STATE. (No. 10136.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §695(6) — OBJECTION TO EVIDENCE AS A WHOLE—ADMISSIBILITY IN PART—EFFECT.**

Grounds 1 and 2 of the amendment to the motion for a new trial contain long extracts from the testimony, which were objected to "in solido." Some of this testimony was admissible, and the objection to it as a whole was properly overruled. "Where evidence, partly competent and partly incompetent, was offered, and objected to as a whole, the illegal portion not being specified nor objected to separately, admitting all of such evidence affords no legal cause of complaint to the objecting party." *Smalls v. State*, 99 Ga. 26, 25 S. E. 614(2). See, also, *Maynard v. Association*, 112 Ga. 443, 37 S. E. 741; *Southern Ry. Co. v. Gilmore*, 116 Ga. 890, 42 S. E. 220; *Gully v. State*, 116 Ga. 527, 42 S. E. 790; *Kelly v. Strouse*, 116 Ga. 881, 43 S. E. 280; *Walker v. Nell*, 117 Ga. 739, 45 S. E. 387, and citations; *Barnard v. State*, 119 Ga. 436, 46 S. E. 644(8); *Ray v. Camp*, 110

Ga. 818, 36 S. E. 242(3); *Great Southern Accident & Fidelity Co. v. Guthrie*, 13 Ga. App. 292, 79 S. E. 162(6), and cases cited.

2. CHARGE OF COURT.

When considered in connection with the entire charge, there is no error in the excerpts therefrom, of which complaint is made in the third and fourth grounds of the amendment to the motion for a new trial.

3. CRIMINAL LAW §1156(1), 1159(2) — MOTION FOR NEW TRIAL—DISCRETION OF COURT.

In passing on the facts in a motion for a new trial, the judge of the trial court has some discretion; but, where he has exercised that discretion, this court is powerless to interfere. Our Supreme Court has said: "This court has always recognized that the greatest weight and consideration should be paid to the verdicts of juries, and in many cases has held that while the verdict was different from what the judges would have rendered as men, the court would not interfere. So, too, where the evidence was conflicting, it would not disturb the finding, although it might think that the preponderance was in favor of the losing party. In testing the sufficiency of evidence this court cannot consider the credibility of witnesses, that being a matter exclusively for the jury, who note their manner of testifying, and consider the thousand and one things transpiring during a trial, which cannot be photographed or transcribed and transmitted to this court as a part of the record." *Patton v. State*, 117 Ga. 234, 43 S. E. 534. The fourth headnote in the case of *Bunn v. Hargraves*, 3 Ga. App. 518, 60 S. E. 223, is as follows: "This court has no power to determine that the preponderance of the evidence is in favor of one party to a cause rather than the other, or to award a new trial in any case where there is any evidence sufficient to support the verdict rendered." See, also, *Randall v. Bell*, 12 Ga. App. 614, 77 S. E. 1132.

4. RULING ON MOTION FOR NEW TRIAL.

Applying the foregoing to the facts as they appear in the present record, the judgment overruling the motion for a new trial must be affirmed.

Error from Superior Court, Troup County;
J. R. Terrell, Judge.

Proceeding by State against Ed Eckman. Judgment against Eckman. From the overruling of his motion for a new trial, he brings error. Affirmed.

Arthur Greer, of La Grange, for plaintiff in error.

C. E. Roop, Sol. Gen., of Carrollton, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 368)

MAY v. SPEARS. (No. 9835.)(Court of Appeals of Georgia, Division No. 2
Feb. 1, 1919.)*(Syllabus by the Court.)***ASSIGNMENTS OF ERROR—VERDICT.**

The assignments of error set forth in the motion for new trial and the amendment thereto, complaining of the ruling of the court in excluding certain testimony as therein set out and of certain excerpts from the charge of the court, are without merit. The verdict is amply supported by the evidence, and the trial court committed no error in overruling the motion for new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action between J. C. May and A. R. Spears. Judgment for the latter, motion for new trial overruled, and the former brings error. Affirmed.

James Humphreys, of Moultrie, and R. A. Hendricks, of Nashville, for plaintiff in error.

Parker & Gibson, of Moultrie, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 375)

CANADY v. STATE. (No. 10126.)(Court of Appeals of Georgia, Division No. 2
Feb. 1, 1919.)*(Syllabus by the Court.)***HOMICIDE** \S 309(3), 340(4) — **INSTRUCTION—EVIDENCE—VOLUNTARY MANSLAUGHTER.**

Although the law of manslaughter should not be given in charge to the jury in a case in which that grade of homicide is not involved, the giving of instructions thereon is not prejudicial, and not cause for a new trial to one convicted of voluntary manslaughter, when the evidence for the state made a case of murder, and none of the evidence nor the statement of the defendant would justify an acquittal.

Error from Superior Court, Calhoun County; W. M. Harrell, Judge.

Floyd Canady was convicted of manslaughter, and he brings error. Affirmed.

C. J. Taylor, of Morgan, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., concurs.

STEPHENS, J., concurs, dubitante.

(23 Ga. App. 236)

COLLINS et al. v. FRAZIER. (No. 9686.)(Court of Appeals of Georgia, Division No. 1
Jan. 15, 1919.)*(Syllabus by the Court.)***1. CONTRACTS** \S 171(1), 264, 316(1), 319(1), 324(2)—**CONSTRUCTION—ENTIRE CONTRACT—BREACH—RECOVERY.**

Where an architect enters into a contract whereby he is to furnish plans and specifications, together with estimates of the cost for the erection of a building, and one sum is to be paid for the entire service, this constitutes an entire contract (*Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533); and if, after having furnished the plans and specifications, he should, without fault on the part of the other party, or what would amount to the consent of that party, fail or refuse to furnish the estimates contracted for, this would constitute a breach of the contract, and he could not recover thereon for such part performance. *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51. When a breach is thus occasioned, the other party has a right to rescind the contract, on notification and return of what he has received, or he may at his pleasure abide by the contract and have a right of action to recover damages for the breach; but he cannot do both. But if, after such breach, he not only retains the articles received, but puts them to his own use, this is equivalent to an election to abide by the terms of the original contract, and he thereafter holds under those terms the articles actually received. *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100.

2. WORK AND LABOR \S 14(3), 27(3)—**PARTIAL PERFORMANCE—LIABILITY—QUANTUM MERUIT—EVIDENCE.**

Even when work to be performed under an indivisible contract has not been done according to its terms, yet if the service is received, and is of benefit to the party receiving it, he is liable in a sum equal to the value of the service rendered and material furnished, and the party rendering the service and furnishing the material may recover such sum in a suit on a quantum meruit. *Ford v. Smith*, 25 Ga. 675; *Sentell v. Mitchell*, 28 Ga. 196; *Southern Railway Co. v. Branch*, 9 Ga. App. 311, 71 S. E. 696. In such a case the plaintiff must prove the value of his services, and the defendant may prove anything in proper reduction thereof. *Jacobus v. Wood*, 84 Ga. 638, 640, 10 S. E. 1099.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by C. E. Frazier against J. S. Collins and others. Verdict for plaintiff, and, from the overruling of their certiorari, defendants except and bring error. Affirmed.

C. E. Frazier brought suit in the municipal court of Atlanta against J. S. and C. R. Collins, alleging that he is an architect, and that the defendants employed him to prepare plans and specifications for a building to be erected by them, he agreeing to prepare the plans and specifications for a price

that he would consider reasonable, and that he thought would be satisfactory to the defendants; that, about 60 days after the plans and specifications had been prepared and delivered to the defendants, he called on them for a payment, stating to them at the time that his charge would be 1¼ per cent. of the cost of the building, and the defendants at that time paid him \$100 on account. The petition, as amended, alleged that the defendants were indebted to the plaintiff in the sum of \$437, the building having cost approximately \$25,000. He afterwards amended his petition by adding a count based on a quantum meruit. The defendants answered, setting up that they employed the plaintiff to prepare plans, specifications, and estimates, he agreeing to prepare the same regardless of price, and to make the price satisfactory to the defendants; that the work was done in a very unsatisfactory manner, and they denied indebtedness. They subsequently amended their answer by setting up that the estimates which the plaintiff had agreed to prepare were not prepared according to contract; that the \$100 paid to him was paid before they knew or had opportunity to know of the errors and mistakes in the estimates; and that, by reason of his failure to make the estimates with any reasonable care and skill, he had broken his contract and was not entitled to anything; and they prayed for a judgment against him for \$100. Upon the trial of the case the jury returned a verdict in favor of the plaintiff for \$250. The defendants sued out certiorari, and they except to the judgment of the superior court, overruling the certiorari.

Paul S. Etheridge and Moore & Branch, all of Atlanta, for plaintiffs in error.

Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

JENKINS, J. (after stating the facts as above). [1, 2] It is insisted by the defend-

ants that the trial court erred in refusing to charge the jury as follows:

"If you believe, from the evidence, that the plaintiff was employed by defendants to prepare plans, specifications, and estimates, then I charge you that this would be an entire contract, and that, unless the plaintiff in good faith and with reasonable care and skill performed all of the contract, then he cannot recover on any part of the contract."

In so far as appears from the evidence adduced upon the trial of this case, the plans and specifications furnished by the plaintiff conformed in every respect to the requirements of the contract, and, while the defendants introduced testimony tending to show that the estimates furnished by the plaintiff were inaccurate, the undisputed evidence shows that the plans, specifications, and estimates, as furnished, were accepted and retained and used by the defendants in the erection and completion of the building for which they were furnished, and that no complaint was made with reference thereto until the present suit was instituted. There was ample evidence to support the verdict; and, under the rules stated in the headnotes, and the facts of this case, the court did not err in refusing to give to the jury the charge requested by the defendants. The ruling made by the Supreme Court in *Spalding County v. Chamberlin*, 130 Ga. 649, 61 S. E. 533, is not in conflict with the holding here made, since that case was not an action on a quantum meruit, where there was acceptance and use of a portion of the agreed service, but was a suit based upon contract, where no such fact of use and acceptance was shown.

The other exception, which is taken to the charge given, is governed by the same principle, and the charge is not subject to the criticism made.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 287)

McELREATH v. GROSS et al. (No. 9745.)(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919.)*(Syllabus by the Court.)***1. PROCESS ¶168—"MALICIOUS USE OF LEGAL PROCESS"—"MALICIOUS ABUSE OF LEGAL PROCESS"—SUIT FOR DAMAGES.**

"Malicious use of legal process" is where a plaintiff in a civil proceeding employs the court's process in order to execute the object which the law intends for such a process to subserve, but proceeds maliciously and without probable cause. In a suit for damages growing out of such malicious use of process, it must appear that the previous litigation has finally terminated against the plaintiff therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malicious Abuse of Process.]

2. PROCESS ¶168—"MALICIOUS ABUSE OF PROCESS"—SUIT FOR DAMAGES.

"Malicious abuse of legal process" is where a plaintiff in a civil proceeding willfully misapplies the process of a court in order to obtain an object which such a process is not intended by law to effect. In a suit for damages growing out of such a perversion of the court's process, it is not necessary to show that the former litigation was without probable cause, or that it terminated prior to the institution of the suit for damages.

3. MALICIOUS PROSECUTION ¶49—PROCESS ¶171—MALICIOUS USE AND ABUSE OF PROCESS—ACTION FOR DAMAGES—PETITION.

The court below did not err in sustaining the demurrer as applied to each count of the petition.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Action for damages by Emmett McElreath against J. H. Gross and others. General demurrer to petition sustained, suit dismissed, and plaintiff brings error. Affirmed.

It appears that an ordinance of the City of Kingsland imposed certain license taxes for doing business within that municipality; and provided for its enforcement by fine or labor on the streets, where persons liable to the tax transacted such business without first obtaining a license so to do; that Gross, Carleton, and others filed a petition for injunction against Emmett McElreath, the mayor, and W. H. Jones, the marshal of the municipality, in which they alleged that the ordinance was void as not being authorized by the city's charter, that petitioners had been arrested and fined for doing business without a license, and that they had sued out writs of habeas corpus before the ordinary, but that the mayor had notified them that he would continue to have them arrested if they attempted to do business without a li-

cense, wherefore they prayed that the defendants be enjoined from further arresting or trying them under said ordinance. On the interlocutory hearing before the judge of the superior court, the defendants were enjoined as prayed. That judgment was reversed by the Supreme Court, it being held that the case fell within the general rule that a court having equitable jurisdiction will not restrain by injunction a prosecution for the violation of a penal ordinance, nor in such a proceeding inquire into the validity of the ordinance, and that the case did not properly come within the exceptions to such general rule as had in some instances been recognized. See *Jones v. Carlton*, 146 Ga. 1, 90 S. E. 278. This decision of the Supreme Court was made the judgment of the court below, and, after the final determination of the injunction proceeding, the said Emmett McElreath instituted the present action for damages against the petitioners in that proceeding, alleging in the first count that the former proceeding was without probable cause and was a malicious use of legal process, intended only to injure, harass, and humiliate the petitioner in his administration of the office of mayor, and that such was its effect. The second count was for a malicious abuse of legal process, the averments of fact setting up the right of action being substantially the same as in the first count, except that a lack of probable cause as to the former proceeding was not alleged. To this suit for damages all the pleadings and orders in the former case were attached as exhibits. The defendants entered a general demurrer to the petition, and the trial judge sustained the demurrer and dismissed the suit, assigning as his reason therefor that the injunction proceeding was not without probable cause, and that since it had been maintained against the defendants in their official capacity, the present individual suit by the plaintiff would not lie.

Jas. T. Vocelle, of St. Marys, for plaintiff in error.

S. C. Townsend, of St. Marys, and Jas. R. Thomas, of Jesup, for defendants in error.

JENKINS, J. (after stating the facts as above). [1] 1. It was manifestly not error to sustain the demurrer so far as the first count, pertaining to the malicious use of process, was concerned. The lack of probable cause is one of the necessary elements to be alleged and proved in an action of this character. In the case of *Short v. Spragins*, 104 Ga. 628, 30 S. E. 810, the Supreme Court said:

"Where an equitable petition for injunction and the appointment of a receiver, which fairly and honestly set forth the facts relied upon by the plaintiffs therein, was presented to the judge of the superior court, who entered thereon an order sanctioning the petition, restrain-

ing the defendants as prayed and appointing a temporary receiver, this action by the judge afforded conclusive evidence of probable cause for the bringing of the suit, although at an interlocutory hearing thereafter had the order above mentioned was rescinded by the judge as having been improvidently granted upon the facts alleged."

See, also, *Georgia Loan & Trust Co. v. Johnston*, 116 Ga. 628, 43 S. E. 27.

[2, 3] 2. Nor do we think that there was error in sustaining the demurrer in so far as it pertained to the second count of the petition, which sought to set up a malicious abuse of legal process. No misapplication or perversion of the court's process is made to appear. The object attained in suing out the petition for injunction was not a perversion of that process. If the purpose and effect of suing out the process had been to maliciously injure, harass, and humiliate the plaintiff, and had it been instituted without probable cause, but not actually put to some unauthorized use, there would have been a malicious use of a legal process; but in order for there to be a malicious abuse of process, it must be willfully misapplied or perverted to some use which the law did not intend that such a process should subserve. *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 281, 62 S. E. 222. It does not appear that the process was employed for any purpose other than that which such a process was intended by law to effect, since the interlocutory granting of the injunction as prayed was the sole use made or object attained. As to what the present defendants did, the allegations end there. The mere fact that the institution of such a proceeding and the granting of such an order might of itself have incidentally caused the worry, annoyance, and humiliation alleged, and might also, as charged have occasioned the usual trouble and expense attending such litigation, could not be taken as a perversion or misapplication of the process. But if the process had been misapplied, had it been perverted to another and different use, such as the law did not intend such a process to subserve, and if by reason of such perversion the intended worry, trouble, and expense had resulted, then such an action for damages as is now referred to would properly lie. In making clear the rather fine but vital distinction which it is here sought to show, the statement in 19 Am. & Eng. Ency. Law (2d Ed.) 632, quoted by the Supreme Court in *Brantley v. Rhodes-Haverty Furniture Co.*, 131 Ga. 276, 281, 62 S. E. 222, is helpful:

"The principal distinction between an action for malicious abuse of process and one for malicious prosecution is that while the former lies for an improper use of the process after it is issued, the latter is an action for the ma-

licious suing out of the process without probable cause."

See, also, *Porter v. Johnson*, 96 Ga. 145, 149, 23 S. E. 123; *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; *Clement v. Orr*, 4 Ga. App. 117, 60 S. E. 1017.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 320)

McCAIN v. STATE. (No. 10146.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1919.)

(Syllabus by the Court.)

1. PARTS OF CHARGE.

When read in connection with the entire charge, there is no reversible error in any of the extracts therefrom, of which complaint is made in the motion for new trial.

2. CRIMINAL LAW §1160—VERDICT—REVIEW.

The evidence is sufficient to support the verdict; and, "the verdict having been approved by the trial judge, under the repeated and uniform rulings of this court and of the Supreme Court a reviewing court is powerless to interfere. When the verdict is apparently decidedly against the weight of the evidence, the trial judge has a wide discretion as to granting or refusing a new trial; but whenever there is any evidence, however slight, to support a verdict which has been approved by the trial judge, this court is absolutely without authority to control the judgment of the trial court." *Toole v. Jones*, 19 Ga. App. 24, 90 S. E. 732. See *Bradham v. State*, 21 Ga. App. 510, 94 S. E. 618, and cases cited.

3. CRIMINAL LAW §1064(3), 1151—MOTION FOR NEW TRIAL—CONTINUANCE—DISCRETION—SUFFICIENCY.

The ground of the motion alleging error in overruling the motion to continue is too indefinite for consideration by this court. It does not even give the name of the absent witness; nor does it show "that he has been subpoenaed; * * * that his testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that he expects he will be able to procure the testimony of the witness at the next term of the court; and that the application is not made for the purpose of delay, but to enable the party to procure the testimony of the absent witness"; nor does the ground of the motion "state the facts expected to be proved by the witness." Pen. Code 1910, § 987. "Grounds of a motion for new trial should be complete within themselves." *Daniel v. Schwarzwelss*, 144 Ga. 81, 86 S. E. 239 (1); *Copeland v. Ruff*, 20 Ga. App. 218, 92 S. E. 955 (2); *Bridges v. Griffin*, 20 Ga. App. 599, 93 S. E. 170 (2). It is true that there is attached to the motion for a new trial what purports to be the evidence of plaintiff in error offered on a motion for continu-

ance, but this is in no way identified as a part of this ground of the motion for new trial, nor referred to therein as an exhibit. In addition to the above, from the case of *Sealy v. State*, 1 Ga. 213 (1), 44 Am. Dec. 641, to *Hilton v. Haynes*, 147 Ga. 725 (2), 726 (2), 96 S. E. 220, our Supreme Court has decided that in motions for continuance the discretion of the court will be interfered with only in extreme cases. In the opinion in the *Sealy Case*, supra, 1 Ga. on page 216, 44 Am. Dec. 641, Judge Lumpkin said: "There is great danger of doing mischief by revising matters of this kind, which should properly be confided to the discretion of the court below, to be regulated by the circumstances of each particular case. No precise rule can be laid down, and a most arbitrary and oppressive exercise of this discretion must be made apparent to this court, before it will interfere." See, also, *Blount v. State*, 18 Ga. App. 204, 89 S. E. 78 (1). In the instant case we cannot say that the trial judge flagrantly abused his discretion.

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceeding by the State against Jess McCain. From the judgment, McCain brings error. Affirmed.

Emmett Smith, of Carrollton, for plaintiff in error.

Willis Smith, Sol., of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 299)

HARRIS v. UNION COTTON MILLS.
(No. 9877.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919.)

(Syllabus by the Court.)

1. PARENT AND CHILD ⇨7(3)—PERSONAL INJURY TO CHILD—PARENT'S RIGHT OF ACTION.

Where a father hires his minor son to an employer to do certain work, and the employer, without the consent of the father, puts the son to a different and more hazardous employment, and the son is injured, the father has a cause of action in his own behalf against the employer for the recovery of such diminution of the child's earning capacity, between the date of the injury and the date of his attaining his majority, as the injury may have occasioned. *Braswell v. Garfield Cotton Oil Mill Co.*, 7 Ga. App. 167, 66 S. E. 539.

2. MASTER AND SERVANT ⇨230(7)—MINOR EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURY.

But where a minor, such as indicated, has been injured, and suit for damages is maintain-

ed in his own behalf, the fact that his employer might have changed the work and duties of his employment would not have the effect of having relieved the plaintiff of the duty on his part to exercise that degree of intelligence, knowledge, and judgment actually possessed by him; and thus, in such a suit, proof of such change of employment would not, of itself, furnish a ground of recovery, where it also appears that the injury complained of was brought about by the plaintiff's own inexcusable negligence. *Wilder v. Miller*, 128 Ga. 139, 57 S. E. 309 (3); *Hendrickson v. Louisville & Nashville R. Co.*, 137 Ky. 562, 126 S. W. 117, 30 L. R. A. (N. S.) 311, and case note.

3. MASTER AND SERVANT ⇨155(1)—EMPLOYMENT OF MINOR SERVANTS—WARNING—LIABILITY.

If the danger was so patent and obvious that it must necessarily have been as easily known to the servant as to the master, the latter will not be liable for his failure to give warning. *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *Williams v. Atlantic Coast Line R. Co.*, 18 Ga. App. 120, 89 S. E. 158; 26 Cyc. 1171.

4. MASTER AND SERVANT ⇨154(1)—INJURY TO SERVANTS—CONTRIBUTORY NEGLIGENCE—NONSUIT.

According to the plaintiff's evidence, he was at the time of the injury an ordinarily developed boy of average intelligence, lacking two months of being 18 years of age. He had worked in the mill for a period of several months, and for half of each day, for a period of three weeks, had been engaged at work with the particular machinery by which he was injured. None of the alleged acts of negligence on the part of the master are substantiated by the evidence of the plaintiff, save the allegation as to the failure of the master to give warning of the danger. The plaintiff necessarily must have known that to place his hand within the rapidly revolving open machinery, with which he was necessarily familiar, would be a dangerous act. Viewing the entire evidence as presented, with all reasonable inferences properly deducible therefrom, the court, in our opinion, did not err in granting a nonsuit. See *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *Id.* 127 Ga. 404, 56 S. E. 452, in which the facts involved were very similar to the evidence here presented.

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by James Harris against Union Cotton Mills. Judgment for defendants, and plaintiff brings error. Affirmed.

W. E. Mann, of Dalton, and Rosser & Shaw, of La Fayette, for plaintiff in error.

W. M. Henry, of Rome, and Shattuck & Shattuck, of La Fayette, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(112 S. C. 329)

WATKINS et al. v. JUSTICE et al.
(No. 10156.)(Supreme Court of South Carolina. Feb. 6,
1919.)**1. APPEAL AND ERROR** **§1022(1)—REVIEW—**
ACTION AT LAW.

In action for partition, where pleadings raised legal issue and made it action for recovery of realty, finding of trial judge, approving master's report, is conclusive if there is any evidence to sustain it.

2. DOWER **§44—RIGHT OF WIFE—CONVEY-**
ANCE BY HUSBAND.

Where legal title to land was at one time in husband during coverture, dower right of wife attached, and she is entitled thereto despite conveyance, in absence of any fact on her part defeating her claim.

3. DOWER **§71(2) — ACTION TO RECOVER**
REALTY—ADMEASUREMENT.

In action for partition, made action for recovery of realty by pleadings, where all parties interested are before court, dower of wife of one in chain of title can be admeasured.

Appeal from Common Pleas Circuit Court of Oconee County; James E. Peurifoy, Judge.

Action by J. M. Watkins and others against W. M. Justice and others. From judgment for plaintiff, defendants appeal. Modified and affirmed.

J. R. Earle, of Walhalla, for appellants.

Stribling & Dendy, of Walhalla, for respondents.

WATTS, J. This is an action for partition of two tracts of land, one containing 135 acres, known as the Thomas Watkins home place, and the other containing 5 acres, known as the Eliza Watkins place. The plaintiffs allege that they, with the defendants, except W. M. Justice, are tenants in common in these lands, and ask for partition, and demand accounting from Sarah Watkins, defendant, in possession, for rents and profits. J. M. Watkins claims also to own in his own right the share of Nisea Watkins. Defendants deny that plaintiffs have any right on the 135-acre tract, and allege that Sarah Watkins is the sole owner of the same. After issue joined the cause was referred to the master to hear and determine all issues of law and fact, and report the same. The master made his report, wherein he found that W. M. Justice owned in fee the 135-acre tract, by virtue of a deed of conveyance executed and delivered to him. Since the commencement of this action, by Sarah Watkins, and that the 5-acre tract was subject to partition amongst the heirs at law of Eliza Watkins, deceased, and recommended a sale thereof for partition. He further

found that J. M. Watkins was not an innocent purchaser for value without notice of the share of Nisea Watkins, but found that she had conveyed her interest prior to Sarah Watkins.

After the master had filed his report exceptions were duly filed and the cause was heard by his honor Judge Peurifoy, who by his decree filed April 26, 1918, overruled all exceptions, and approved and confirmed said report of said master. After entry of judgment, appellants appeal, and by four exceptions impute error.

[1] All of the exceptions are overruled except exception 4, for the reason that the pleadings raised a legal issue, and made it an action for the recovery of real estate, and the finding of the circuit judge is conclusive, if there is any evidence to sustain his finding, and there is. In addition to this we have the concurring finding of the master and circuit judge, and the appellants fail to satisfy this court that the finding is against the preponderance of the evidence.

[2] So much of exception 4 as raises the point that Cella Watkins, the widow of John Watkins, is barred of dower, according to the finding of circuit court, must be reversed. The record shows that the legal title to land conveyed was at one time in John Watkins during coverture with Cella, and the dower right of Cella attached therein, and the record fails to disclose any fact on her part that would defeat her claim thereto.

[3] All of the parties being before the court, her dower can be admeasured in this proceeding. With this modification as to dower, the judgment of circuit court is affirmed.

Modified.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 434)

BALLENGER v. FISK-CARTER CONST.
CO. (No. 10148.)(Supreme Court of South Carolina. Feb. 3,
1919.)**MASTER AND SERVANT** **§286(39), 288(11),**
289(37)—NEGLIGENCE—CONTRIBUTORY NE-
GLIGENCE—ASSUMPTION OF RISK—QUESTIONS
FOR JURY.

Questions of negligence, contributory negligence, and assumption of risk held under the evidence for the jury, where a construction company ordered an inexperienced laborer to go on a car of lumber and take the brakes off, and it ran down a grade into a post, causing his death.

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by J. L. Ballenger, administrator of Foster Simpson, deceased, against the Fisk-Carter Construction Company, for death of deceased when a car of lumber ran down a grade into a post, after he as directed unloosed the brakes, the track being, it was claimed, icy and slippery. Judgment for plaintiff, and defendant appeals. Affirmed.

Sirrinc & Nettles, of Greenville, for appellant.

Martin & Henry, of Greenville, for respondent.

WATTS, J. This is an action for damages, by plaintiff against the defendant, for death resulting from personal injuries sustained by plaintiff's intestate, Foster Simpson, January 7, 1918, while engaged as a laborer by the defendant. The case was tried before Judge Wilson and a jury, and resulted in a verdict in favor of the plaintiff for \$2,000. At the close of plaintiff's testimony, a motion for a nonsuit was made by the defendant, and refused by his honor.

After entry of judgment, defendant appeals, and complains of error by 9 exceptions. At the hearing in this court appellant abandoned exceptions 2, 6, and 9. The remaining exceptions assign error in refusal of the defendant's motion for a nonsuit, and the judge's charge, and may be considered in three propositions: (1) That there is no testimony tending to establish any negligence, as alleged on the part of the defendant. (2) The testimony for the plaintiff shows that the injury was due solely to the negligence of the deceased. (3) The testimony for the plaintiff shows that the deceased laborer assumed the risk of injury under the circumstances. This exception cannot be sustained. The evidence shows that the place was dangerous, and that the defendant required the plaintiff's intestate to do a dangerous thing, in a dangerous way, and the jury were justified, under the law and evidence in the case, that the pleas of contributory negligence and assumption of risk could not avail.

The evidence shows that the deceased was an ignorant, inexperienced servant, as to this particular work; that he was neither warned nor instructed by the master; that the master selected the place, the fellow laborer's implements, and placed the deceased, who was ignorant and inexperienced and did not realize the unsafe conditions and surroundings in which the master had placed him. The evidence shows that he was an ordinary laborer, a country laborer, without experience in handling cars or in railroad-ing. The master selected four laborers from the crowd, and ordered deceased to go upon the cars and "take the brakes off."

The master put an extraordinary piece of

work upon the deceased, and the deceased did the work imposed upon him, under and in presence of master's representative. His honor made no mistake in submitting to the jury, under the evidence in the case, for their determination, whether the defense of the pleas of contributory negligence or assumption of risk was made out. Neither do we see any error in any particular in his honor's charge.

All exceptions are overruled, and judgment affirmed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 457)

DREHER et al. v. COLUMBIA MILLS CO.
(No. 10157.)

(Supreme Court of South Carolina. Feb. 7, 1919.)

1. APPEAL AND ERROR ¶895—WEIGHT OF EVIDENCE—REVIEW.

The Supreme Court cannot consider where the preponderance of the testimony lies.

2. NEGLIGENCE ¶136(14) — QUESTION FOR JURY.

Whether a watchman was negligent in waving a club in front of horse while telling plaintiff he could not use a private way, whereupon horse backed wagon into a dangerous excavation, held for jury.

3. APPEAL AND ERROR ¶215(3)—MATTERS REVIEWABLE — SAVING OBJECTIONS — INSTRUCTIONS.

If the trial judge misstates the issues, his attention must be called to it or the error is waived.

4. NEGLIGENCE ¶61(2)—PROXIMATE CAUSE — ACTS OF THIRD PERSONS.

If a watchman for defendant was negligent in brandishing his club in front of a horse while telling the driver, plaintiff, that he could not drive on the defendant's premises, causing the horse to back the wagon into a dangerous excavation on the property of a third person, defendant cannot excuse himself, on the ground that the death trap was set by such third person.

Appeal from Common Pleas Circuit Court of Richland County; M. S. Whaley, Judge.

Action by Mamie Dreher and her husband against the Columbia Mills Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Wm. Elliott and James H. Fowles, both of Columbia, for appellant.

A. W. Holman and A. F. Spigner, both of Columbia, for respondents.

FRASER, J. [1] There was evidence that the plaintiff was going along Gist street in the city of Columbia; that Gist street ran through the yard of the defendant mills company; that the street had gates at both the entrance into and exit of the street from the mill yard; that the gate of entrance was open; that as the plaintiff was going through the gate a watchman of the defendant said to the plaintiff, "You can't go through there;" that plaintiff asked permission to go far enough to turn round, and that another watchman ran up brandishing a stick, and ordered the plaintiff to go back; that the second watchman came so close to the horse and used such threatening gestures that it frightened the horse, and it went backwards out of the gate and ran the wagon off of the street and down the embankment, whereby the plaintiff sustained serious injuries. Much of this was denied, but this court cannot consider the preponderance of the testimony.

[2] The defendant made a motion for the direction of a verdict on the ground that there has been no negligence of any agent of the defendant acting within the scope of his authority. The motion was refused, and this refusal constitutes the first exception. The second watchman, Mr. Spigner, said:

"I am employed as watchman at the Columbia Mills, and it is my duty to stop all from coming into the millyard, except employes of the mill."

There is testimony, therefore, that the watchman was acting in the line of employment. Now, did Mr. Spigner wave the stick at the horse? Did he wave it close enough to the horse to frighten him? Was it negligence to do so, in view of the fact that there was a dangerous excavation just in the rear of the wagon? All of these questions were for the jury, and we cannot set aside their findings. This exception cannot be sustained.

The second exception is as follows:

"His honor erred when he charged the jury that if the plaintiff had acquired the right to go upon the defendant's property this right could not be negligently revoked, when there is no allegation in the complaint that the plaintiff acquired, or that the defendant revoked, a license to go upon its property, and when the allegation and proof was that the plaintiff was injured by a fall down a steep and dangerous embankment near one of the streets of Columbia, and not on the defendant's property."

This exception cannot be sustained.

[3] The rule is that if the trial judge misstates the issues, his attention must be called to it or the error is waived.

[4] The second part of this exception is really another exception, but it cannot be sustained. A man cannot excuse himself for throwing one into a death trap on the

ground that the trap was set by a third person. The proximity of a death trap calls for greater care.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 499)

AUGHTRY v. CITY OF COLUMBIA.
(No. 10145.)

(Supreme Court of South Carolina. Feb. 1, 1919.)

1. NEGLIGENCE \S 117—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence ordinarily is an affirmative defense.

2. MUNICIPAL CORPORATIONS \S 800(1)—INJURIES ON SIDEWALK—NEGLIGENCE—PROXIMATE CAUSE.

To render city liable for injuries to pedestrian from slipping on banana peel on sidewalk, city must not only have been negligent, but its negligence must have been proximate cause of injuries.

3. MUNICIPAL CORPORATIONS \S 821(20) — INJURIES ON SIDEWALK — CONTRIBUTORY NEGLIGENCE—DIRECTION OF VERDICT.

Where pedestrian, injured in slipping on banana peel on sidewalk, to prove negligence by defendant city relied upon things which also proved contributory negligence on her part, verdict should have been directed for city; action having been brought under statute requiring proof she did not negligently contribute to her own injuries.

Appeal from Common Pleas Circuit Court of Richland County; M. S. Whaley, Judge.

Action by Mrs. R. El. Aughtry against the City of Columbia. From judgment for plaintiff, defendant appeals. Reversed.

C. S. Monteth, of Columbia, for appellant.
James H. Hammond and J. S. Verner, both of Columbia, for respondent.

FRASER, J. This is an action for personal injuries. The plaintiff was walking up Main street, in the city of Columbia, on a paved sidewalk. She stepped on a piece of banana peeling lying on the sidewalk and slipped and fell to the sidewalk, and broke her arm and otherwise injured herself, and brought this action for damages.

The plaintiff testified:

"I live at 2017 Main street. On the morning of June 10, 1917, between 7 and 8 a. m., while walking along the sidewalk on Main street going to store of H. D. Cooper, I slid or slipped on a banana peel and fell to the pavement. It was good daylight, and sidewalk was paved. My foot slipped from under me, and I fell on

my left side, breaking my arm and otherwise bruising myself. Mr. Cooper helped me up. My arm pained me very much at the time and have never since that time been much good to me. Policemen pass my house all the time, about every half hour, or something of that kind. I saw policeman passing there the afternoon before I was injured. The scavenger wagons come right early, about 8 o'clock. The banana peeling was a black, rotten peeling, all dusty and full of dirt. It was an old peeling. It was lying not quite middleways of the pavement, and it had dust on it.

"I did not have anything but myself. I had a dollar bill in my hand, and that was all I had, and I was just going along in front, going along slowly. There was nothing to hurry me. I live on Main street near where I got hurt. Policemen pass my house all the time, every half hour, or hour. I see them pass my house every day. Scavenger wagons come by our house before 8 o'clock and take up trash from the street."

Cross-examination: "I do not know when the peeling was put on the sidewalk. I did not see it before I slipped on it. My eyesight is very good. I did not examine the banana peeling until after I had fallen. I went back and looked at it. The sidewalk at that point is the regular size of sidewalks on Main street. It is a nice paved sidewalk, and there is nothing the matter with it. I saw the peeling after I stepped on it and my foot rubbed it on the sidewalk."

There was further testimony to the effect that the throwing of a banana peeling on the sidewalk was forbidden by city ordinance; that a policeman was required to walk over that sidewalk every 45 minutes and it was his duty to remove such things from the sidewalk; that the driveway was swept by the city, but that the city relied upon the property owners to sweep the sidewalk; that the banana peeling was lying in plain view, and there were no other obstructions.

At the close of the testimony, the defendant moved for a direction of a verdict. The statute under which this action is brought reads:

"Causes of Action for Damages from Defects in Streets, Mismanagement, etc.—Any person who shall receive bodily injury, or damages in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation within the limits of any town or city, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof.

If any such defect in a street, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured if his load exceed the ordinary weight: Provided, the said corporation shall not be liable unless such defect was occasioned by its neglect or mismanagement: Provided further, such person has not in any way brought about any such injury or damage by his or her own negligent act or negligently contributed thereto."

[1-3] Ordinarily, contributory negligence is an affirmative defense; but this statute requires the plaintiff to allege and to prove that she did not negligently contribute to her own injury. Whether the presence of the banana peeling on the sidewalk was evidence of negligence on the part of the defendant or not is immaterial. The evidence shows that the defect was obvious. It did not require expert supervision to detect the banana peeling, or to know of its danger. If the policeman should have seen it, then the plaintiff should have seen it. If it was negligence in the city, then it was contributory negligence in the plaintiff. There is no evidence to show that the peeling was on the sidewalk when the policeman passed. All the case shows is that the peeling was there when the plaintiff stepped on it. There is nothing in the case to show that the city had put it there or could have prevented it by the utmost care. It is said that the city did not sweep its sidewalks. The defendant must not only be negligent, but its negligence must be the proximate cause of the injury. There is nothing in the case to show that the banana peeling would not have been there at the unfortunate moment, even if the sidewalk had been swept daily. There was no evidence that the city was guilty of any negligence that was the proximate cause of the injury. The right of action is based upon the negligence or mismanagement which was the proximate cause of the injury. Those things relied upon to prove negligence, if they did prove negligence, would also prove contributory negligence.

The verdict should have been directed in favor of the defendant, and the judgment is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(112 S. C. 64)

GILLIAM v. BLACK. (No. 10150.)

(Supreme Court of South Carolina. Feb. 4, 1919.)

1. APPEAL AND ERROR \S 882(16)—**INVITED ERROR.**

Party cannot complain that presiding judge separated equitable and legal issues and restricted evidence before jury, where judge did so upon his suggestion and with his consent.

2. TRIAL \S 3 — **EQUITABLE ISSUES — SUBMISSION TO JURY.**

Where legal and equitable issues in case were separable, there was no error in not allowing jury to pass upon testimony going to prove equitable defense.

Appeal from Common Pleas Circuit Court of Barnwell County; Ernest Moore, Judge.

Action by T. J. Gilliam against W. Riley Black. Judgment for plaintiff, and defendant appeals. Affirmed.

G. M. Greene and C. Carroll Simms, both of Barnwell, for appellant.

James E. Davis and J. O. Patterson, Jr., both of Barnwell, for respondent.

WATTS, J. This is an action to recover on a general warrant contained in a deed from defendant to the plaintiff after issues joined. The case was tried before Judge Moore and a jury, and resulted in a verdict in favor of the plaintiff for the sum of \$274.35. After entry of judgment, defendant appeals.

At the opening of the trial Judge Moore construed the pleadings to contain separable legal and equitable issues, and would only submit to the jury such evidence deemed by him to be responsive to the legal issue, and in construing the first deed merged in the second deed to be one granting a specific number of acres and that the defendant would be liable for damages for any deficiency in said acreage. The exceptions summarized impute error to the presiding judge in separating the issues and restricting the evidence before jury and in his rulings in these particulars.

After all of the evidence was in, the equitable issues were fully inquired into by his honor, who decided the same, and then submitted the legal issues to the jury.

[1, 2] The exceptions cannot be sustained that insist that the jury should have been allowed to pass upon the testimony going to prove an equitable defense. Appellant did not ask his honor to withdraw the case from the jury. Neither did the court do so. But appellant's counsel suggested to the court "that the only question is trying the equitable issue before your honor," and in reply to this the court said, "You gentlemen agree to that?" and the reply of appellant's counsel

was, "Yes, sir; we agree to that." Thereupon the court, in accordance with this suggestion and agreement of appellant's counsel, proceeded to try the question of mistake set out in the answer. The jury retired and this defense was fully entered into. The appellant cannot be heard to complain in this particular. Neither was there any error on the part of his honor in his construction of the deed (second one) in question. It was the deed that both plaintiff and defendant by mutual agreement entered into after execution and delivery of first deed between the parties and was to govern the transaction between them.

After delivery of second deed, plaintiff was ousted of part of the land embraced thereon under a title containing a general warrant by a paramount outstanding title in another. As to the finding by his honor of the equitable issues in the case, the appellant has failed to convince us that it is not sustained by a clear preponderance of the evidence in the case. The evidence shows that the plaintiff was to get the lands described in the plat. The deeds were the same, except the second deed gave the plaintiff the land within the plat. The evidence fails to show fraud or mutual mistake. The defendant knew, or should have known, what he was doing when he executed the deed.

We fail to see any errors in the trial in the circuit court, and all exceptions are overruled, and judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 437)

HENRY v. NORRIS BROS., Inc. (No. 10149.)

(Supreme Court of South Carolina. Feb. 3, 1919.)

1. MASTER AND SERVANT \S 153(2)—**MASTER'S DUTY TO WARN IGNORANT EMPLOYÉ.**

It is master's duty to warn immature or ignorant employé working on unsafe machinery of the danger.

2. MASTER AND SERVANT \S 286(41)—**INJURY TO EMPLOYÉ — DANGEROUS MACHINERY — JURY QUESTION.**

In action for injuries to newly employed workman while working on planing machine with unprotected cylinder, where there was abundant evidence that machine was dangerous, and that no warning had been given, court properly refused to direct verdict for defendant.

3. MASTER AND SERVANT \S 278(13) — **DANGEROUS MACHINERY — NEGLIGENCE OF EMPLOYER—EVIDENCE.**

In action for injuries to newly employed worker from unprotected knives attached to cylinder on planer on which employé was work-

ing, evidence held to support a reasonable inference of negligence by master as a proximate result of the injury.

4. MASTER AND SERVANT \Rightarrow 218(3)—DANGEROUS MACHINERY — PLANING MACHINE — ASSUMPTION OF RISK.

Newly hired employe did not assume risk of working on planing machine with cylinder with attached knives, though cylinder was in plain view, where its dangerous character was not obvious and employe did not know and had no opportunity to learn thereof.

5. MASTER AND SERVANT \Rightarrow 177—INJURY TO EMPLOYE — NEGLIGENCE OF FELLOW SERVANT.

In action for injuries to employe, who slipped on floor and cut his hand in cylinder, defense that injury was caused by negligence of fellow servant employed to sweep floor was not available, where there was no evidence that fellow servant disobeyed instructions by failing to sweep floor when required to do so by master.

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by R. J. Henry against Norris Bros., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

McCullough, Martin & Blythe, of Greenville, for appellant.

B. A. Morgan and Martin & Henry, all of Greenville, for respondent.

FRASER, J. This is an action for damages for personal injuries. The negligence alleged was an unsafe place to work, unsafe machinery, and in causing him to work on an unsafe machine without warning him of danger.

In appellant's argument, it is said:

"Plaintiff entered defendant's employment September 25, 1917, at 6:40 a. m. and about 3:30 p. m. had his hand badly cut in an unprotected planer. He had been put to work upon this planer at about 11 a. m. Two worked the planer, one pushing the pieces of timber and the other pulling. They were making shuttles. They stopped 40 minutes for dinner, so that plaintiff had worked the planer for about four hours when he was hurt."

The other facts can be stated in considering the exceptions.

At the close of the evidence the defendant moved for the direction of a verdict, which was refused. The jury found for the plaintiff, and from the judgment entered on their verdict the defendant appealed.

I. The first exception complains that there was error in not directing a verdict, because "there was no evidence to support a reasonable inference of negligence, which was the proximate cause of the injury." This exception cannot be sustained. There was evidence that this was the first day the plain-

tiff had worked in the mill; that when the plaintiff was transferred to the planer he knew nothing about the machine upon which he was required to work; that he was given no instructions; that he was not warned of the danger; that, while the cylinder to which knives were attached was unprotected and in plain sight, yet that he did not see it except when it was in motion; that when it was in motion (3,000 revolutions a minute), it looked smooth; that the fact that it had knives upon it was not apparent, and the plaintiff did not know and was not warned of the dangerous place on the machine; that plaintiff's fellow servant, who was working with him on the machine, got a splinter in his hand, and called him, or plaintiff thought he did, and he started to go around the machine, slipped on the floor, and his hand went on the cylinder and was badly cut.

[1, 2] There can be no doubt that it is the duty of the master to warn an immature or ignorant employe of the danger. *Gadsden v. Power Co.*, 80 S. C. 248, 61 S. E. 960. There was abundant evidence that the machine was dangerous, and that no warning was given. A verdict therefore could not have been directed.

[3] II. "There was no evidence sufficient to support a reasonable inference of negligence as a proximate cause of the injury." This exception cannot be sustained. There was, in addition to the above, evidence that other employes had been injured by this machine before the accident here complained of. The foreman said that he had told Mr. Norris:

"It looks like we would have to fix something to keep them fellows from sticking their hands into the cutter."

There is a conflict of evidence as to whether the knives could have been protected or not, but, whether protection could or could not have been had, the duty to warn a novice of the unprotected danger was apparent. There was a conflict of testimony in regard to a warning, but that was a question for the jury.

[4] III. "The plaintiff assumed the risk." While the cylinder was in plain sight, yet there was evidence that the dangerous character of it was not obvious, and that the plaintiff did not, as a matter of fact, know the source of the danger, and had no opportunity to know it. This exception cannot be sustained.

IV. That a verdict should have been directed on the ground of contributory negligence. The appellant admits that this is not its strong point. The admission is well made, and this exception cannot be sustained.

[5] V. Appellant next claims that the negligence, if, any, was that of a fellow servant.

This cannot be sustained. The negligence here referred to is that of the man employed to sweep the floor. The negligence of the sweeper, to be available, would be in failing to sweep when required to do so by the master. There was no evidence here that the sweeper failed to obey instructions.

The sixth exception was abandoned.

The judgment appealed from is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 442)

MORTON v. TOLBERT. (No. 10151.)

(Supreme Court of South Carolina. Feb. 4, 1919.)

1. COSTS \S 254(4) — APPEAL — RECORD.

The case not conforming to the rule, the evidence not being given in narrative form, and much of it being wholly unnecessary, disbursements will not be allowed; both sides being responsible for the record.

2. EJECTMENT \S 9(2) — NECESSITY OF TITLE.

One in possession of land has right to retain possession against all the world, except the true owner, and so need not show title to recover of one removing her from possession.

Appeal from Common Pleas Circuit Court of Abbeville County.

Action by Sue E. Morton against B. R. Tolbert, Jr. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

D. H. Hill, of Abbeville, for appellant.

J. Moore Mars, of Abbeville, for respondent.

FRASER, J. [1] This case does not conform to the rule. The evidence is not given in narrative form, and much of it is wholly unnecessary. As both sides are responsible for the record, no disbursements are allowed. The appellant's argument thus states the case:

"The plaintiff brought this action to recover the possession of two small tracts of land, aggregating nine acres. The complaint was served on the 13th of September, 1917. According to the allegations of the complaint the plaintiff claims that she is the sole owner of the premises in fee simple, and that during the year 1912 the defendant entered thereon, and unlawfully ousted the plaintiff from possession.

"The case was tried before his honor, Judge Shipp, and a jury, and the jury rendered a verdict in favor of the plaintiff for the possession of the whole of the premises.

"The defendant has appealed, charging error in the presiding judge in not granting a non-

suit at close of plaintiff's case, and also charging error in the presiding judge not having directed a verdict at the close of all the testimony. The grounds of the motion for a nonsuit and for a direction of verdict are set forth in the 'case,' and need not be repeated here.

"The points made by the appeal are: (a) That there was no proof that the premises sued for in the complaint are included in the chain of title put in evidence, and under which plaintiff undertook to prove that she was the owner in fee simple of the premises sued for; (b) that, even if it should be admitted for the sake of argument that the premises sued for in the complaint are included in the chain of title introduced by plaintiff, still this chain of title only shows that plaintiff is the owner of a part interest in the premises, as a tenant in common, with other parties, not parties to the action, and under the allegations of the complaint the plaintiff could not recover, for the reason that under the circumstances the jury had no alternative but to find either in favor of plaintiff or against her, and a verdict in her favor for the whole was manifest error."

[2] There was abundant evidence to carry the case to the jury. Appellant manifestly overlooks the fact that the respondent alleged that she was not only the owner in fee of the land in dispute, but that she was in possession of the disputed land, and that the appellant invaded her possession and ran her tenants off. One in possession of a tract of land has the right to retain the possession against all the world, except the true owner. *Nicholson v. Villepegue*, 91 S. C. 234, 74 S. E. 506.

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 448)

LIDE v. HARTSVILLE OIL MILL
(No. 10153.)

(Supreme Court of South Carolina. Feb. 4, 1919.)

1. CORPORATIONS \S 433(1) — AGENCY — JURY QUESTION.

In action for value of cotton seed delivered by plaintiff to defendant's alleged agent, where defense was that such person was not in fact defendant's agent, existence of agency held a question for the jury.

2. APPEAL AND ERROR \S 1083(4) — HARMLESS ERROR — REVIEW — INSTRUCTIONS.

In action for value of cotton seed delivered by plaintiff to alleged agent of defendant, where defense was that there was no agency, court's refusal to charge on the law, whereby defendant could have been held on ground of ratification, was not error, where plaintiff did not claim ratification; the elimination of ratification being favorable to defendant.

Appeal from Common Pleas Circuit Court of Darlington County; R. W. Memminger, Judge.

Action by R. L. Lide against the Hartsville Oil Mill. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the exceptions referred to in opinion:

(1) Because from the undisputed evidence the relation between McDonald and the defendant was that of buyer and seller, not agency, and his honor erred in refusing the motion for a directed verdict and the motion for a new trial on said ground.

(2) Because there was no evidence that McDonald was the agent of defendant for the purchase and exchange of cotton seed, or that McDonald so acted for defendant, or that defendant held McDonald out to the public as such, and his honor erred in refusing defendant's motion for a directed verdict and the motion for a new trial on said ground.

(3) Because his honor erred in refusing to charge defendant's fourth request to charge, which was duly preferred, and in charging the jury in lieu thereof as follows: "Then comes a general statement of the law in respect to ratification of agency, which has no application here at all, and there is absolutely no use in consuming time in reading it"—said request being the following: "It is a settled principle of law that a principal is not liable for the unauthorized acts of his agent unless these acts are subsequently ratified by the principal. Therefore, even if you should find that the relation of agency existed between McDonald and the defendant, yet, before you could find the defendant liable, you would have further to find from the evidence, and the greater weight thereof, that McDonald was authorized by the defendant, and was held out to the public by the defendant as its agent for the purchase and exchange of cotton seed, or, if the acts alleged in the complaint were unauthorized, that the defendant subsequently ratified the same."

Specifications of Error.

(a) It was erroneous and highly prejudicial to refuse to charge the jury that a principal is not liable for the unauthorized acts of his agent unless these acts are subsequently ratified by the principal, because there was direct and emphatic evidence that defendant refused to ratify the very transaction alleged in the complaint when the same was called to its attention by the plaintiff.

(b) The jury were thus virtually instructed to disregard the following vital testimony of witness Lawton: "Q. Mr. Lawton, will you state whether or not Mr. Lide asked you the point-blank question whether he was your agent? A. That is my recollection. He said, 'Isn't Mr. McDonald your agent?' and I said, 'No; he is not our agent at all.'"

(c) There being no evidence that McDonald was authorized by defendant or was held out to the public by defendant as its agent for the purchase and exchange of cotton seed, it was prejudicial error to refuse specifically to charge the jury as requested in that respect.

(4) Because his honor erred in refusing to construe the written contract between defendant

and McDonald which was admitted to be the only contract between defendant and the alleged agent; whereas, his honor should have construed said instrument in writing and directed a verdict accordingly.

(5) Because his honor erred in holding that there was any conflict of testimony, it being respectfully submitted that there was no conflict in the testimony, and therefore only a matter of law upon which it was the duty of the court to direct a verdict.

(6) Because, in any event, plaintiff in dealing with McDonald acted at his peril, and was bound to ascertain, not only the facts of agency, but the nature and the extent of the authority, it not being within the power of McDonald to bind defendant by evidence which he alone may have put forward as to his authority. There being no evidence at all imputable to defendant tending to show agency, his honor erred in refusing defendant's motion for a directed verdict.

We hereby agree that the foregoing is the case for appeal to the Supreme Court, and that a printed copy thereof shall constitute the return required by law.

Miller & Lawson, of Hartsville, for appellant.

E. C. Dennis and J. Monroe Spears, both of Darlington, for respondent.

WATTS, J. This was an action to recover \$400, the value of certain cotton seed delivered by plaintiff to J. L. McDonald, the alleged agent of the defendant, for the purchase and exchange of cotton seed and whom it was alleged defendant held out to the public as its agent for said purchase, all of which defendant denied. The case was tried by his honor, Judge Memminger and a jury at the fall term of court, 1917, for Darlington county. The defendant moved for a directed verdict, which was refused. The jury rendered a verdict in favor of plaintiff for full amount claimed. After entry of judgment, defendant appealed, and by six exceptions alleged error, and asked reversal. Exceptions 1, 2, 4, 5, and 6 are all based upon the contention that the court should have directed a verdict for the defendant.

[1] An examination of the evidence discloses a great deal of testimony that should have been submitted to the jury, whether McDonald was the agent of the defendant generally, or acted as their agent in this particular case. There is no doubt that McDonald acted for them in getting Lide's seed, and turned the seed over to the defendant. There is evidence that defendant authorized McDonald to make a special agreement with Lide, with reference to the exchange of seed for meal. Lide acted with good faith, and had every reason, under the evidence in the case, to think he was dealing with the defendant, and not McDonald alone. The evidence was such that the court could not have disregarded it, and directed a verdict for the defendant as asked for. There was evidence that the defendant had permitted McDonald to appear as its agent for this particular trade

with the plaintiff, and the plaintiff, in good faith, dealt with McDonald on the faith of this appearance, and, agency being a question of fact for the jury, and there being competent evidence on this issue in the case, his honor committed no error in submitting the case to the jury, and these exceptions are overruled.

[2] Exception 3, which imputes error in the court's refusal to charge defendant's fourth request, is overruled. When his honor eliminated ratification, it was favorable to the defendant. The defendant could have been held either as agent, or that it had ratified what had been done, but plaintiff did not claim ratification. His honor's charge fully covered the law applicable to the case, and is free from error in the particulars complained of. This exception is overruled.

Judgment affirmed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 456)

GRIFFIN v. THAYER et al. (No. 10155.)

(Supreme Court of South Carolina. Feb. 5, 1919.)

MASTER AND SERVANT §262(3, 4)—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE—AFFIRMATIVE DEFENSES.

Assumption of risk and contributory negligence are affirmative defenses to a servant's action for injuries, and must be pleaded by the employers.

Appeal from Common Pleas Circuit Court of Colleton County; Mendel L. Smith, Judge.

Action by William Griffin against H. S. Thayer and others. From judgment for plaintiff, defendants appeal. Affirmed.

M. P. Howell, of Walterboro, for appellants.

Padgett & Moorers, of Walterboro, for respondent.

FRASER, J. Little need be said of the facts in this case, as only two questions are raised in the argument. The other exceptions were abandoned at the hearing.

The plaintiff, an employé of the defendants, brought this action for damages for personal injuries. The trial judge refused to submit to the jury the questions of assumption of risk and contributory negligence, inasmuch as assumption of risk and contributory negligence had not been pleaded. From these rulings this appeal is taken. Both are affirmative defenses and must be pleaded in order to be available defenses. Neither was plead-

ed, and his honor, Judge Smith, could not have submitted either.

The rule is so well settled that a review, or even a citation of authorities, is unnecessary.

The judgment is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 453)

HUGHES v. GREEN. (No. 10154.)

(Supreme Court of South Carolina. Feb. 4, 1919.)

GUARDIAN AND WARD §33—COLLECTION OF RENT—LIABILITY.

Guardian must collect rent from ward's real estate, and he is responsible therefor on failure to so do.

Appeal from Common Pleas Circuit Court of Union County.

Proceedings by D. Ambrose Hughes against T. A. Green, to open and set aside a settlement between guardian and ward. Decree of Probate Court affirmed by Court of Common Pleas, and respondent appeals. Modified.

J. Ashby Sawyer, of Union, and Carson, Boyd & Tinsley, of Spartanburg, for appellant.

Wallace & Barron, of Union, for respondent.

FRASER, J. This appeal arises from a proceeding commenced in the probate court for Union county, to open and set aside a settlement had between a guardian and his ward. The decree of the probate judge states:

"The respondent was the administrator on the estate of W. F. Hughes, deceased, and the guardian of the petitioner's estate; the latter being the sole heir and distributee of the said W. F. Hughes. The respondent has received his discharge, after a final settlement or return, as administrator, and has also filed his return, which he claims to be full and final, as guardian, but has never received his discharge as such guardian.

"This proceeding is brought to reopen and surcharge the returns filed by the respondent, both as administrator and guardian. As a matter of equity and justice, I have determined that this should be allowed; and I am moved to do this for the reason that, among other things, I feel that a judge of probate is, in part, at least, responsible for any wrong done in stating accounts such as these. Such matters are under his special supervision, as the respondent's attorneys contend, and the parties to such accountings rely very largely upon the advice and actions of the judge of probate.

"In the present instance I desire to say that I was never altogether satisfied with the accounts rendered by the respondent. Doubtless I should have called this to the latter's attention, but in some instances the accounts were sent me by mail, and in the final return these things were overlooked. It is these matters that, so far as I am able, I desire to correct in this decree."

I. The judge of probate finds that there was a final settlement, except as to two matters of rent. It is thus seen that the settlement between the guardian and his ward is opened on the ground that the probate judge has changed his mind as to the "equity and justice" of the final settlement between the parties. In *Dunsford v. Brown*, 19 S. C. 570, it was said, in a per curiam order for rehearing, that the settlement cannot be opened unless there has been misrepresentation, undue influence, imposition, or fraud in said settlement. There is no such finding in this case.

II. The judge of probate finds that the settlement was final, except as to two matters of uncollected rent, to wit, rent due by Rice and Goings. The Rice rent was paid and is out of the case. The guardian is responsible for the Goings rent. It was the duty of the guardian to collect the rent, and he did not do so. If the ward has agreed to take the account against Dr. Goings as cash, that might have raised another question. The finding is, and we cannot say it was error, that the ward did not take the account as cash.

The judgment appealed from is modified as above.

HYDRICK, WATTS, and GAGE, JJ., concur.

The CHIEF JUSTICE did not participate.

(111 S. C. 444)

ARTHUR v. HOLLOWELL (No. 10152.)

(Supreme Court of South Carolina. Feb. 4, 1919.)

1. DEEDS §83—RECORDATION—WITNESSES.

A deed which was in fact witnessed by two witnesses was properly recorded; the record hinging on the fact that it was so witnessed.

2. ACKNOWLEDGMENT §36(1)—VALIDITY OF RECORD—CLERICAL OMISSION.

Where deed was in fact witnessed by two witnesses, the mere fact that the notary omitted to declare in the probate that one of the witnesses was also present at the execution was not sufficient to invalidate the record, notwithstanding 17 Stats. 319, requiring, before recording, execution to be proved by a subscribing witness and Civ. Code 1912, § 3453, as to execution.

3. EVIDENCE §83(5)—PRESUMPTION—PERFORMANCE OF DUTY—NOTARY.

Where notary omitted to declare in probate to deed that one of the witnesses was present

at the execution, it will be presumed that notary did what he was required to do, and took proof that witness was also present, and that he only failed by oversight to state that fact in the record he made of the transaction.

Appeal from Common Pleas Circuit Court of Richland County.

Action by Anne Moore Arthur against R. L. Hollowell. From order sustaining plaintiff's demurrer to defendant's answer, defendant appeals. Affirmed.

Robert Moorman, of Columbia, for appellant.

Weston & Aycock, of Columbia, for respondent.

GAGE, J. There is but one issue in the cause, and that of law. The defendant objects to taking the title tendered him by the plaintiff simply because a deed which constitutes a link in plaintiff's chain of title was put upon the record without warrant of law, and therefore was not notice to creditors of that conveyor. The defect in the deed suggested by counsel is that the probate of it was insufficient to have warranted the register of mesne conveyance to record it. The deed was executed by McNulty and Owens to Arthur, and the names of David and Feagan are put down as witnesses to the transaction. The probate runs thus:

"State of South Carolina, Richland County.

"Personally appeared before me, Aaron David, and made oath that he saw the within named W. E. McNulty and L. B. Owens sign, seal, and, as their act and deed, deliver the within written deed for the uses and purposes herein mentioned, and that he with _____ witnessed the execution thereof. Aaron David.

"Sworn to before me this 31st day of December, 1918. T. E. Eskew [L. S.]

"Notary Public for So. Car."

The indicated defect in the probate is the supposed failure of David to have sworn that he witnessed the execution *with Feagan*. That inference arises simply out of the omission of the notary to insert Feagan's name in the space left blank for it. Of course it required the use of a microscope to detect such an omission; and that suggests that the omission ought not to be counted of serious import.

[1] There is no suggestion that there were not in fact two witnesses to the transaction; indeed the defendant, who sets up the defect, alleges in the answer that the deed in question was "executed by McNulty and Owens, whose signatures are attested by David and Feagan as witnesses thereto." If the deed was in fact so witnessed by David and Feagan, then of course it was properly recorded, for record hinged on that fact. The only object the Legislature had in requiring before the record of it some proof that the in-

strument was what it seemed on its face to be was "for preventing of frauds." The Statutes so declare. 7 St. at Large, p. 232, par. 45.

And so solicitous was the Legislature in those early days about the integrity of the transaction that the statute required "proof of the signing, sealing and delivery thereof, to be made in *open court*, by the oath of *two credible witnesses at the least*." (The italics are supplied.) Same citation. That was in 1785; but in 1839 the Legislature relaxed the procedure, and provided that:

"The execution of every such writing shall first be proved by affidavit of a *subscribing witness* taken before some *officer competent to administer an oath*." 11 Stats. 80. (The italics are supplied.)

The act of 1880 prescribed a like procedure. 17 St. at Large, p. 319.

The statute of 1880 does not prescribe the form and words of the probate; that is the work of practice through long years, and it ought to be adhered to. But the statute does prescribe how the deed shall be executed; it shall be signed, a seal indicated, and "in the presence of and be subscribed by two or more credible witnesses." Section 3453, Civil Code.

[2] Reverting to the recording statute of 1880, *supra*, it requires the execution (above described) shall be proved by a subscribing witness before the deed shall go on record. Plainly the subscribing witness who shall make the oath must swear to the whole execution, which is that the maker signed, and that each witness signed. But it would shock the judgment to conclude that such a manifestly clerical omission as was clearly made in the instant case by the notary should invalidate the record of a deed.

[3] The probate is not the transaction, but only some evidence of it. If two credible persons witnessed the signing, sealing, and delivering by the maker, and the answer alleges they did, then the law is satisfied; the deed is genuine, and was entitled to be recorded. The omission of the notary to accurately state in the probate the whole transaction, by the failure to declare in it that Feagan also was present at the execution, is not sufficient to invalidate the record. The presumption is that the notary did what he was required by law to do, that he took proof that Feagan was also present, and that he only failed by oversight to state that fact in the record he made of the transaction.

We find no case in our books on the exact issue. These cases cited by the appellant from our reports are in no wise inconsistent with the conclusions we have announced.

The order below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(33 W. Va. 236)

HUFF v. EQUITABLE LIFE INS. CO. OF DISTRICT OF COLUMBIA. (No. 3708.)

(Supreme Court of Appeals of West Virginia. Jan. 28, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1002—VERDICT ON CONFLICTING EVIDENCE—REVIEW.

In an action upon an insurance policy containing the condition that no obligation is assumed by the insurer unless at the date thereof the insured is "in sound health," which is treated by the defendant as a representation falsely and fraudulently made, and the evidence is conflicting as to the condition of the insured's health at the time he was insured, and also as to the time he was examined and advised by a physician that he had chronic nephritis, some witnesses fixing the time before and others after the date of the policy, a verdict based on such conflicting evidence will not be disturbed.

Error to Circuit Court, Ohio County.

Action by Susie Huff against Equitable Life Insurance Company of District of Columbia. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. C. Beneke and Jno. J. Coniff, both of Wheeling, for plaintiff in error.

WILLIAMS, J. To a judgment of the circuit court of Ohio county in favor of plaintiff, defendant obtained this writ of error and assigns as error the overruling of its motion to set aside the verdict of the jury as contrary to the law and the evidence, as disclosed in the trial of the case, and grant it a new trial.

Plaintiff is the beneficiary in a life insurance policy issued to Arthur Huff on the 13th day of August, 1917, by the defendant. The insured died the 3d day of the following December, and this suit is brought to recover the amount due under the policy.

The defense is based on the following provision of the policy:

"No obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

The defendant contends that the record shows that the insured knew at the time he took out the policy he was not in sound health, but was afflicted with chronic nephritis or Bright's disease, and concealed the facts from its agent, and therefore obtained the policy through fraud and misrepresentations.

J. H. Jenkins, superintendent of the defendant company, testified that, where the amount of the policy was less than \$300, no physical examination is made of the applicant, but that he is simply asked a number of questions as to the condition of his health

by the company's physician. Dr. R. L. Dev-
ereux says he went to Huff's house and fill-
ed out the inspection blank from answers
made to him by the insured, and that he
answered "No" to the question as to wheth-
er he suffered from certain diseases, includ-
ing kidney diseases, and that he reported him
as a good risk. This inspection took place
August 5, 1917. Dr. C. J. Ryan testified that
he had been called in to see the insured
July 23, 1917, and the next day examined
a specimen of his urine, and found him to be
suffering with chronic nephritis, commonly
known as Bright's disease; that he treated
him up to the 16th of August, and told him
as near as he could what his trouble was,
but did not believe he realized how serious
it was. The physician who prescribed for de-
ceased on the 26th of November, during his
illness, in his certificate of death, gave acute
nephritis and valvular heart lesions as the
cause of death.

Plaintiff testified that at the time her hus-
band took out the policy he was working at
the Wheeling Mold & Foundry Company, and
as far as she knew there was not anything
the matter with him. She says it was the
last of August when Dr. Ryan was called;
that there was not anything the matter with
her husband when he went to Chattanooga,
Tenn., in November. Luther Huff, brother
of deceased, says he saw him nearly every
day, and no physician was called to see him
prior to the 13th of August, 1917; that he
first took sick along the latter part of Au-
gust; that he was working right along in the
foundry at the time he was insured; and that
he knew when he took sick, and it was not
before he was insured. Warner Carrothers,
another witness, says he knew the insured,
and boarded with him during the month of
August, 1917; that he knew when he was in-
sured in the defendant company, and that
he was then working in the foundry; that
he never heard him complain before that
time of being sick; that he looked to be
healthy and all right; and that he did not
take sick until after he was insured, but
says he was sick along in October and No-
vember. Jessie Haley, another witness for
plaintiff, says she knew the insured well for
10 or 11 years and, as she expressed it, "he
appeared to be just the picture of health; he
was a strong, healthy, portly looking man."
Says she knew when he took the policy. This
witness lived in the same house with de-
ceased, and says she knew nothing of his
being sick prior to the 13th of August.

There is a conflict in the testimony as to
when Dr. Ryan visited the insured and in-
formed him that he had chronic nephritis.
He places the time as the 23d of July. But
other witnesses fix the time as the latter part

of August, after the policy was written.
There is also some apparent conflict in de-
fendant's own evidence. The doctor who
certified the death of deceased stated the
cause thereof to be acute nephritis, whereas
Dr. Ryan says he was suffering from chronic
nephritis in July, nearly a month before he
was insured. The evidence, therefore, pre-
sented a question of fact to be decided by
the jury; and the court has no right to in-
vade its province and reverse its finding if
there is sufficient evidence to support it,
even though the court, sitting as a jury,
might have found otherwise.

As appears from the instructions to the
jury, given on behalf of both the plaintiff and
the defendant, of which no complaint was
made, both parties tried the case on the
same theory of the law applicable thereto.
For the plaintiff the jury were told that, if
they believed from the evidence deceased
answered truly, and to the best of his knowl-
edge and belief, the questions propounded to
him at the time of his application for insur-
ance, they should find for the plaintiff. On
the other hand, the jury were instructed, at
the request of the defendant, that if they
believed deceased was suffering from chronic
nephritis or Bright's disease immediately be-
fore and after the issuance of said policy,
and had knowledge of such disease at the
time of his examination, and that his answers
to the questions were untrue "and made with
the knowledge of his own conditions," they
must find for the defendant. Also, that if
they believe, at the time of the delivery of
the policy, deceased was "knowingly suffer-
ing from nephritis, or Bright's disease, which,
if known to the defendant, would have caus-
ed the rejection of the risk, then the failure
to communicate it to the company was a
fraud upon the company," and their verdict
should be for the defendant.

The theory upon which the case was tried
renders it unnecessary for us to determine
whether or not the condition in the policy,
above quoted and relied on to defeat recov-
ery, was a representation or a warranty.
The instructions given at defendant's request
show that it treated it as a representation,
and sought to prove that it was knowingly
false and fraudulent. It cannot now com-
plain, even if, properly interpreted, the con-
dition should be held to be an absolute war-
ranty, a question we do not decide.

It was for the jury to say, upon the con-
flicting evidence, whether insured died of
chronic or of acute nephritis, and whether,
if he had chronic nephritis, he knew it at the
time he was insured. Recoveries from acute
nephritis are frequent, while recoveries from
chronic nephritis are seldom.

Finding no error, we affirm the judgment.

(83 W. Va. 250)

CANFIELD v. COLLINS et al. (No. 3479.)

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919.)*(Syllabus by the Court.)*BOUNDARIES \S 46(3) — ESTABLISHMENT — GRANT.

An owner of two adjoining tracts of land having a common line may sell and convey any part of one or both tracts and fix the boundary therefor as he may elect, and if the calls in the deed, promptly recorded, locate the common boundary between the tract sold and that retained on a line slightly different from the old one, the line so fixed will prevail over the calls of a subsequent recorded deed conveying the tract so retained, though it purport to fix the common boundary line as formerly located.

Error to Circuit Court, Gilmer County.

Ejectment by F. M. Canfield against Almira Collins and husband. Judgment for plaintiff, and defendants bring error. Reversed and remanded for retrial.

R. F. Kidd and L. H. Barnett, both of Glenville, for plaintiffs in error.

A. L. Holt and Lann & Craddock, all of Glenville, for defendant in error.

LYNOH, J. Frank M. Canfield brought ejectment to recover possession of a small triangular parcel of ground, containing about 1 acre, along the line common to a 69-acre tract owned by him and a 136.5-acre tract owned by the defendant Almira Collins, and secured the judgment of which she and her codefendant husband complain; they assigning as erroneous the giving of plaintiff's instruction No. 2 and the refusal of their instruction bearing the same number.

To understand fully their relevancy and applicability, or the lack of either, to the issues involved, a brief summary of the facts proved or admitted is necessary. Almira Collins acquired title to the 136.5 acres June 17, 1904, directly through Thursey M. Lynch, who was a daughter of Currence B. Conrad and intermarried with Charles Thompson, a son of Hugh Thompson, whom she survived, and afterwards with Vanlinden S. Lynch, who joined with her in the Collins deed, recorded November 10, 1904; and Canfield title to the 69 acres through two conveyances, one by Thursey M. Lynch and V. S. Lynch to N. E. Wiant, dated August 21, and recorded October 20, 1913, the other by Wiant to Canfield May 4, 1914, recorded June 4 of that year. The 69-acre tract is sometimes referred to in the record as containing 60 acres, but which, it is agreed, contained the larger area, 2 acres of which, located somewhere near the common line, were reserved in the Wiant deed, so that Canfield acquired and now owns only 67 acres of the 69-acre tract.

Although in the deed to Wiant other grantors joined with Thursey M. and V. S. Lynch, they did not do so because of any real interest possessed by them in the land granted, but merely in recognition of the right of the grantors named to dispose of the property and to avoid any question affecting the title thereto, and the case was argued and submitted as if Thursey M. Lynch was the immediate and unquestioned source of the title to both tracts.

Besides the division line, there are two and only two corners common to both tracts—one a rock, whose location and identity are established; the other a stake, not definitely identified or located. The two surveyors, of whom the court appointed one, either upon its own motion or by and with the consent of the parties, the other selected by the plaintiff and to some extent acting under his guidance and direction, did not agree upon the location of the second corner and found nothing by which they were able to identify it confidently. They did find some marked trees at the end of the line, or along it, and some portions of an old fence; but the marks were not well-defined or reliable, as the testimony seems clearly to indicate. Beall, whom plaintiff selected, ran from the rock on a course N. 38° E., and Lewis, whom the court appointed, on a course N. 39° E., the distance specified in the deed to the next corner. That corner each of them attempted to locate at the northeast end of the lines so run by them. This difference in degree resulted from Beall's adopting the course found in the decrees partitioning the lands of Hugh Thompson, out of which were carved in 1868 the two tracts of land now severally owned by the parties to this action, that course being N. 35° E., or S. 35° W., and, as corrected for variations, made the call as run by him. Lewis, however, took as the proper course that which he found in deeds made in 1902 and 1904 by Thursey M. Lynch, then the owner of both tracts, and her husband, one to R. C. Kerens, conveying the coal under the 136.5 acres, the other to Mrs. Collins, conveying the surface of the same tract, that course being S. 38°30' W., and, adding half a degree for variation, ran the line on this course as corrected.

The only reason or excuse for going back to the partition decrees is that both tracts were parts or parcels of the Thompson tract; the first being assigned to William L. Thompson, who conveyed it to Thursey M. Thompson, now Thursey M. Lynch, and she to Mrs. Collins. Thursey M. Lynch also acquired the 69 acres as the devisee of her father, Currence B. Conrad; that tract now being owned by the plaintiff, her remote grantee, less 2 acres, which she reserved.

The instruction of which the defendants complain told the jury—

"that if they believe from the evidence that the rock corner planted and agreed to, and as

shown as the beginning corner of the disputed line on the map identified and filed in evidence by J. Ernest Beall, surveyor, as an original corner, and that the corner at the other end of the disputed line is not found, then the course and distance called for in the original partition of Hugh Thompson's estate shall govern."

This instruction ignores an essential element of the defense interposed on behalf of the defendant, and certainly supported by the following facts and circumstances, revealed upon the trial and clearly appearing upon the record and not controverted.

As we have said, Thurse M. Lynch was the source through which the parties acquired title. The coal underlying the surface of the 136.5 acres she sold in 1902 to Richard Kerens, trustee, and preliminarily to the execution of the deed May 30, 1902, the tract was surveyed, and the survey so made and the deed executed pursuant thereto recognized and adopted as the true division line of the two tracts, and as the correct or corrected course of the line in dispute, the call S. 38°30' W. 149.5 poles, or the reverse thereof, N. 38°30' E. Mrs. Lynch also conveyed to Mrs. Collins the surface of the 136.5 acres June 17, 1904, by the calls of the Kerens coal deed; and, in the absence of anything appearing to the contrary, the rational, reasonable, and legal presumption is that as such grantee she entered into the immediate and actual possession of the land conveyed and every part of it, even to the full limit as described by the calls of the deed, a possession not disturbed or molested thenceforward to the date of the service of the declaration upon the defendant, September 17, 1914, a period of more than 10 years. She also endeavored to inclose the land by a fence along the common line soon after the date of her deed, and as plaintiff admits has held and now holds possession to the inclosure.

Whether by inadvertence or not, in the deed for the 69-acre tract made by Mrs. Lynch, her husband, and others to Wiant, plaintiff's grantor, August 21, 1913, more than nine years afterwards, the call for the controverted line was the same as that adopted in the decrees in the Thompson partition suit, instead of the call in the deed to Mrs. Collins. But the apparently complete and undisturbed possession of the defendant to the limits of the boundaries fixed by the call of her deed cannot be ignored, as it was ignored in the instruction of which she complains.

It is hardly necessary, because axiomatic, to say that, while Thurse M. Lynch owned both tracts and before she had conveyed

either of them, her control over them was complete, her dominion absolute, and she could dispose of them in whole or in part as she might elect, and if she elected to sell part of either or both and retain the residue, she had ample and unquestionable authority to do so, and could convey by any course or call she might approve or her judgment dictate without regard to any previously established division line between them. In the exercise of her proprietary rights she could convey to the same grantee the land on either side of the common line, thereby entirely obliterating it, and if she had done so she could not, nor could any subsequent vendee of hers, complain or set up a title hostile to that voluntarily conferred upon the former grantee by a prior recorded deed; this upon the maxim that priority in time gives priority of right. *Stewart v. Parr*, 74 W. Va. 327, 334, 82 S. E. 259.

This would be the inevitable result, even if the intention of Mrs. Collins' grantors was to conform to the calls of the partition decrees, as perhaps it was, since the divergence is only 3½ degrees, and this chiefly because of magnetic variation. The rights of the parties are to be judged by the prior deed as it is while it remains unmodified and uncorrected, and not by what the subsequent grantee of the adjoining tract may conceive his rights to be, notwithstanding the prior grant and recordation. If the grantors chose to alter the 35-degree line, or give it any other direction, as they did by making it S. 38°30' W., that was a matter that concerned them, and no one else. It was this latter course, run apparently in 1902, that Lewis adopted as the basis of his survey, and, allowing half a degree variation, ran it as S. 39° W., while Beall adopted the old or partition call of 1863, repeated in the deeds of 1913 and 1914, under which plaintiff holds title, and added 3 degrees, making the course S. 38° W. As Mrs. Collins, the defendant, was the prior grantee of the common grantor, the course as given in the deed to her in 1904 is accorded priority over a different subsequent call.

To the extent any of the instructions propounded by plaintiff and given, and especially instruction No. 2, ignored or disregarded the legal principles stated, they were erroneous and prejudicial, and ought not to have been given. For virtually the same reason defendant's instructions should have been given. And as they were apparently vital to the issue tried by the jury, the ruling thereon requires a reversal of the judgment and the remand of the case for retrial.

(83 W. Va. 273)

UNDERWOOD v. UNDERWOOD.
(No. 3637.)(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919.)*(Syllabus by the Court.)***1. DIVORCE §158 — REMARRIAGE — COMMON LAW—EQUITY.**

The common law does not forbid remarriage of persons absolutely divorced from one another, nor either of them, nor has a court of equity any inherent authority to inhibit it by a decree.

2. DIVORCE §158 — RESTRAINT OF MARRIAGE—VALIDITY.

In so far as a decree of divorce from the bonds of matrimony inhibits or restrains, without statutory authority, either of the parties from remarriage, it is erroneous, and will be reversed on appeal.

3. DIVORCE §158 — RESTRAINT OF MARRIAGE—EQUITY JURISDICTION.

A court of equity is not authorized to restrain the innocent party to a decree of divorce from the bonds of matrimony from remarrying within three years from the date of the decree.

4. DIVORCE §288 — APPEAL — COSTS.

If the defendant to the suit in which such a decree was entered made no appearance in the court below, nor in the appellate court, no costs are allowable in the latter court.

Appeal from Circuit Court, Brooke County.

Suit for divorce by Robert Underwood against Elvinia Underwood. From a decree granting an absolute divorce, but restraining plaintiff from marrying again within three years from date of decree, he appeals. Decree in so far as inhibiting plaintiff's remarriage reversed.

R. L. Ramsay, of Follansbee, Erskine, Palmer & Curl, of Wheeling, for appellant.

POFFENBARGER, J. The decree complained of on this appeal granted the appellant a divorce from the bonds of matrimony, on the ground of willful desertion for more than three years, but, against his wishes, restrained him from marrying again within three years. There was no defense to his bill in the trial court, and the appellee has not entered an appearance here, in resistance of his effort to be relieved from the provision of the decree inhibiting his remarriage.

Section 14 of chapter 64 of Barnes' Code of 1918 (Code Supp. 1918, § 3648a) forbids marriage of the parties to a divorce suit, except to one another, within six months from the date of the decree, and authorizes the court to prohibit the guilty party from remarrying again, within a certain time to be fixed by the decree, not exceeding five years.

Section 12 of that chapter (Code 1913, § 3647) forbids marriage of either party to a decree of perpetual separation during the life of the other. Beyond these provisions, there is no statutory restraint upon the right of remarriage of divorced persons, nor any statutory authority in the courts to impose such restraint.

[1-4] The common law does not forbid the remarriage of such persons, nor is there any inherent authority in a court of equity to inhibit it. In *re Crane*, 170 Mich. 651, 136 N. W. 587, 40 L. R. A. (N. S.) 765, Ann. Cas. 1914A, 1173; *Barber v. Barber*, 16 Cal. 378; *People v. Hovey*, 5 Barb. (N. Y.) 118; *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59; *Nelson, Div. & Sep.* § 588; *Blash, Div.* §§ 655-659; 9 R. C. L. 437, Div. § 241.

For these reasons, so much of the decree as inhibits the plaintiff and appellant from marrying again within three years from the date of the decree must be reversed and annulled; but, since the wife made no defense in the court below and does not oppose modification of the decree here, and it does not appear that any objection was made in the court below, the provision complained of, nor that any effort has been made to have the decree modified in that court, no costs will be awarded to the appellant. The error is due either to his generosity or indiscretion in the drafting of a decree in his own favor, or misapprehension on the part of the court, not induced by the defendant.

(83 W. Va. 246)

MARSHALL v. PORTER. (No. 3648.)(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR §1022(3)—DECREE OF CIRCUIT COURT—EVIDENCE—REVIEW.**

The decree of a circuit court approving the findings of a commissioner based upon conflicting evidence will not be reversed by this court, unless such findings are in conflict with a substantial preponderance of the evidence.

2. EQUITY §57 — MAXIM — DISCHARGE OF INDEBTEDNESS.

Equity looks upon that as done which ought to be done, and where one who is indebted to another, and who is being pressed for the payment of such indebtedness, in order that such other may meet certain obligations which he has outstanding, agrees that he will himself acquire such outstanding obligations, and discharge the same with his indebtedness, and he does acquire such outstanding obligations of his creditor, equity will consider that his indebtedness was applied to the discharge of such obligations at the time he acquired the same.

8. EQUITY ⚡180—JUDGMENT ⚡718(2)—
PLEADING DEFENSES—RES JUDICATA.

Where in a suit a claim is asserted against a defendant, the validity of which he denies, he must, if he would have the advantage of them, plead and rely upon all of the defenses available to him to defeat such claim. If the matters involved in the suit are adjudicated adversely to the defendant, after full opportunity to both sides to present all of the matters in support of their several contentions, such adjudication will be *res adjudicata*, and the defendant will be barred from subsequently making a defense which was available to him in the first instance.

Appeal from Circuit Court, Hancock County.

Bill by Oliver S. Marshall against W. D. Porter, executor, etc., and James M. Porter and others. Decree for plaintiff, and last-named defendant appeals. Affirmed.

See, also, 71 W. Va. 330, 76 S. E. 652.

E. A. Hart, of New Cumberland, for appellant.

Marshall & Forrer, of Parkersburg, for appellee.

RITZ, J. In 1886 the plaintiff purchased from one Jasper M. Porter certain real estate in the county of Hancock, and for the deferred installments of purchase money executed certain nonnegotiable notes. These notes were held by Porter until about the year 1893, when they were transferred to the defendant James M. Porter, who held them until the year 1907, when he transferred the same to his sister Fannie Porter McBride, who has since died, and who is represented in this suit by the defendant W. D. Porter as the executor of her will. After the death of Fannie Porter McBride, her executor threatened to execute a deed of trust given to secure these notes, and the plaintiff then brought this suit for the purpose of canceling the notes and canceling the deed of trust as a cloud upon his title to the real estate. The theory upon which he proceeds is that in the year 1893 and prior thereto the defendant James M. Porter became indebted to him in considerable sums of money, and that he importuned the said James M. Porter to make settlement with him of this indebtedness in order that he might meet his obligation to Jasper M. Porter on account of these notes; that James M. Porter in the year 1893 told him that he would acquire the notes himself from Jasper M. Porter, and would settle the indebtedness to the plaintiff in so far as the notes would cover the same in that way. As before stated, James M. Porter did acquire the notes at that time, and so advised the plaintiff, and the plaintiff believed, as he alleges, that the arrangement for settling the same with the indebtedness of James M. Porter to him was en-

tirely satisfactory. After James M. Porter became the owner of the notes, the plaintiff at various times, as he testifies, attempted to have Porter cancel the same and deliver them to him, but Porter always delayed doing this, not upon the ground that the plaintiff was not entitled to have it done, but upon the ground of inconvenience and like excuses. Plaintiff's contention was that the indebtedness of James M. Porter to him not only fully satisfied the notes at the time they came into Porter's hands, but was in excess of the amount of the notes, and he desired to have the notes canceled and the deed of trust removed as a cloud upon his title, and a decree for any balance said James M. Porter might owe him.

The case was heard by the circuit court, and the plaintiff's bill dismissed, but upon appeal to this court that decree was reversed, and this court held that the plaintiff was entitled to have the indebtedness of Porter to him set off against these notes; in other words, it was held that the plaintiff's contention as to the arrangement between him and James M. Porter was proved, and that he was entitled to relief thereon, and remanded the cause with the suggestion that it was one where a reference to a commissioner would likely be proper to ascertain the correct amount of the various items in the plaintiff's account, and to apply the same to the notes in question. See *Marshall v. Porter*, 71 W. Va. 330, 76 S. E. 653. After the cause was remanded to the circuit court it was referred to a commissioner, and the commissioner made a report finding that Marshall was entitled to have the notes canceled as fully satisfied, to have the deed of trust also canceled, and to have a recovery against James M. Porter for a small amount in addition thereto. The circuit court decreed accordingly, and this appeal is prosecuted.

[1] Some question is made as to the sufficiency of the proof to establish certain debts claimed by Marshall, or rather to establish the amount of them as they were found by the commissioner. Upon this question it suffices to say that there is evidence in the case fully supporting the commissioner's findings as to the amount of these particular debts, even though it may be in some instances controverted, and this court will not reverse the decree of the circuit court approving the findings of a commissioner upon controverted facts, unless such finding is clearly against the weight of the evidence. Such is not the case here. One of these items was for the interest of the plaintiff in an oil well, the legal title to which was in the defendant James M. Porter. It is shown that James M. Porter sold this well and took the money himself, and never accounted

to the plaintiff for one cent, although it is admitted that the plaintiff had a considerable interest therein. The defendant James M. Porter has always refused, and even when he testified in this case refused, to say how much he got for this well, or to whom he sold it. The commissioner could do nothing but take the best evidence he could get as to this, and we think his findings are as advantageous to the defendant James M. Porter as he could reasonably expect, particularly in view of the fact that it lay in his power to make the matter absolutely certain.

[2, 3] In the circuit court, when the report of the commissioner came up for consideration, the defendant James M. Porter for the first time by exceptions set up the statute of limitations as a bar to any of the claims asserted by the plaintiff. In so far as these claims were applied to the discharge of the notes set up and referred to in the bill there is nothing in this contention. The agreement, which this court by its former decree found existed between the parties, was to apply this indebtedness of James M. Porter to Marshall to the extinguishment of these notes. Having found that that agreement existed, a court of equity looks upon that as done which ought to be done. We will treat the notes executed by the plaintiff, and which are sought to be canceled here, as satisfied and discharged as of the time James M. Porter and the plaintiff agreed that it should be done. Story's Equity Jurisprudence, § 81; Felch v. Hooper, 119 Mass. 52; Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460. But does the statute of limitations apply to the decree in favor of the plaintiff for the excess of his indebtedness above the notes held at the time by the defendant James M. Porter? As before stated, these claims were set up by the plaintiff in his bill filed in this case, and while they were not particularized in that bill, they were gone into by particular items in testimony taken in support of it. The defendant James M. Porter at that time denied their validity, and denied that the plaintiff had the right to discharge the notes referred to in this case in that way, or to recover any of said claims. The parties, after full opportunity to offer all of the matters they had in support of their respective contentions, submitted the case for a decision, and this court on appeal held that the plaintiff was entitled to recover his claims in this suit. That decree established the validity of them, and the only thing left for determination was the amount thereof and their application to the notes in controversy. The defendant James M. Porter could not reserve one of his defenses. He had full opportunity to make all defenses at that time, and not hav-

ing made his defense of the statute of limitations, then the finding of this court establishing the validity of the plaintiff's claims is *res adjudicata*, and we will not now reopen that question and allow him to plead the statute of limitations to prevent a recovery against him for the amount in excess of the notes which were canceled by the court's decree. It is fundamental that, where a party is sued, and he challenges the validity of the cause of action against him, he must put in all of the defenses he has thereto. If he fail to do so, he will not be allowed after a decree or judgment against him upon the merits to assert a defense which was available to him before the rendition of such adverse judgment or decree. *Alderson v. Horse Creek Coal Land Co.*, 81 W. Va. 411, 94 S. E. 716, and authorities there cited.

It follows from what we have said that the decree of the circuit court of Hancock county complained of will be affirmed.

(83 W. Va. 267)

GEORGE DE WITT SHOE CO. v. ADKINS et al. (No. 3386.)

(Supreme Court of Appeals of West Virginia. Jan. 28, 1919.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT ⇐103(12)—POWERS OF TRAVELING SALESMAN—RETURN OF GOODS.

A traveling salesman has implied authority, as agent, to bind his principal by a stipulation in a contract of sale of goods, according to the vendee right to return the goods, within a reasonable time, if found to be unsatisfactory.

2. PRINCIPAL AND AGENT ⇐103(12)—POWERS OF TRAVELING SALESMAN—RETURN OF GOODS.

But he has no implied authority to stipulate for an unconditional and unlimited right of return. It must be reasonable and usual in its character.

3. SALES ⇐168½(5)—STIPULATION FOR RETURN OF GOODS—CONSTRUCTION.

A stipulation for right of return of goods, if unsatisfactory, proved in general and indefinite terms, is properly construed as one allowing only a reasonable period of time for testing their desirability and fitness by inspection and sales, and the purchaser, after having sold an unreasonable portion of them, and kept the balance for an unreasonable period of time, cannot return the residue for credit on his account.

Error to Circuit Court, Cabell County.

Assumpsit by the George De Witt Shoe Company against E. E. Adkins and others. Judgment for defendants, and plaintiff brings error. Reversed, verdict set aside, and new trial awarded.

Jean F. Smith, of Huntington, for plaintiff in error.

J. W. Perry, of Huntington, for defendants in error.

POFFENBARGER, J. The important inquiries arising upon this writ of error to a judgment for the defendant, in an action of assumpsit for the price of merchandise sold and delivered, are (1) whether power to make a conditional sale of merchandise is within the apparent authority of a traveling salesman; (2) if so, whether such authority is unlimited; and (3) whether the evidence sustains the verdict.

Under an order taken September 9, 1910, by J. W. Koontz, its traveling salesman, the plaintiff made five shipments of shoes to the defendant, between that date and December 10, 1910, of the aggregate value of \$619.63. The first and largest bill matured a few days before the last shipment was made. Nothing was paid on any of them, until after the claim had been placed in the hands of an attorney for collection. Evidence introduced by the plaintiff tends to prove a demand for payment of the first bill by a letter on December 6, 1910, and repeated demands for payment of it and the others as they fell due. On December 19, 1910, a draft was made for the amount of the first bill, which was returned unexplained. One of the defendants, in his testimony, denies having received any of the letters except one, and, on January 4, 1911, he wrote the plaintiff a letter, saying:

"We will pay you on the 20th as we have a pay day then; hope this will be satisfactory to you. We have to sell on those terms, and we will pay you sure then."

He admits presentation and dishonor of the draft. Out of these shoes, the defendants sold at retail, until May 4, 1911, when, having sold \$293 worth of them, they boxed up and delivered to the Chesapeake & Ohio Railway Company the residue for shipment to the plaintiff, upon the assumption of their right under the contract to return them, because they were unsatisfactory. The plaintiff refused to accept them, on their arrival at their destination, Lynchburg, Va., and, in considerable subsequent correspondence, denied the right of the defendants to return them.

Not having produced the order on which the shipments were made, nor proved any excuse for nonproduction thereof, the plaintiff introduced testimony tending to prove that it was unconditional in its terms. On the other hand, the two members of the defendant firm and the wife of one of them swear positively that the goods were purchased, or the order given, with the understanding and agreement that the defendant should have the right to return them, if they should be found to be unsatisfactory. They further testified that

the shoes were very unsatisfactory, and caused them a great deal of trouble with their customers; it having been necessary to make good a great many shoes returned on account of serious defects. In addition to its denial of the conditional character of the contract, the plaintiff introduced testimony tending to prove the shoes were regular and good values for the prices at which they were sold. For some reason not explained, the salesman who took the order was not put on the stand by either of the parties.

The case was submitted to a jury, without instructions, and they returned a verdict for the defendant, on which the judgment was rendered, after the overruling of a motion for a new trial.

[1-3] The prevailing, if not the universal, holding of the courts is that it is within the scope of the apparent authority of a sales agent, to stipulate with the vendee that the property sold may be returned to the vendor, if it is not satisfactory to the purchaser. Of course a vendor may agree with the vendee, that the latter shall take the goods upon trial and test them out and return them, or the unused portion of them, in case they prove to be unsatisfactory, for such a contract is neither illegal nor contrary to public policy. The liberty of contract obtaining in this country enables the owner either to give or withhold from his agent power to make such a contract on his behalf; and if an agent should make it for his principal, without authority, he would violate his agreement with his principal, but, according to the current of judicial authority, he would nevertheless bind his principal to the vendee, if the vendee had no knowledge of the limitation upon the agent's apparent authority. Secret instructions to an agent, inconsistent with his apparent authority, are not binding upon third parties dealing with him. Union Bank & Trust Co. v. Long Pole Lumber Co., 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663; Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312; Rohrbough v. Express Co., 50 W. Va. 149, 40 S. E. 398, 88 Am. St. Rep. 849; Clark v. Gordon, 35 W. Va. 735, 14 S. E. 255; Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Ludlow-Saylor Wire Co. v. Fribley Hardware Co., 67 Kan. 710, 74 Pac. 237; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Clews v. Reilly, 53 Hun, 636, 6 N. Y. Supp. 640; Hatch v. Taylor, 10 N. H. 538; Mechem, Agency, § 854.

An agent has implied authority to fix the price and terms of sale and agree upon such incidental matters as the time and place of delivery, provided he does not go beyond what is reasonable and usual, in the stipulations he makes respecting such things, and his principal is bound by what he does, within these limitations, even though he acts without authority, if the person who deals with

him is not cognizant of his want of authority. A stipulation in a contract of sale of personal property, binding the principal to take back the property, if it proves to be unsatisfactory, is held to be usual and reasonable, and therefore within the agent's apparent authority. *Eastern Mfg. Co. v. Brenk*, 32 Tex. Civ. App. 97, 73 S. W. 538; *French Piano Co. v. Cardwell*, 114 Ga. 340, 40 S. E. 292; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Oster v. Mickley*, 35 Minn. 245, 28 N. W. 710; *Babcock v. Deford*, 14 Kan. 408.

As to the existence of a stipulation for return of the goods, if found to be unsatisfactory, there is no preponderance of evidence against the verdict. It is all oral and conflicting, the witnesses for the plaintiff only denying the authority of the salesman to make a conditional sale and the existence of a return provision in the order, and three witnesses swearing the sale was a conditional one, while the law supplies the agent's authority. While they do not define it, the witnesses for the plaintiff admit its maintenance of a return goods department. The letter in which the defendants promised to pay is general and indefinite in its terms and purport. Hence, it is not necessarily inconsistent with their position. As the order for the goods was not produced, nor its complete contents established, there is no proof of a written contract. If it had been put in evidence, it might have been no more than a memorandum or an incomplete contract, not precluding oral proof of terms and conditions not stated in it. *Rymer v. South Penn Oil Co.*, 54 W. Va. 530, 48 S. E. 559; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 896.

The evidence is insufficient, however, to sustain the kind of a return contract the defendants claim. It is general and indefinite in its terms, and, properly construed, it means that the purchasers were to take the goods upon trial, with the privilege of return after a reasonable time for a test of their fitness for the trade for which they were conditionally bought. One witness states the contract in these terms:

"If the shoes did not give satisfaction or any number that did not give satisfaction, we were to return them."

Another says the agent said:

"If these shoes don't prove to be the shoes I say they are, and don't give satisfaction, all you have got to do is to box these shoes up and send them back at our expense."

The third one says:

"The contract was that the shoes were to give perfect satisfaction, if not, we were to box them up and return them."

Nothing in this language imports intention to permit an unlimited and unrestricted right of return. Inspection was one of the tests to be made and that required very little time. Determination of fitness by sales required more time, but not an unlimited or unreasonable period. A month or two was amply sufficient. These goods were retained seven months, and almost half of them sold, before the return of the residue. As this provision of the contract was inserted for the benefit of the defendants, and they were relying upon it, as a ground of defense, it was incumbent upon them to prove and define it, and they have proved no more than a stipulation for right of return, which, presumptively, was the usual and customary return privilege after a fair test of fitness. If it was more than that, they should have said so, and the jury could not supply the lack of evidence by their verdict. Retention of trial goods, after a reasonable test has been made, amounts to an election to keep them. *Zipp Mfg. Co. v. Pastorino*, 120 Wis. 176, 97 N. W. 904.

An agreement for an unlimited and unrestricted right of return, if made, was not within the implied authority of the agent. Under it, he could do only what was reasonable and usual. Power to stipulate for a limited right of return constitutes no ground of argument for authority to allow such right without a limit. The reasonableness of a stipulation may depend upon its extent, as well as its character or subject-matter, and there is no authority for the proposition that an agent has implied power to put an unreasonable provision in his principal's contract.

It follows, from these principles and conclusions, that the judgment must be reversed, the verdict set aside, and a new trial awarded.

(83 W. Va. 274)

JEFFERSON v. SIMPSON. (No. 3624.)(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919.)*(Syllabus by the Court.)***1. WILLS §68—CONTRACT TO MAKE WILL—BREACH—REMEDY.**

Assumpsit is a proper remedy for a breach of contract to make a will.

2. SPECIFIC PERFORMANCE §86 — WILLS §56—CONTRACT TO MAKE WILL—CONSTRUCTION.

A contract to make a will is controlled by the same rules and principles and enforceable as other contracts.

3. WILLS §59—CONTRACT TO MAKE WILL—CONSIDERATION.

An agreement made singly or in connection with another to sacrifice an old home, to sell and dispose of one's property, and to remove to the home provided by the other party to the contract in order to furnish him companionship during the remainder of his natural life constitutes a sufficient consideration for his promise to make a will bequeathing to the promisee a sum certain out of his estate.

4. WILLS §58(1) — CONTRACT TO MAKE WILL—CERTAINTY—ACTION FOR DAMAGES.

Such a contract is sufficiently definite and certain in its terms to be enforceable in a suit by the promisee against the executor of the promisor for damages for the breach thereof by the promisor.

5. WILLS §58(2) — CONTRACT TO MAKE WILL—SUFFICIENCY OF EVIDENCE.

A case in which the evidence is held sufficient to support a parol agreement to make a will.

6. EVIDENCE §278 — DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

Declarations of the promisor subsequent to the making of a contract to make a will, being against interest, are admissible in evidence, not as sufficient in themselves to prove the fact, but as corroborative of the evidence of witnesses to the contract.

7. EVIDENCE §236(1), 271(16)—SELF SERVING DECLARATIONS—ADMISSIBILITY.

But evidence of contrary declarations made to other witnesses, being self serving and not in the presence of the other party to the contract, are inadmissible.

8. WILLS §68—CONTRACT TO MAKE WILL—BREACH—DAMAGES.

The measure of damages in a suit for breach of a valid contract to make a will is the sum stipulated in the contract or the value of the property contracted for.

Error to Circuit Court, Marshall County.

Action by Martha Jefferson against J. G. Simpson, executor, etc. Demurrer to declaration overruled, judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Simpson and Martin Brown, both of Moundsville, for plaintiff in error.

J. Howard Holt, of Moundsville, for defendant in error.

MILLER, P. Numerous points of error are relied on by defendant to reverse the judgment below against him for \$3,980.00. The first is that his demurrer to the declaration and to each count thereof should have been sustained. There are six counts. The fourth and fifth are nothing more than the common counts in assumpsit, and as to which no defects are specifically pointed out, and we perceive none. But the remaining counts it is urged are bad in point of pleading, (1) because of want of averment of a sufficient consideration for the alleged promises on the part of the decedent Samuel Francis; (2) that the several statements of the contract pleaded are too indefinite, uncertain and inadequate to be enforceable, even in a court of equity.

The contract of decedent substantially alleged in each of the four counts under review is that in consideration that the plaintiff with her husband W. H. Jefferson, farmers residing on their farm in Marshall County, would sell and dispose of their horses, cattle, hogs and farming implements, quit farming and move to the city of Moundsville and there reside with him at his home and provide him companionship for and during the remainder of his natural life, according to the first count, he would give plaintiff the sum of \$4,000.00 to \$6,000.00, payable out of his personal estate at the time of his death, and that he would provide therefor in his last will and testament. The second count with slight variation as to consideration, is the same as the first. The third predicated on the same consideration alleges the promise of decedent to pay plaintiff all expenses, costs and losses incurred by her and her husband in so disposing of their stock of horses, cattle, hogs, farming implements, etc., and all money expenses incurred in carrying out their contract, and which losses are specifically alleged, and also the loss which the said W. H. Jefferson would sustain by lack of employment, stated at \$2,000.00, and aggregating more than the sum recovered. The sixth and last count also based on the same consideration avers more specifically a promise on the part of the decedent that he would give and bequeath to the plaintiff out of his estate the sum of from \$4,000.00 to \$6,000.00, payable to her out of his estate at his death. Each of said counts avers full performance by plaintiff and her husband of the said contract on their part, and the breaches thereof by the decedent as averred in each count, and lay her damages at the sum of \$6,000.00.

[1] That one may maintain assumpsit on a contract to make a will when founded on a good and valid consideration, is not con-

troverted. The authorities so hold. 40 Cyc. 1070; *Hotsinpilller v. Hotsinpilller*, 72 W. Va. 823, 825, 79 S. E. 936, and cases there cited.

[2, 3] Was the contract here pleaded based on a good and sufficient consideration? We think it was. The contract as alleged involved sacrifice by plaintiff of her previous home on the farm, of property thereon, changes of friends and neighbors, and her husband of profitable employment, and to that extent at least of means of support, and gave to the other party therein companionship during his natural life, however long that might be lengthened out in time. There can be no doubt of the sufficiency of the consideration, especially when viewed in the light of the relationship and situation of the parties disclosed by the evidence.

Contracts to make wills are controlled by the same rules and principles and are enforceable as other contracts. *Davidson v. Davidson*, 72 W. Va. 747, 750, 79 S. E. 998, and cases cited. A gain to the promisor is as adequate a consideration to support a contract as the loss of the promisee. *Jackson v. Hough*, 38 W. Va. 236, 240, 18 S. E. 575; *Rowan v. Hull*, 55 W. Va. 335, 340, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Ann. Cas. 884.

The incurrance of some risk and trouble at the instance of the promisor singly or in connection with another at the instance of the promisor constitutes a valuable consideration. *County Court v. Hall*, 51 W. Va. 269, 41 S. E. 119. And it has been decided by the highest authority that an agreement for companionship constitutes a sufficient consideration for a promise to make a will. *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; *Schutt v. Missionary Soc.*, 41 N. J. Eq. 115, 3 Atl. 398.

[4] Is the contract alleged sufficiently definite and certain in its terms to be enforceable? There can be no doubt, we think, on this proposition. As the promise of the plaintiff is definite and certain, the only thing that can be regarded as uncertain is the amount of money promised by the decedent, \$4,000.00 to \$6,000.00. But the least sum promised was \$4,000.00. This was the sum less the value of the property given by the will which plaintiff recovered. Agreements to give by request all the property of the testator have been held sufficiently definite. *Burdine v. Burdine's Ex'r*, *Howe v. Watson*, and *Schutt v. Missionary Soc.*, *supra*. The contract to pay \$4,000.00 to \$6,000.00 is certainly a promise to pay at least a sum of \$4,000.00.

[5] The other ground urged for reversal is that the contract alleged is not proven. In this we think counsel is in error. Plaintiff proved by her daughter, present at the time, previous conversations relating to the contract, and that the contract finally agreed upon between her mother and Samuel Francis was substantially in all respects as alleged, and that the contract was in all respects

fully performed on the part of the plaintiff. Moreover, numerous witnesses swear positively that Francis declared to them after the time of the making of the contract the substance of the agreement as alleged and that he had made provision for his sister in his will as agreed. And one witness, a notary public, testified that he had prepared at least two wills for Francis in which provisions were made for Mrs. Jefferson, giving her practically if not quite all of his property, which then consisted mainly of personal estate. The evidence considered in the light of all the acts and conduct of the parties subsequently to the time of the making of the contract establish the fact of the contract beyond question of doubt.

[6] But it is urged that the evidence of decedent's declarations and of the making of the wills subsequent to the date of the contract, was improperly admitted over defendant's objection. The proposition is not sustained by the authorities. None are cited which support it. The fact of the making of the subsequent wills providing for plaintiff, while not of itself sufficient to establish the contract, is nevertheless corroborative in character and admissible on that score. *Burgess v. Burgess*, 109 Pa. 312, 317, 1 Atl. 167. And the alleged declarations of Francis subsequent to the making of the contract, he being dead and they being against his interest, were admissible, we think, as tending to establish the fact of the contract. *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21, syl. 8, 5 L. R. A. 523; *High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536; 1 R. C. L. 502; *Daggett v. Simonds*, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332.

[7] Another contention in connection with the last proposition and as calling for reversal is that the court improperly excluded the testimony of witnesses for defendant of other declarations of the deceased testator as to contrary declarations made by him. The rulings of the court thereon, both to the exceptions to the introduction thereof and for a new trial based on their exclusion, were fully justified under the rule that all such declarations were made in the absence of the other party to the contract, were self serving, and properly excluded on both grounds. *Crothers' Adm'r v. Crothers*, 40 W. Va. 169, 20 S. E. 927; 4 Enc. Dig. Va. & W. Va. Rep. 344.

[8] The next point we will consider is the conflicting theories presented by the rulings of the court on instructions given and refused, and the motion of defendant for a new trial overruled, as to the true measure of damages in cases of this character. The court in substance told the jury by the only instruction proposed by plaintiff that if they found the contract proved as alleged, they should find for the plaintiff on account of the promises of defendant's testator not less than four thousand dollars, but to subtract therefrom the value of the bed and bedding

left to plaintiff by the will of said testator. This instruction amounted to telling the jury that the true measure of damages in the case was the amount stipulated in the contract. There can be no doubt in the world, we think, that in the absence of fraud, mistake, duress, or some other fact, where the parties are competent to make the contract, the amount stipulated or the value of the thing contracted for constitutes the true measure of damages for the breach thereof. 3 Sutherland on Damages (4th Ed.) § 706; 3 Elliott on Contracts, § 2220; 8 Amer. & Eng. Enc. Law, 683, 684; 13 Cyc. 168; Mullen v. Cook, 69 W. Va. 456, 71 S. E. 566. The amount stipulated in such cases will be regarded as the estimate of the parties of the value of the services rendered or to be rendered. In contracts for companionship, the loss to the other party in the performance thereof is often incapable of being measured in dollars and cents. In such cases the estimate of the parties and the sum stipulated is the only true measure of recovery. This is not the case supposed by defendant's counsel where no price has been stipulated or the contract is incapable for some reason of enforcement and where the rule is as contended by him, that the value of the services rendered is to be determined on a quantum meruit.

Respecting the defendant's instructions: No. 12, given, we think sufficiently and fairly presented to the jury the theory of the defendant applicable to the facts in the case. It put the burden of proof of the contract on plaintiff and told the jury that in such cases the contract alleged must be sustained by evidence, clear, positive and convincing. It also presented the theory of the defendant that the contract alleged had been fully performed by the decedent in his life time by the conveyance of a house and lot in the city of Moundsville to a daughter of the plaintiff. We have examined carefully all the defendant's other instructions refused by the trial court, and on familiar principles find no reversible error in the rulings of the court thereon.

For the reasons given we are of opinion that the judgment should be affirmed.

(83 W. Va. 280)

STATE v. CENTRAL POCAHONTAS COAL CO. et al. (No. 3497.)

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919.)

(Syllabus by the Court.)

1. TAXATION ¶684(2)—TAX SALE—RETURN AND RECORD—VALIDITY.

Under the law as it stood in 1875 a sale of land by the sheriff for the nonpayment of the

taxes thereon is void, where the record does not show that the sheriff returned his report of such sale within ten days thereafter.

2. ESTOPPEL ¶37 — TAXATION ¶855 — CONVEYANCE OF FORFEITED LAND—TITLE OF GUARANTY.

A deed made by the commissioner of school lands under the provisions of the Acts of 1872-73, c. 134, in regard to the sale of forfeited, waste, and unappropriated land, is a grant from the state. Such deed vests in the grantee therein all of the title possessed by the state, and in case the state subsequently acquires an adverse title by forfeiture or otherwise, it will be estopped to assert the same against its grantee in such school commissioner's deed.

3. TAXATION ¶853 — DECREE OF REDEMPTION—EFFECT.

A decree of redemption in a suit to sell forfeited lands for the benefit of the school fund, brought under the provisions of chapter 105 of the Code of 1913 (secs. 4433-4454), is in effect a grant by the state of the land redeemed to the party redeeming the same.

4. TAXATION ¶853 — SALE OF FORFEITED LANDS—ADVERSE POSSESSION.

One who has been in possession of land for more than ten years under a decree of redemption entered in a suit brought to sell such land as forfeited under the provisions of chapter 105 of the Code of 1913 (secs. 4433-4454), and has paid the taxes regularly assessed against such land during such time, becomes vested with the title of an adverse claimant to such land under the provisions of section 3, art. 13, of the Constitution, when the same is purchased by the state for the nonpayment of the taxes assessed against the same in the name of such adverse claimant, and is not redeemed within one year after such purchase as provided by law.

5. EQUITY ¶302—AMENDED AND SUPPLEMENTAL ANSWER—ALLOWANCE.

It is not error to allow a defendant to file an amended and supplemental answer, where the matter set up therein is of such character that it is necessary that the same should be before the court for a proper determination of the matters involved in the suit, and is not contradictory of the matter alleged in the original answer.

6. TAXATION ¶518, 730 — ASSESSMENT AGAINST JOINT OWNERS—REDEMPTION.

Where a tract of land is assessed upon the land books in the name of the joint owners as a whole, a payment by one of the joint owners of a portion of the taxes corresponding with his interest in the land will not redeem such interest from the delinquency, and a purchase by the state of such land at a sale of the same for such delinquent taxes will vest the title to the whole thereof in the state upon a failure of the former owners to redeem the same within one year, even though the sheriff advertises for sale and purports to sell only an undivided interest.

Appeal from Circuit Court, Cabell County.

Suit by the State of West Virginia against the Central Pocahontas Coal Company, Lewis

B. Cook, and others. Decree for plaintiff, and defendants Lewis B. Cook and others appeal. Affirmed.

A. D. Preston, of Beckley, Wm. R. Thompson, of Huntington, M. P. Howard, of Pineville, and Brown, Jackson & Knight, of Charleston, for appellants.

E. T. England, Atty. Gen., for the State. Anderson, Strother, Hughes & Curd, of Welch, and Price, Smith, Spliman & Clay, of Charleston, for appellees Central Pocahontas Coal Co. and others.

BITZ, J. This suit was instituted for the purpose of having sale of a tract of 905 acres of land for the benefit of the school fund. There are two sets of claimants to this land, to wit, the Central Pocahontas Coal Company, claiming it under a deed from John V. Bouvier and others; and A. D. Preston and others, claiming it under a title derived from the commissioner of school lands of Wyoming county. This tract of 905 acres is a part of a larger grant of 480,000 acres made by the commonwealth of Virginia in the year 1795 to Robert Morris. This 480,000-acre grant, together with another grant of 320,000 acres lying adjacent thereto, passed in the year 1852 under various deeds to Michael Bouvier, with the exception of 50,000 acres which had been theretofore conveyed away. Several people were interested with Michael Bouvier, and under an agreement among them the land, remaining, after excluding the 50,000 acres which had theretofore been sold, was surveyed, and it was found that instead of there remaining 750,000 acres of the two surveys, there was only 157,500 acres thereof. This was divided into tracts, one of which was to be conveyed to each of the interested parties, upon the payment of certain sums specified in the contract. Accordingly Bouvier conveyed two of said tracts, to wit, 63,000 acres and 17,850 acres to John Herman in the year 1853; a 15,750-acre tract he conveyed to Oakes Terrill, Jr., and another 15,750-acre tract to Richard Warren. Both of these conveyances were made in the year 1853. This left remaining a tract of 36,750 acres, which was to be conveyed to Eustache Bouvier, and a tract of 8,400 acres, which was to be conveyed to William A. Bull, upon the performance by these parties of the conditions of the contract referred to. The 36,750-acre tract was in 1865 conveyed to Jonathan Patterson through an arrangement with Eustache Bouvier, which it is not now necessary to advert to, leaving title to 8,400 acres remaining in Michael Bouvier. The tract of land in question is a part of this 8,400 acres. Michael Bouvier retained this tract of land until his death in 1874, when it passed to his devisees under his will. It appears that for the years 1869 to 1876, inclusive, this tract of land was returned delinquent for the non-payment of the taxes thereon, and was offer-

ed for sale by the sheriff for such delinquent taxes, and purchased by the state at each of said sales. From 1877 until 1890 the tract of land was not on the land books in the name of Bouvier or his devisees, and in the year 1890 the commissioner of school lands of McDowell county, in which county the larger part of the land lay, filed a bill, asking to have sale thereof for the benefit of the school fund as forfeited for nonentry upon the land books for more than five years. In that proceeding Bouvier's executors filed a petition, asserting title to the tract of land, and asking leave to redeem the same from the forfeiture. This leave was granted, and it was redeemed, the taxes in arrears paid thereon, and the same re-entered upon the land books of McDowell county. At that time, and for some time thereafter, it was believed that this tract of land lay entirely in the county of McDowell, when in fact part thereof, to wit, a little over 900 acres, lay in the county of Wyoming. After this redemption in 1890 the land was regularly charged on the land books of McDowell county, and the taxes regularly paid thereon until the year 1908. In that year it was discovered that part of the tract lay in Wyoming county, to wit, 953 acres thereof. Upon discovering this fact this 953 acres was entered upon the land books of Wyoming county, and the taxes thereon duly paid for the year 1908 and each subsequent year by the Bouviers and those claiming under them, and the McDowell tract reduced in area by a like amount. A part of this 8,400 acres embracing the land in controversy in this suit was conveyed by the Bouviers to the defendant Central Pocahontas Coal Company, by deed of October 2, 1914.

The defendant Preston and his associates claim under a deed from the commissioner of school lands of Wyoming county made in the year 1887. It appears that in the year 1866 a deed purports to have been executed by Michael Bouvier to Henry L. Morris conveying the 480,000-acre grant and the 320,000-acre grant made to Robert Morris in 1795. This deed was placed on record in Tazewell county, Va., in the year 1875. A deed purporting to be executed by Henry L. Morris, dated in the year 1875, to Morgan H. Haskins, and conveying the same land, also was recorded in Tazewell county, Va. In the year 1879 these two deeds, or authenticated copies, were recorded in Wyoming county, W. Va. The deed from Michael Bouvier to Henry L. Morris was a forgery, and as soon as it became known to the real owners of the land it was attacked, and, in several suits brought for the purpose, has been adjudicated to be a forgery. The 480,000-acre grant under this forged title was conveyed to Jesse R. Irwin. The taxes were not paid upon the tract of land under the Irwin title, and in the year 1881 the commissioner of school lands of Wyoming county instituted a suit for the pur-

pose of having sale of the 480,000-acre tract as forfeited to the state of West Virginia for the benefit of the school fund. The land was decreed to be sold in this proceeding, and was offered for sale, but it appears that the first sale reported was not confirmed by the court, for the reason that the price was inadequate, and the court thereupon directed the commissioner of school lands to have the tract subdivided into 640-acre parcels, and to again offer the same for sale. In accordance with this direction some 50 or more tracts were laid off, and when they were offered for sale they were largely purchased by John W. McCreery and L. B. Cook. At any rate, the subdivisions which it is contended include the tract of land in controversy in this suit were purchased by McCreery and Cook. In 1887 deeds were made to the said Cook and McCreery conveying the tracts of land so purchased by them, including the parcels which it is claimed cover the land involved here. In addition to including the land involved in this case the purchases made by Cook and McCreery included a large part, if not all, of the 36,750-acre tract conveyed by Bouvier to Patterson, as above stated. Upon the discovery of this fact Patterson's successors in title, to wit, Francis Lasher and others, trustees, instituted a suit for the purpose of cancelling the school land commissioner's deed as a cloud upon the Lasher title. In this suit the school land commissioner's deed was canceled and held to convey no title, because of the fact that the tract of land purported to have been sold by the state of West Virginia for the failure of Jesse R. Irwin to pay the taxes had no existence; that the deeds under which Irwin held were forgeries, and no title passed thereby. Preston and his associates, however, claim that this adjudication only affected the rights of McCreery and Cook so far as the deed to them covered the Lasher land. They claim that they have ascertained that this tract of 905 acres is not part of the Lasher tract and is within the 8,400-acre tract. With this view they had placed upon the land books of Wyoming county a tract of 905 acres which it is claimed by them was conveyed to Cook and McCreery by the commissioner of school lands in the year 1887, being the residue of the land contained in that conveyance, excluding the part thereof covered by the Lasher deeds. In the year 1910 they failed to pay the taxes upon this tract of land charged in their names, and the same was returned delinquent for the nonpayment of these taxes, and sold by the sheriff of Wyoming county, and purchased by the state. It was not redeemed within one year, in which the former owner had a right to redeem before the title became vested in the state, and this suit was thereupon brought by the commissioner of school lands to subject the same to sale for the benefit of the school fund.

The defendant Central Pocahontas Coal Company claims that the defendants Preston and others have not now, and never did have, any title or interest in this tract of land. They claim: First, that no title ever became vested in Jesse R. Irwin under the forged deed from Bouvier to Morris; second, that no title became vested in Cook and McCreery by the deed from the commissioner of school lands in the year 1887; and, third, that even though Cook and McCreery did get title under the deed of 1887, this title became vested in the Bouviers under the provisions of the Constitution as soon as it became vested in the state for the failure to pay the taxes in 1910. It is earnestly insisted by Preston and his associates that the Bouvier land was forfeited and the title thereto vested in the state in the year 1881, at the time of the institution of the suit by McClure, commissioner of school lands, for the purpose of having sale of the 480,000-acre Morris grant, and that when the sale was made by the commissioner of school lands the purchaser acquired all of the title of the state of West Virginia in the lands covered by the deeds made by said commissioner, whether the same was acquired by the state through the Irwin title, or from any other source, and that because this 905 acres of the Bouvier 480,000-acre tract was included in the deed made by the commissioner of school lands to Cook and McCreery, the title thereto being at the time forfeited and vested in the state, it passed to and became vested in Cook and McCreery under that deed.

On the other hand, it is contended that in the year 1881, at the time of the institution of the suit by the commissioner of school lands of Wyoming county, the Bouvier title had not been forfeited. It is admitted that this land was returned delinquent for the nonpayment of taxes for the years 1869 to 1876, inclusive, and that it was sold by the sheriff for those years and purchased by the state, but the contention is that those sales and each of them were absolutely void and passed no title to the state of West Virginia. It is admitted that this land was off the land books thereafter until the year 1890, when it was redeemed by the Bouviers, the back taxes paid, and the tract placed upon the land books in McDowell county, where it was then believed the whole tract lay, and that subsequently, in 1908, upon discovering that 953 acres was in Wyoming county, that amount was entered upon the land books of Wyoming county. But it is said that the fact that this land was off the land books after the year 1876 had not the effect of forfeiting the title thereto and vesting the same in the state in the year 1881, when the school land suit was brought, for the reason that it was on the land books in the name of Irwin and his associates for part of that time, and that notwithstanding the Irwin title was a forgery, if the land was

charged on the land books in the name of Irwin, it would prevent the title thereto from becoming forfeited and vesting in the state, inasmuch as Irwin purported to claim under the same title as Bouvier; and it may be said, further, that in the year 1881, at the time of the institution of the school land proceeding, the land had not been off the land books in the name of Bouvier for five years. The defendant Central Pocahontas Coal Company contends that this was the true status of the Bouvier title in 1881, and that the state of West Virginia, at the time of the institution of that proceeding, had no right, title, or interest, of any character, in the tract of land now sought to be sold, for the reason that the Irwin title was a forgery, and no rights could be acquired thereunder, and the Bouvier title had not at that time become forfeited for nonentry for as much as five years, and the sales made thereof by the sheriff were void and of no effect, and, this being true, the circuit court of Wyoming county was entirely without jurisdiction to entertain a suit to sell the tract of land, and any proceedings had by it were coram non iudice. The contention is further made, however, that even though the Bouvier title was forfeited and vested in the state in the year 1881, and the deed from McClure, commissioner, to Cook and McCreery, made in 1887, did have the effect to vest in Cook and McCreery the state's title to so much of the Bouvier tract as was included in that deed, still Preston and his associates are not entitled to redeem the land in this proceeding for the reason that the deed from McClure, commissioner, to Cook and McCreery was a grant from the state of West Virginia, and should be treated as such; that the decree of redemption made by the Bouviers in 1890 was likewise a grant from the state of West Virginia for their tract of land, and that the parties stood in the position of holding conflicting titles to the same tract of land, so far as the McClure deed included any part of the Bouvier land. Of course the Cook and McCreery deed was the senior grant and was superior, and their title would be good unless they lost the same in some of the ways provided by law, and the Central Pocahontas Coal Company contends that this is just what they did. It is shown, and not attempted to be contradicted, that the Bouviers and those claiming under them had possession of the 8,400-acre tract for a long time, much more than ten years, before the return of delinquency of the Cook and McCreery tract for the taxes in 1910, and that while it may be that this possession was not in Wyoming county, and was not within the interlock, still, this being a contest between the state and the Bouvier interests, it is not material upon what part of the tract the Bouviers had possession, just so that it was upon the tract granted to them by the state under the redemption proceeding, and

their contention is that the very minute the title of Cook and McCreery vested in the state by reason of the return of delinquency for the taxes of 1910, and the sale and purchase thereof by the state under that delinquency, this title became transferred to them under the provisions of the Constitution.

[1, 2] Did the state have any title to the land in controversy at the time of the institution of the proceeding against the 480,000-acre tract in Wyoming county in 1881? Of course, the forfeiture of the Jesse R. Irwin forged title conferred no title upon the state, and if the Bouvier title was not at that time forfeited, then the state did not have any title at that time. If the sales made by the sheriff of McDowell county of the Bouvier tract for nonpayment of taxes for the years 1869 to 1876, inclusive, were void, and the state acquired no title thereunder, and this title was not forfeited for nonentry upon the land books for more than five years, then the same was not vested in the state at that time. The contention is made that the sales made by the sheriff for the years 1869 to 1876, inclusive, are void, for the reason that it does not appear that the sale list was returned to the clerk's office within ten days after the sales were made. Certificates of the clerk are filed in the record in this case, showing that it does not appear when these sale lists were returned to the clerk's office, and, as held in *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; as the law stood then, a sale was void where the record did not show that the sale list was returned to the office of the clerk within ten days, and the date of such return noted thereon. We are therefore constrained to hold that no title vested in the state of West Virginia by reason of the sales made by the sheriff for the delinquencies for the years 1869 to 1876, inclusive. Was the Bouvier title forfeited to the state in 1881 for nonentry upon the land books for more than five years? This tract of land was charged on the land books in the year 1876, and it is quite patent that in 1881, at the time of the institution of the school land proceeding by McClure, commissioner, five years had not yet elapsed, and there could have been no forfeiture or vesting of the title in the state in 1881 for that reason. The proceeding was instituted by McClure in the fifth year, and not after the five years had expired. The forfeiture does not become complete, and the title does not vest in the state unless the land remains off the land books for five years. The state has no more title at any time during the five-year period than it would have if the land had been regularly kept on the land books and the taxes paid thereon.

But the defendant Central Pocahontas Coal Company contends that, even though the Bouvier land was not on the land books for more than five years, the fact that the Morris tract, including the land in controversy in this suit,

was charged on the land books in the name of Irwin and his associates for some of these five years would prevent a forfeiture to the state, even though the Irwin title was void because based upon a forgery, and this seems to be the law. *Kelley v. Dearman*, 65 W. Va. 49, 63 S. E. 693; *Chilton v. White*, 72 W. Va. 545, 78 S. E. 1048. But does the fact that the state had no title to any part of the land in 1881, when the proceeding to sell the same was begun, make any difference? It is admitted that the Bouvier title was forfeited and vested in the state in 1887 when the deed from the commissioner of school lands to Cook and McCreery was actually made. It must be borne in mind that this proceeding was brought under the Acts of 1872-73, c. 134, and that the same was a purely administrative proceeding, and not in any sense judicial. *McClure v. Matland*, 24 W. Va. 561. It was the method adopted by the state of divesting itself of the title to land which came to it by forfeiture or by purchase for delinquent taxes. The Legislature could have as well conferred the authority to make these grants upon any other officer as upon the commissioner of school lands. There were certain preliminary inquiries to be made in order that the officer upon whom the duty of making the conveyance devolved might be fully informed of the real condition of the title, but these inquiries were in no sense judicial. The former owner of the land had no interest therein; he had no right to be a party to the suit. It is true the state permitted him to redeem the same, or in effect become the purchaser for the amount of taxes in default, but this was not a right given to him under the law as it then was, but simply a chance that he had to take advantage of if he would get the benefit of it. If he redeemed the land before the state sold it, he got his title back, but if the state sold it without his knowledge before he redeemed it, his title was gone. This being the nature of the proceeding by which the commissioner of school lands conveyed to Cook and McCreery, it would seem that any title vested in the state at the time the grant was made in 1887 would pass thereby. It is in no wise different from a case in which the state would make a second grant of land which it had theretofore granted. Any part of the first grant, the title to which should become vested in the state by forfeiture or otherwise, would pass to the grantee in the second grant. Further than this, even though the state's title was not good at the time of the grant, and conceding that the grant must be construed as taking effect at the time the proceeding was instituted for that purpose, the deed made by the commissioner of school lands would, under the contention of the defendant Central Pocahontas Coal Company, convey no title as a matter of fact, but the state could not say this. The state offered the land for sale. This offer to

sell presupposes title thereto in the state; and, after it has received the purchase money and made a deed therefor to the purchaser, it cannot be heard to dispute that title, and any title subsequently coming to the state by forfeiture or otherwise from a source other than the grantee in the deed, would inure to the benefit of such grantee. It is the application of the same doctrine that is enforced in the case of a transaction between individuals. If one make a deed to real estate to which he has no title, and subsequently acquires title thereto, he will be estopped from claiming said real estate against his grantor, and so the state in a proceeding like this, even though it had no title at the time of the conveyance, would be estopped to set up a subsequently acquired title against its own grantor. *State v. King*, 64 W. Va. 610, 63 S. E. 495. It follows from this conclusion that when the Bouvier title became forfeited, as it did a short time after the year 1881, it passed to the grantees of the state in the Cook and McCreery deed, or at any rate the state in this proceeding cannot claim that Cook and McCreery did not own this land.

[3, 4] But does this conclusion help Preston and his associates in this case? In 1890 confessedly the Bouvier title was forfeited, and so much of this Bouvier land as was acquired by the deed from McClure, commissioner, became vested in Cook and McCreery by reason of that deed, so that at the time of redemption by the Bouviers it may be said that the Bouvier title to the 905 acres here involved was vested in Cook and McCreery, at least in so far as the state of West Virginia was concerned. What was the effect, however, of the redemption by the Bouviers in 1890 in the suit brought by the commissioner of school lands to sell the Bouvier land as forfeited? The Bouviers in that proceeding claimed to own the 8,400 acres of land. The court decreed that they were entitled to redeem the same, and they did pay all the taxes found to be due the state thereon, and have paid the taxes assessed against the same ever since. Under the holding of this court in the case of *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465, such a redemption was a grant of the land from the state; it was the same in effect as though a grant had been made by the state to the party redeeming. So that, even under the contention made by Preston and his associates, they had a grant from the state by reason of the deed from McClure, commissioner, in 1887, which covered the 905-acre tract involved in this suit. The Bouviers had a junior grant from the state covering the very same land. It must be borne in mind in this case that the contest here is between the grantee of the Bouviers and the state, and is not between Preston and the Bouviers. The state is here asserting the right to sell this tract of land, claiming that the title is vested in it. The Bouviers are

contending, upon the other hand, that the state cannot sell this land because it granted the same to them in 1890, and has collected the taxes thereon from them ever since. They claim and show that they have been in possession of the 8,400-acre tract for much more than ten years prior to the return of delinquency of the Cook and McCreery title, and their contention is that just as soon as the Cook and McCreery title became vested in the state by reason of their failure to pay taxes, the sale thereof by the sheriff, and the purchase thereof by the state, it was immediately transferred to and vested in the Bouvier interests by virtue of the constitutional provisions contained in section 8 of article 13. The fact that the possession of the Bouviers is not clearly shown to be upon the tract of land now in controversy, being only a part of the grant to them by the state in 1890, can make no difference. Their possession within the bounds of the 8,400-acre tract is undisputed. As before stated, their controversy is with the state of West Virginia. They say to the state, You have granted us this 8,400-acre tract of land, and by the Constitution it is provided that if we will go upon it and take possession of it and pay the taxes thereon, any subsequent title which may become vested in you will immediately upon the vesting thereof become transferred to us. We think it quite clear, therefore, that even though Cook and McCreery acquired title to this land under the deed of 1887 from McClure, commissioner, the minute that title became vested in the state of West Virginia it was transferred to and became the title of the Bouvier interests.

[5, 6] After the issue was made up in this case by the filing of the answers of the defendants, and after the commissioner had reported on the matters involved, the defendant Central Pocahontas Coal Company was permitted to file an amended answer, in which was set up the invalidity of the tax sales made by the sheriff of McDowell county of the Bouvier lands for the years 1869 to 1876, inclusive, and in which was also set up the fact that the 480,000-acre grant to Robert Morris was on the land books for some of the years between 1876 to 1881 under the Irwin forged title. The appellants objected to the filing of this answer, and they assign the action of the court in permitting it to be filed as ground for reversing the decree. It is quite true that the matter set up in this answer existed at the time the original answer was filed, but the defendant avers that it was not advised thereof, and that it came into the possession of the information since the filing of its original answer. As to when a defendant in an equity suit will be permitted to file an amended answer is largely discretionary with the trial court. If it appears that the matter set up in the amended answer is such as should be presented to the

court in order for a full hearing and determination of the rights of the parties, and is not contradictory of the matter set up in the original answer, ordinarily permission will be granted to file such an amended answer. Story's Equity Pleadings, § 902. While it may be true that the defendant did not know these facts at the time it filed its original answer, it is clearly true that it might have known them by an investigation of the records, but still it seems that where the matter set up in the amended answer is such as the court should have before it in order for a fair determination of the controversy, such amendment will be allowed. We do not think the court abused its discretion in this case in permitting the amended answer to be filed. If the parties adversely interested desire an extension of time in order to meet the new matter set up in the amended answer, ordinarily it should be granted them. In this case no such time was granted, nor was it asked, and it was not error for the court to proceed with the hearing of the cause without granting time to meet the new matter set up in the answer when such time was not asked by any party adversely affected thereby.

Preston and his associates now contend that the sale made by the sheriff for the taxes of 1910, at which the state became the purchaser, was void for the reason that the sheriff only purported to advertise a seven-eighths interest in the tract of land, and returned only a seven-eighths interest therein. The whole tract of land was assessed on the land books in the name of Preston and his associates for the year 1910. One of the joint owners paid one-eighth of the taxes, he claiming to own a one-eighth interest in the land, and the sheriff then advertised for sale a seven-eighths interest in the land, and returned as sold to the state a seven-eighths interest therein. Under our decisions in the cases of Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915, and Caretta Railway Co. v. Fisher, 74 W. Va. 115, 81 S. E. 710, an undivided interest in a tract of land cannot be placed upon the land books and assessed for taxes, for the reason that the lien of the state for taxes goes to the whole of the tract and to every part thereof, and it was held in those cases that such an assessment was void, and that a deed based thereon was likewise void. That is not the case here, however. The assessment was of the whole tract of land, and the irregularity was in the advertisement for sale and the sheriff's return of the sale. Undoubtedly under the decisions above cited the state's lien for taxes existed on every part of this tract of land even after the payment of one-eighth of the taxes by one of the interested parties. That only reduced the amount which the state was entitled to collect, and did not in any wise affect the security or change the lien existing thereon, and when this land was sold in satisfaction of

this lien and purchased by the state, the state purchased all of the land upon which the lien existed. The irregularities existing in the advertisement and in the return of the sheriff did not affect the validity of this sale. Section 32 of chapter 31 of the Code (sec. 1090) provides that all of the title of the former owner shall vest in the state upon a purchase by it at a tax sale without a deed therefor, giving to such a purchase the same effect as a purchase under a conveyance by deed would have were the land purchased by an individual, and the curative provisions of section 25 of chapter 31 (sec. 1084) apply to sales made to the state. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650. That section provides that all such title and interest as was vested in the person or persons charged with the taxes thereon for which it was sold, at the commencement of or at any time during the year or years for which said taxes were assessed, shall be transferred to the purchaser, in this instance the state, notwithstanding any irregularity in the proceedings under which the same was sold, unless such irregularity appear on the face of such proceedings of record in the clerk's office, and be such as to materially prejudice and mislead the owner as to the portion of his real estate sold, and when and for what year sold, or the name of the purchaser, and not then unless it be clearly shown that but for such irregularity the former owner of the real estate would have redeemed the same. The irregularity here appeared upon the face of the record in the clerk's office, but can it be said that it materially prejudiced and misled the owners? They were bound to know that the payment of a part of the taxes did not discharge the state's lien as to any part of the land, but only reduced the amount to be collected. They knew, because it is the law, that the state had the same right to sell the whole of the land for part of the taxes as it had to sell it for the whole thereof. The record showed a proper assessment against the whole tract, and that Sanders had paid one-eighth of the taxes. Instead of the record misleading them, it informed them as to the exact facts, and these facts under the law did not relieve the land, or any part of it, of the lien for taxes. Surely if these curative provisions are to be given any effect they must be applied to a case like this. It is urged that this conclusion is not consistent with the holding in the case of *Shrewsbury v. Horse Creek Land Co.*, 78 W. Va. 182, 88 S. E. 1052. There were other sufficient grounds for setting aside the sale in that case, and the procedure there was somewhat different from the procedure in this case. It is true that in that case the sheriff undertook to sell an undivided interest, after part of the taxes had been paid by one of the joint owners, but the purchasers, before taking a deed, had an ex

parte partition made of the land and took a deed for the part they assigned to themselves. It was held that they could not do this, as this was in effect discharging the state's lien as to part of the land, and that could not be done. The holding in that case goes no farther than that. Had the purchaser taken a deed to the whole of the land and treated the sheriff's attempt to sell a part of it as an irregularity, the holding in that case might have been different. There is some language in the opinion that might bear the construction contended for when read without relation to the facts being considered. The language of an opinion must always be read in the light of the facts in the instant case, and qualified so to make it apply to those facts. It cannot be given any broader meaning or more extended application. Being thus guided in the construction of that opinion, it is not inconsistent with the conclusion we have reached in this case.

We are of opinion that there is no error in the decree of the circuit court of Cabell county complained of, and the same is affirmed.

(148 Ga. 658)

HERRINGTON v. RODDENBERRY.

RODDENBERRY v. HERRINGTON.

(Nos. 897, 904.)

(Supreme Court of Georgia. Jan. 15, 1919.
Rehearing Denied Feb. 14, 1919.)

(Syllabus by the Court.)

ASSIGNMENTS OF ERROR—EVIDENCE.

This was a suit in equity by the grantor against the grantee in a deed to land, to enjoin a suit at law by the latter against the former for breach of warranty, for reformation of the deed, and for other relief. The defendant demurred and answered. Her demurrer was overruled, and she excepted *pendente lite*, assigning error on the judgment overruling the demurrer in a cross-bill of exceptions. Upon the trial the verdict was for the defendant. The plaintiff filed a motion for a new trial, which was overruled, and he excepted. In his bill of exceptions he complains of certain rulings upon the admissibility of evidence, of certain charges given by the court to the jury, and of refusal to charge as requested. None of the special assignments of error show cause for reversal, and the evidence authorized the verdict.

Error from Superior Court, Jeff Davis County; J. Mark Wilcox, Judge pro hac vice.

Suit for injunction by J. L. Herrington against Saphronia Roddenberry. Judgment for defendant, motion for new trial overruled, and plaintiff excepts and brings error, and defendant takes a cross-bill of exceptions. Affirmed on main bill of exceptions and cross-bill dismissed.

S. D. Dell, of Hazlehurst, and Padgett & Watson, of Baxley, for plaintiff in error.

Gordon Knox, of Hazlehurst, for defendant in error.

GEORGE, J. Judgment on the main bill of exceptions affirmed. Cross-bill dismissed. All the Justices concur.

(148 Ga. 640)

CONKLIN v. CONKLIN et al. (No. 801.)

(Supreme Court of Georgia. Jan. 14, 1919.
Rehearing Denied Feb. 14, 1919.)

(Syllabus by the Court.)

CONSPIRACY §11—DIVORCE §167—VACATION OF DECREE—FRAUD—NEGLIGENCE IN FAILING TO DEFEND.

A husband filed suit for divorce against his wife, a nonresident of the state. The petition for divorce alleged the mental incapacity of the wife at the time of the marriage, unknown to the husband. The wife had both actual and legal notice of the pendency of the divorce case, but failed to appear and defend the same. Fourteen years after final decree, granting to both parties a total divorce, the wife filed an equitable suit against the husband and others, alleged to have been in conspiracy with him in the prosecution of the divorce case, to set aside the decree and to recover damages, alleging, in effect, that the ground upon which the decree was granted was fictitious and false, and so known to the defendants at the time of the filing of the suit for divorce, and that she failed to defend the divorce case because the husband and one of his alleged coconspirators fraudulently represented to her, at or about the time of the filing of the suit for divorce, that the decree would be sought and obtained upon the ground of desertion on the part of the wife. The wife had not in fact deserted the husband. Held, that the fraud charged is insufficient to relieve the plaintiff from the imputation of negligence in failing to defend the divorce suit, and that the petition, considered as a suit to cancel the decree of divorce or to recover damages, was properly dismissed upon demurrer.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by Mary L. G. Conklin against G. H. Conklin and others. General and special demurrers to petition sustained, and suit dismissed, and plaintiff excepts and brings error. Affirmed.

On October 30, 1917, Mary L. Greer Conklin filed a petition in equity in Richmond superior court against George H. Conklin, Boykin Wright, Oswald R. Eve, Alonzo F. Purdy, as administrator with the will annexed of Daniel B. Dyer, late of Richmond county, deceased, Turner C. Vason, and Dr. H.

H. Malone, all of Richmond county, Ga., the Dyer Investment Company, and the Augusta-Aiken Railway & Electric Corporation, also of Richmond county, Ga., and Dr. Henry D. Allen, of Baldwin County, Ga. In substance the plaintiff alleged as follows:

On July 28, 1900, she was married to George H. Conklin in Fulton county, Ga., "but lived with him as his wife only a very short while, because of his drunkenness and his cruelty to her." She went with him to his home at Augusta, with the intention of living with him, but she found it impossible, "because of his dissolute habits and his cruelty to her, which caused her health to break down and precipitated a nervous condition and insomnia." Daniel B. Dyer (a lifelong friend of her family) and George H. Conklin proposed to her that she go to a summer hotel in Baldwin county for the remainder of the summer, and she readily assented, "as a relief from the horrors of the condition in which she found herself as the wife of George H. Conklin," and on August 3, 1900, she was placed under the care of the defendant Dr. H. D. Allen at his institution in Baldwin county. She was kept at Dr. Allen's institution, against her will, until October 17, 1900, when she was taken therefrom and placed by her brother in the Battle Creek (Mich.) Sanitarium. Dr. Allen maintained to her brother that his institution was not an insane retreat, and that petitioner "was not in any manner insane, but was suffering merely from a nervous breakdown." On May 12, 1902, the defendants entered into a conspiracy to "injure, ostracize, and damage petitioner by means of a fictitious judicial proceeding, which purported to culminate in a total divorce between petitioner and George H. Conklin, * * * in the superior court of Richmond county, Ga., on the 28th day of October, 1903." The petition for divorce filed by Conklin against her contained the following false allegation: "That at the time of said marriage said defendant [referring to the present plaintiff] was a lunatic, mentally incapable of contracting marriage," which fact was unknown to him at the time of the marriage. He also alleged that the plaintiff had been removed from Dr. Allen's sanitarium to a distant state; that when last heard from she was residing in the city of Chicago, Ill.; that on May 12, 1912, in Richmond superior court, an order was passed reciting that she was a nonresident of the state, and that it was necessary to perfect service upon her by publication; and it was accordingly so ordered. In compliance with said order a notice, bearing test in the name of the judge and signed by the clerk, was published and a copy of the publication was mailed to petitioner "when she was studying at the University of Chicago, in Chicago, Ill." Said notice contained the proper caption, and was addressed to the plaintiff, requiring her "to be and appear at the next October term of the superior court of Richmond county, Ga., to be held on the third Monday in October, 1902, to answer a petition for divorce," filed by George H. Conklin as plaintiff against her as defendant. On January 19, 1903, an order was passed in the divorce proceeding, appointing Turner C. Vason as guardian ad litem for petitioner; and on the same day he accepted

the appointment in writing. The first verdict for a total divorce was returned on April 25, 1903, and the second verdict was returned on October 28, 1903, and a decree was rendered, granting to both the plaintiff and the defendant a total divorce, and restoring to defendant in that suit her maiden name. "At or about the time of the filing of the pretended divorce petition in Richmond superior court," Conklin and Dyer (the latter having died before the filing of the present suit) represented to petitioner and certain members of her family that the divorce "was being procured on the ground of desertion on the part of petitioner. Petitioner and her family believed this representation, [and] were justified in believing it at that time."

After the decree had been rendered in the divorce suit, petitioner and her family were led by Conklin and Dyer to believe that the divorce had been granted on the ground of desertion, and petitioner had no knowledge to the contrary until "about the 10th day of May, 1917. She had no positive knowledge of any injury to her because of said conspiracy and false testimony [referring to the testimony upon which the divorce was granted] until the 28th day of June, 1917." On or about June 25, 1914, petitioner met a wealthy, cultured, unmarried man of 50 years, Mr. F. W. Andros, of South America, and became engaged to marry him. Thereafter she advised Mr. Andros that she had resided in Georgia and had been married and divorced in Georgia. Subsequently Mr. Andros learned, from the record in the divorce proceeding, of the ground upon which the divorce had been granted, and forthwith broke his engagement with plaintiff, without explanation, to her injury, mortification, and humiliation. Andros was a man of great wealth, and as his wife she would have received all the necessities and luxuries of life. On June 28, 1917, Andros advised her of his reason for breaking his engagement with her. In November, 1912, H. W. Freeman, a wealthy widower, residing in Massachusetts, was about to employ petitioner as a companion for his children; but when he learned that she had been divorced he held up the employment until he investigated the record in the divorce case, then refused to employ her, thinking that she had once been insane. Had she procured the position with Mr. Freeman, she would have been well cared for, and, in addition to her board and \$40 per month as a salary, would have been given the necessary time in which to "work at her profession as an author. The false and infamous record in the divorce suit of George H. Conklin against Mary Greer Conklin in Richmond superior court made possible only by and through the nefarious plans and designs of the conspirators herein named as defendants" was the sole cause of the plaintiff's failure to procure the position with Mr. Freeman and to consummate an advantageous marriage to Mr. Andros. Said record likewise reflects upon her as a writer of books and magazine articles, to her financial injury and loss. The motive of the defendants, other than Conklin, in conspiring with him, is set forth in the petition, and the failure of the guardian ad litem to defend the suit, and his participation in the conspiracy, are alleged.

By amendment to the petition it was alleged that no process was attached to the di-

vorice suit, for which reason the whole proceeding was void, the plaintiff [defendant therein] not having waived, by appearance or otherwise, this alleged defect in the proceeding for divorce. She prayed that the verdicts and decree in the divorce suit be set aside for the fraud as already alleged, that all orders entered therein be vacated and canceled, that she have a judgment against the defendants in the sum of \$200,000, and for process. Copies of the divorce suit, with all orders therein, and of the verdicts and the decree, are incorporated in the petition.

Each of the defendants filed demurrers, both general and special, raising similar questions of law. The principal grounds of demurrer were:

The petition sets forth no cause of action. The plaintiff had actual and constructive notice of the pendency of the divorce suit, and is bound by the decree rendered therein. The cause of action for damages, if any, is barred by the statute of limitations. The allegations made in the suit for divorce are privileged. The allegations charging conspiracy are vague, irrelevant, and amount to conclusions of fact and of law. The damages prayed are too remote and speculative, and the facts alleged fail to show that the defendant corporations authorized, ratified, or in any way participated in the alleged conspiracy.

The court sustained the demurrers and dismissed the action. The plaintiff excepted.

Hill & Adams, of Atlanta, L. D. McGregor, of Warrenton, and E. H. Clay, of Marietta, for plaintiff in error.

Barrett & Hull, Jos. B. Cumming, J. O. C. Black, Callaway & Howard, C. H. & R. S. Cohen, Archibald Blackshear, Henry O. Roney, and A. F. Purdy, all of Augusta, and Allen & Pottle, of Milledgeville, for defendants in error.

GEORGE, J. (after stating the facts as above). In the view we take of this case it is unnecessary to consider and decide the several grounds raised by the special demurrers, and for that reason we have omitted from the statement of facts the allegations of the petition charging in detail the formation of the conspiracy, and the several acts of the various defendants in the execution of it, particularly those allegations against the defendant corporations, made for the purpose of showing their connection with the conspiracy. The Constitution of this state provides:

"Divorce cases shall be brought in the county where the defendant resides, if a resident of this state; if the defendant be not a resident of this state, then in the county in which the plaintiff resides." Civ. Code, § 6538.

The petition in the divorce suit alleged that the plaintiff, George H. Conklin, was a resident of Richmond county, Ga., and that the defendant, Mary Greer Conklin, had re-

turned to her former home in Winfield, Cowley county, Kan., but that when last heard from she was residing in the city of Chicago, state of Illinois. That petition therefore alleged that the defendant in that suit was a nonresident of the state. Section 2951 of the Civil Code provides:

"The action for divorce shall be by petition and process, as in ordinary suits, filed and served as in other cases, unless the defendant be nonresident of this state, when service shall be perfected as prescribed in this Code in causes in equity."

Section 5552 of the Civil Code requires the clerk of the court to annex to every petition, unless the same be waived, a process, signed by the clerk or his deputy, bearing test in the name of a judge of a court, and directed to the sheriff or his deputy, requiring the appearance of the defendant at the return term of the court. Section 5553 provides:

"If the defendant in an equitable proceeding does not reside in the state, service of the petition or any order of the court may be made by publication."

Sections 5556 and 5557 provide for the manner and mode of service of the petition on a nonresident defendant by publication. Under these sections the judge of the court in which the suit is pending may order service to be perfected by publication in the paper in which the sheriff's advertisements are printed, twice a month for two months. The published notice shall contain the name of the parties plaintiff and defendant, with a caption setting forth the court and term and character of the action, and a notice directed and addressed to the party defendant, commanding him to be and appear at the next term of the court, and shall bear test in the name of the judge and be signed by the clerk of the court. Where the residence or abiding place of the nonresident is known, the party obtaining the order for the service of the petition by publication shall file in the office of the clerk, at least 30 days before the term next after the order for publication, a copy of the newspaper in which said notice is published, with said notice plainly marked, and thereupon the clerk of the court shall at once inclose, direct, stamp, and mail said paper to said party named in said order, and make an entry of his action on the petition. Under section 5558 it is made the duty of the judge trying the case—

"to determine whether such service has been properly perfected, and to write an order to that effect upon the petition in said case as showing service thereof, which shall also be entered upon the minutes of the court."

The provisions of sections 5556, 5557, and 5558 were, according to the allegations in the

present suit, fully complied with in the divorce case. The plaintiff in the present suit alleges in effect that she received the notice as required by the Code section, and she makes no attack upon the validity of the several sections of our Code providing for service by publication upon a non-resident party defendant. Moreover, she admits actual notice of the pendency of the divorce case, and alleges that she was advised by the plaintiff in that case and one of the alleged conspirators that the suit was brought upon the ground that she had deserted her husband. We are of the opinion that, as defendant in the divorce case referred to, she was served with the notice of the suit and process of the court as required by the laws of this state.

It is to be observed that she did not desert her husband. It is true she consented to leave him, "as a relief from the horrors of the condition in which she found herself," and to go to a summer hotel, according to the allegations of the petition. She distinctly alleges that the separation was due to her husband's "drunkenness and his cruelty to her." She therefore knew that her husband was seeking a divorce upon a false ground, conceding that she was ignorant, as a matter of fact, of the requirement of the law of this state that desertion, in order to constitute a ground for divorce, must be continuous for a term of three years. She certainly knew that she had not willfully deserted her husband, and under our Code (sections 2945-2947) "willful and continued desertion by either of the parties for the term of three years" shall be sufficient to authorize the granting of a total divorce. If the husband by his conversation and conduct compelled the wife for her safety to leave him and his home, he, and not the wife, was guilty of willful desertion. In no event, according to the allegations of the petition, can it be said that Mrs. Conklin deserted her husband. We do not hold that the divorce suit referred to in this case was a collusive one, because, so far as disclosed by the petition, she did not consent to the bringing of that suit, nor did she in any wise assist, encourage, or aid in its prosecution. She did, however, exercise the legal and moral right to keep silent when she was confronted with the knowledge that her husband had brought the suit for divorce against her upon a false ground. So far as she now discloses, she was willing that the husband be granted a divorce upon the ground that she had deserted him. Indeed, her only complaint is that the husband sought and obtained a divorce upon the false ground of the mental incapacity of the wife at the time of the marriage.

Our conclusion is that she is in no position to ask a court of equity to set aside a decree for divorce which she understood was to be granted upon a false ground, merely

because a decree was in fact granted upon a different ground which she also alleges to be unfounded and untrue in fact. It is true that the charge in the petition for divorce of the mental incapacity of the wife at the time of the marriage is a serious charge, and one calculated to do the wife much harm, if in fact untrue. If the wife was mentally capable of contracting at the time of the marriage, as she insists, and if the suit was brought as a result of a conspiracy and the divorce obtained upon false testimony, as charged in the petition, the wife has been grievously wronged. The fact remains, however, that she knew of the suit, had legal notice of the pendency of the suit, makes no attack upon the constitutionality of the statute providing for service of such notice by publication, and cannot now be heard to complain that the judgment which she knew was being sought upon a false ground was obtained upon a different ground. She is precluded by her laches. Had the husband, or any one acting for him, represented to her that the divorce suit would be dismissed, or that no judgment or decree would be taken therein, the present case would be different. The plaintiff here would then occupy the position of a suitor who had been misled by the fraudulent conduct of the opposite party, and if she had a valid defense to the suit, equity would grant her the relief now prayed, and place her in position to defend that suit. It is to be noted that she does not now complain of the decree, but her complaint is directed to the allegations of the petition and the proof in support thereof upon which the decree was in fact rendered. She does not occupy the position of a diligent litigant, with a valid defense to an action, who has been misled by the fraud of the opposite party, and thereby prevented from making that defense. If she stood in that position, she might invoke the aid of a court of equity.

From the foregoing it follows that the decree in the divorce case, rendered on October 28, 1903, in Richmond superior court, is a valid decree, binding upon both parties thereto. Nothing alleged in the petition will enable the plaintiff to have that decree canceled. If, therefore, a wrong was committed upon her by the several defendants named therein, it must be held that her lack of knowledge of all the matters and things of which she now complains, and her failure to defend the suit, were due to negligence; and she cannot now, after the lapse of 14 years, maintain the present suit, either for cancellation of the decree or for recovery of damages for the alleged tort. The demurrers to the petition were properly sustained, in our opinion, for the reasons stated.

Judgment affirmed. All the Justices concur.

(23 Ga. App. 390)

FORREST & GEORGE ADAIR v. SMITH.
(No. 9748.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919.)

(Syllabus by the Court.)

1. BROKERS ⇨71—LEASE CONTRACT—CONDITIONS.

Where a renting agent, acting for the owner of the property, enters into a contract of lease with a tenant, it is not competent to ingraft on the terms of the agreement stipulations relating to the mutual obligations arising out of the contract between the agent and the owner, so as to bind the latter thereby, since stipulations of this character are foreign to the subject-matter of the lease contract, and do not concern the parties to that agreement.

2. BROKERS ⇨71—LEASED PROPERTY—INDORSEMENT BY OWNER.

But where, at the instance of the agent and without the practice of any fraud upon his part, the owner of the property, with actual knowledge of the terms and provisions thus contained, enters his own indorsement upon the contract of lease as signed by the agent and by him presented to the owner for approval, then the stipulations referred to become mutually binding upon both the agent and the owner as an agreement thus arrived at by and between them.

3. PRINCIPAL AND AGENT ⇨81(4)—LEASE CONTRACTS—RIGHTS OF PRINCIPAL—NOTICE.

Where an agent who occupies such a confidential or fiduciary relationship to his employer presents to the latter for approval such a contract, which he has made on behalf of his employer with a third person, and which relates to the business and purposes of his employment, but which also contains a stipulation foreign to the subject-matter of the lease, concerning and affecting the rights and interests of the employer and the agent as to matters arising out of the contract, before the employer will be bound to his agent by virtue of his approval of the stipulations thus embraced in the writing, it is essential that he should have had actual knowledge that such provisions were therein contained.

4. PRINCIPAL AND AGENT ⇨84—REVOCATION OF AGENCY—POWER CORROBORATED WITH INTEREST.

"Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act, or the death of either principal or agent, revokes the power. If, however, the power is coupled with an interest in the agent himself, it is not revocable at will; and in all cases the agent may recover from the principal, for an unreasonable revocation, any damages he may have suffered by reason thereof." Civ. Code 1910, § 3575(1). The interest of the agent, above referred to, must lie in the subject-matter of the agency, and not merely in the profits which are to result from the exercise of the power; that is to say, in a case like the instant one, the agent must have an interest in the

contract of rental, and not merely in the contract of agency by virtue of which he is to be compensated for his future services in the collection of the rents. The work and expense of an authorized agent in finding a tenant and securing a lease could be taken as sufficient to establish such an interest in the contract of rental.

5. ASSIGNMENTS ⇐18, 19—CHOSES IN ACTION—STATUTE.

While, as a general proposition, all choses in action arising upon contract and involving property rights may be assigned so as to vest title in the assignee (Civil Code of 1910, §§ 3653, 3654), there is a well-recognized exception to this rule, which applies in those instances where the contract involves a relation of personal confidence, such as to show that the party conferring the rights must necessarily have intended them to be exercised only by him upon whom they are actually conferred. *Tifton, etc., Ry. Co. v. Bedgood*, 116 Ga. 945, 43 S. E. 257; *Cowart v. Singletary*, 140 Ga. 435, 446, 79 S. E. 196, 47 L. R. A. (N. S.) 621, Ann. Cas. 1915A, 1116; 5 C. J. 880, §§ 46, 47. But even though the subject-matter of a contract might of itself in a sense indicate that it is intended to be personal in its nature, the parties thereto can nevertheless, by the express terms of the agreement, manifest a different purpose and intent (5 C. J. 875); and thus, where the contract is within itself and by its own express terms made assignable, a contrary purpose will not, as a matter of law, be set up and enforced, unless from a consideration of the entire instrument such a contrary construction is clearly demanded. Where the agreement in fact provides that the service may be performed either by the contracting party himself, or by such other person as the contract may be assigned to, in order that a construction contrary to such expressed intent can be inferred as a matter of law, it must appear from the nature of the contract that the performance of the obligation by another would be essentially different in result from what had been contracted for.

6. ASSIGNMENTS ⇐90 — LEASE CONTRACT — DUTY OF ASSIGNEE.

Where a rent contract, after having been procured and effected at the trouble and expense of an agent, has been approved for him by the owner, with actual knowledge on the owner's part of a stipulation therein providing that a stated commission from the rent shall go from him to the agent, and stating that the rent shall be paid to the agent named, "its successors or assigns," an assignee of the contract, upon his acceptance thereof, will ordinarily assume the burdens and acquire the benefits provided for by the terms of the agreement. See *Alden v. Frank Improvement Co.*, 57 Neb. 67, 69, 77 N. W. 369.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by Forrest & George Adair against L. A. Smith, executor. Judgment for plaintiffs, and, from a judgment sustaining a certiorari

and rendering final judgment for defendant, plaintiffs bring error. Reversed.

Forrest & George Adair, real estate and renting agents, sued Jasper N. Smith for certain commissions claimed to be owing to them. Charles P. Glover Realty Company, as the agent of Smith, prepared and executed a lease of a building owned by him to Marbut & Young, for a period of five years, at a monthly rental of \$50; which lease was signed "Chas. P. Glover Realty Company, Agent, by Eugene S. Kelly, Vice President," and by the lessees. Thereafter the lease was presented by the Chas. P. Glover Realty Company to Smith for approval, and he made thereon the following entry: "Approved, Jasper N. Smith." The pleadings of the defendant allege, and the evidence in support thereof indicate, that Smith, by reason of his age and infirmity, was unable to read over the contract; but the evidence for the plaintiffs authorized the municipal judge, who upon the trial sat as both judge and jury, to find that the defendant actually knew, when he approved the agreement, that the following stipulation was contained therein, "It is agreed by all parties hereto that the above-stipulated rental shall be paid to Chas. P. Glover Realty Company, agent, its successors or assigns, and Chas. P. Glover Realty Company is to receive a commission of five per cent. of said rental for the time specified in this contract, the same to be paid by the owner," although the defendant himself testified that he had not authorized Glover Realty Company to make a lease containing any such clause, and did not know it was in it, and relied on the company to prepare a proper lease, and signed it without reading it. The defendant testified:

"Glover Realty Company had my business because Mr. Aycock was a stockholder and manager of their rent department, and was attending to my business."

Aycock swore that the defendant let him put it in the hands of Glover Realty Company because the defendant liked Aycock, and had paid him to attend to his business, and Aycock was manager of the rent department, and the defendant thought he would look after it properly. Glover Realty Company in writing, "for value received," transferred and assigned to the plaintiffs, Forrest & George Adair, "their heirs, successors, or assigns, any and all rights the said Chas. P. Glover Realty Company now has, or may hereafter have to receive a commission of five (5) per cent. of the rentals agreed to be paid as specified in the attached contract of lease dated November 1, 1915, between Chas. P. Glover Realty Company, as agent for Jasper N. Smith as lessor and G. F. Marbut and R. G. Young as lessees together with any and all rights the said Chas. P. Glover Realty

Company now has or may hereafter have to have the stipulated rentals provided for in said attached contract paid to it, and together with all right, title, interest, claim, or demand that said Chas. P. Glover now has or may hereafter have or acquire against the said Jasper N. Smith, or the said G. F. Marbut, or the said R. G. Young, under or by virtue of any of the terms, conditions, or agreements of the said attached contract of lease." Forrest & George Adair gave Smith written notice of the assignment, and that they asserted a right to collect the rentals and receive the commission; and they gave the tenants written notice of the assignment, and demanded that the rentals be paid only to them. Smith told the plaintiffs that Aycock was attending to his business, and that he (Smith) had a perfect right to do as he pleased, and that, while he had no objections to the Adairs, he had not employed them, and for this reason he repudiated the assignment of the contract. After the assignment the defendant first placed the business with another firm, who collected the rents and received the commissions, and this arrangement continued until Aycock went into the renting business for himself, after which the rents were collected by him, and he in turn received the commissions.

The case was tried before one of the judges of the municipal court of Atlanta. The defendant defended on the grounds hereinafter stated. Judgment was rendered for the plaintiff, and the defendant sued out certiorari upon the following grounds: (a) Said judgment is contrary to the evidence and without evidence to support it, and is therefore contrary to law. (b) Said judgment is contrary to the weight of the evidence and is therefore contrary to law. (c) Because the evidence showed that petitioner had revoked the agency of Glover Realty Company, and said agency was revocable under the law. (d) Because the agency given to Glover Realty Company was not coupled with any interest in the subject-matter of the agency, and was therefore revocable under the law. (e) The evidence showed that petitioner desired the special and peculiar services of Glover Realty Company, because Mr. C. G. Aycock was a stockholder in said company, and manager of its rent department, and the agency was given to Glover Realty Company on that account, and the authority of that company could not be delegated to its assigns without his permission and consent, which he had never given. (f) Because Glover Realty Company could not legally turn over the collection and custody of his rents to any one except such person as he might himself designate. (g) Because contract rights coupled with liabilities or involving a relation of personal confidence between the parties cannot be transferred to a third person by one of the parties to the contract, without the

assent of the other. (h) Because the clause in the lease contract on which the plaintiffs relied did not state that any commission should be paid to any one except Glover Realty Company; and did not make it payable to their assigns. (i) Because the mere use of the word "assigns," in the part of said clause relating to collection of rents, did not make the contract assignable when it called for personal service. (j) Because a right of action is not assignable if it does not involve, directly or indirectly, a right of property. (k) Because Glover Realty Company had no property right or interest in petitioner's property or rents, and that a right to commission is not an interest in the property. (l) Because the clause quoted in paragraph 4 of plaintiff's petition was not a contract between Jasper N. Smith and Glover Realty Company, but was only inserted in a contract between Jasper N. Smith (acting through his agent Glover Realty Company) and Marbut & Young. (m) Because petitioner's agent, Glover Realty Company, was not authorized to make lease contracts with tenants containing any such clause as that quoted in paragraph 4 of plaintiff's petition. The duty of Glover Realty Company was to act in behalf of petitioner's interest and not to enter into contracts with tenants for the benefit of said agent and sacrificing the interests of said agent's employer. (n) Because there was no consideration moving from Glover Realty Company to petitioner, or from Marbut & Young to Glover Realty Company, or to petitioner, or from or to any other person, for any contract of petitioner to turn over the right to collect his rents to any person to whom Glover Realty Company might assign its alleged rights without petitioner's consent. (o) Said Adairs did not assume and could not have been compelled to perform the duties of Glover Realty Company, unto petitioner, or to bear any liabilities unto petitioner on account of said assignment. (p) Because the said clause was void for lack of mutuality and want of consideration. (q) Because the commissions sued for were, at the time of said assignment, a mere possibility of having a future commission, which could not be legally sold or assigned.

The superior court sustained the certiorari and rendered final judgment in favor of the defendant. The plaintiffs except to the judgment of the superior court, and assign error thereon upon the ground that it is contrary to law, contrary to evidence, and without evidence to support it.

A. A. & E. L. Meyer, of Atlanta, for plaintiff in error.

E. M. & G. T. Mitchell, of Atlanta, for defendant in error.

JENKINS, J. (after stating the facts as above). [1-8] Something may properly be said

in elaboration of the last two divisions of the syllabus. The clause in the lease agreement making the rent payable either to the Glover Realty Company or to its successors or assigns cannot be construed, as was done in *Swarts v. Narragansett Electric Lighting Co.*, 28 R. I. 436, 59 Atl. 111, as words merely descriptive of the persons who might take an interest in or incur a liability under the contract, but must be taken as affecting the terms of the contract itself. Here the words as plainly employed designate the person or persons who shall "execute" the contract, and are not intended to be merely descriptive personæ, and to pertain only to who might acquire a right or incur a liability thereunder. See, also, *Schlessinger v. Forest Products Co.*, 78 N. J. Law, 637, 76 Atl. 1024, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627. But while in the proper construction of a contract which might otherwise be taken as having been intended to be personal in its nature and therefore nonassignable, heed must thus be given to the actual and different intent as evidenced by the language used; still we do not mean to say that even the actual incorporation of general words of assignment must always and necessarily show that the real intent of the agreement was not to procure the benefit of a personal and peculiar service. As was stated by the late Justice Lumpkin in *Cowart v. Singleary*, cited in the syllabus:

"Certain classes of contracts are inherently nonassignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications."

As an example of an engagement calling for such special, personal, and peculiar skill or qualifications, Chief Justice Stiness, of the Supreme Court of Rhode Island, in *Swarts v. Narragansett Electric Lighting Co.*, supra, instances an agreement whereby one obligates himself to paint a portrait for another. In such a case, even were the word "assigns" added to the name of the party upon whom the obligation itself is imposed, it still could not be thought or held that the mere addition of such word could reasonably manifest an intention to render assignable a contract which in its very nature was inherently personal and utterly incapable of thus being made so. While it might be truly said that the services involved in the instant case call for the exercise of integrity and ordinary business capacity (and the same might be

said as to almost any engagement), still it cannot be contended that they involve the exercise of any special and peculiar talent, or that their performance by another would be essentially different in result from what had been contracted for. When the assignee of the contract collects the rent and turns it over to the owner, the service is precisely and in all respects the same as if the work had been accomplished by the original agent. Here, as always, it is the intent of the parties, as shown by the contract, which at last must govern; and while it might be altogether reasonable to suppose that an owner might desire some particular person for some particular reason, to execute such a service, still there is no reason why the law would forbid or prevent his making a contrary agreement authorizing the agent to assign the contract of service to another; and, where the contract as made plainly expresses such a purpose, it should be considered that he intended to do that which he actually did, unless it be that the work provided for, if performed by another, would be essentially different from what has been contracted for. The question has not been an altogether easy one to decide, since all of the arguments, both in justice and under the law, do not seem unmistakably to point the same way. But under our view of the law, when the contract as agreed upon by the owner made the rent payable either to Glover Realty Company or to such other person as the contract might be assigned to, the owner (so far as his liability for commissions is concerned) lost the power to select for the service one of his own particular and peculiar choice, even though it be granted that the service might, in a sense, otherwise and ordinarily be properly considered as personal in its nature. It might well be said that the agent's power of assignment would not authorize him to require the owner to accept in his stead the services of one who was dishonest, or one who was incompetent to perform even such an ordinary task; but no such question as this is made by the record, and the defendant in fact has made specific disclaimer of any such ground of defense.

It is our opinion that the judge of the superior court erred in sustaining the certiorari and rendering final judgment in favor of the defendant.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 307)

WITHERINGTON v. LAURENS COUNTY FARMERS' CO-OP. WAREHOUSE CO.
(No. 9912.)(Court of Appeals of Georgia, Division No. 1.
Jan. 16, 1919.)*(Syllabus by the Court.)***1. BAILMENT §27—WAREHOUSEMEN §25(8)
—EXCUSES FOR DELIVERY—ADVERSE TITLE
—LEGAL PROCESS.**

While the general rule is that a warehouseman, as a depository for hire, will not be allowed to set up an adverse title in another as an excuse for his failure to deliver the property to his bailor on demand, and while it is incumbent upon the warehouseman to show the exercise of ordinary diligence, where such failure to deliver has been shown, still it is a general rule that a bailee, in an action against him by the bailor for the recovery of property deposited with him, may set up as a good defense that the property was taken from him upon legal process fair on its face; provided that the bailee did not fail in any duty in connection therewith which he properly owed to his bailor, and that the bailor, if not a party to that proceeding, had been given full and ample notice thereof. Thus, in an action by a bailor against his bailee, where the bailee shows that a suit for the property had been instituted by another, and that he had promptly notified his bailor of the institution of such action, and was proceeding to defend therein the right and claim of his bailor to the property, the fact that he then proceeded, with the knowledge of his bailor, to surrender the property to the levying officer, in accordance with one of his options under the law in such cases, would not amount to a conversion on his part such as to render him liable in an action of trover instituted by his bailor, but his course and conduct as outlined would be sufficient to support a finding in the bailee's favor that he had exercised the degree of ordinary diligence required of him. See *Jensen v. Eagle Ore Co.* (47 Colo. 306, 107 Pac. 259), as reported in 33 L. R. A. (N. S.) 681, 19 Ann. Cas. 519, together with the general note upon the subject thereto appended; *Smith v. Frost*, 51 Ga. 337; *Nicholas v. Tanner*, 117 Ga. 223, 227, 43 S. E. 489. See, also, *Central Bank v. Georgia Grocery Co.*, 120 Ga. 883, 48 S. E. 325; *Delaney v. Sheehan*, 138 Ga. 510, 514, 75 S. E. 632.

2. ADMISSION OF EVIDENCE—MOTION FOR NEW TRIAL.

The admission of the testimony complained of in the second ground of the amendment to the motion for a new trial was harmless, and the remaining grounds of the motion are without substantial merit.

Error from City Court of Dublin; T. M. Hightower, Judge.

Trover by J. H. Witherington against the Laurens County Farmers' Co-operative Warehouse Company. Judgment for defendant and plaintiff brings error. Affirmed.

Larsen & Crockett, of Dublin, for plaintiff in error.

R. Earl Camp, of Dublin, for defendant in error.

JENKINS, J. Witherington bought of Hodges two bales of cotton and stored them for hire with the defendant warehouse company. Subsequent to such storage, the warehouse company was sued in trover for the cotton by Summerlin, who claimed to be the true owner and entitled to the possession thereof by reason of the relationship of landlord and cropper existing between himself and Hodges, from whom Witherington had purchased the cotton. Upon the institution by Summerlin of this proceeding in trover against the warehouse company, the latter notified Witherington thereof, and, in the presence of Witherington, surrendered possession of the cotton to the sheriff, after which it was proceeding to defend the interests of Witherington in the action brought by Summerlin. While this proceeding of Summerlin's was still pending, Witherington made demand upon the warehouse company for the cotton, and, upon its failure to deliver same, brought the present action in trover against it.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 351)

SHORES-MUELLER CO. v. FITZPATRICK et al. (No. 9765.)(Court of Appeals of Georgia, Division No. 1.
Jan. 15, 1919.)*(Syllabus by the Court.)***1. PLEADING §194(1), 259—DEMURRER TO ANSWER—GROUNDS—AMENDMENT TO PLEA.**

The demurrer to the seventh paragraph of the original answer, which paragraph claimed a credit for certain boxes therein alleged to have been charged but not received, should have been sustained, as the account attached to the contract sued upon included no such item. The court likewise erred in allowing an amendment to the plea which set up a parol agreement at variance with the written contract sued upon, since the amendment failed to allege explicitly that the additional agreement was either in writing or made after the execution of the written contract.

2. NEW TRIAL §68—GROUNDS—VERDICT CONTRARY TO EVIDENCE.

The evidence failed to show that certain credits allowed by the jury by virtue of an alleged agreement between the purchaser of the goods and one who was described as a "representative" of the plaintiff were authorized, in view of the total lack of any testimony tending to show that the alleged representative had au-

thority to modify the written contract or make the alleged agreements. The verdict returned necessarily depended upon the allowance of these credits and was therefore unauthorized, and the court erred in overruling the motion for a new trial.

8. OTHER QUESTIONS.

In the light of the rulings made, it is unnecessary to pass upon the remaining questions raised by the record.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Suit by the Shores-Mueller Company against C. R. Fitzpatrick and others. Demurrer to paragraph of original plea overruled, motion for new trial overruled, and plaintiff brings error. Reversed.

L. D. McGregor, of Warrenton, for plaintiff in error.

M. L. Felts, of Warrenton, for defendant in error.

WADE, C. J. [1] 1. Suit was brought against Fitzpatrick and English upon a guaranty entered into by them in behalf of one Norris for the faithful performance of a contract touching the sale of merchandise and a proper accounting therefor. The petition alleged that the balance due on said contract amounted to \$805.49 principal, and the itemized statement attached thereto as an exhibit included divers and sundry articles and things, but nowhere referred to or mentioned as an item of charge against the purchaser any boxes whatsoever. The original plea of the defendant alleged in the seventh paragraph thereof that—

"Said W. J. Norris is charged with 297 oak special boxes by plaintiff, and said boxes were not received, and should be credited on the account of said Norris."

Subsequently there was an additional allegation, made in an amendment to the plea, with reference to the said 297 boxes, as follows:

"That at the time W. J. Norris accepted the goods purchased from Shores-Mueller Company said plaintiffs agreed to allow him to return all boxes in which goods were shipped and to give him credit for same at twenty-five cents each. Subsequently thereto and in the fall of 1914, said W. J. Norris undertook to get the said plaintiff to accept a return of said boxes for credit, and whereupon the plaintiffs refused to accept same. That said Norris held said boxes and still holds them for credit on his said account and defendants should be allowed a credit for the value of said boxes in the sum of \$74.25."

Paragraph 7 of the original plea was demurred to upon the ground that the plaintiff was not attempting to recover of the defend-

ants any amount whatsoever for 297 oak special boxes, as alleged in that paragraph, and therefore said paragraph should be stricken. The court overruled this demurrer, and, in so doing, erred. The amendment to the answer claiming credit for the boxes, under an agreement made by the plaintiff company at the time that Norris "accepted the goods," was likewise demurred to, upon the ground that this amendment sought to vary the terms of the written contract sued upon by setting up a parol agreement in conflict therewith, and furthermore was deficient in that it failed to definitely allege the number of boxes which the defendants claimed Norris had offered to return to the plaintiff company. The last objection we think is without merit, since the amendment expressly alleged that Norris had offered to return boxes aggregating in value \$74.25 at the agreed price of 25 cents per box, from which by easy calculation it could be determined how many boxes were included in his offer. We think, however, the amendment was subject to the objection that it sought to vary the terms of the written contract by setting up a parol contemporaneous agreement. While it is not alleged explicitly that this agreement by the plaintiff company, to allow the return of all boxes in which goods were shipped and give credit therefor at 25 cents each, was made at or before the time the written contract was executed, and in fact the allegation is that this agreement was made "at the time W. J. Norris accepted the goods purchased" from the plaintiff, nevertheless it is not clearly averred that the agreement in reference to the return of the boxes was made "subsequently" to the execution of the contract, nor is it averred that this agreement, whether made contemporaneously or subsequently, was in writing; and, the burden being upon the defendants, who did not deny the existence and validity of the contract forming the basis of the suit, to set up a legal and sufficient reason for any modification thereof (under the familiar rule that pleadings are to be construed most strongly against the pleader), we must interpret the allegations as made in the amendment to mean that the agreement was in parol and was made "at the time" the contract was signed, when constructively at least the goods were "accepted" by Norris. The validity of the contract could not be attacked by inference merely. The court therefore erred in overruling the demurrer to this amendment.

[2] 2. Aside from other particulars in which the evidence submitted in behalf of the defendant is somewhat unsatisfactory, it is enough to say on the general grounds of the motion that the verdict returned was necessarily arrived at by the allowance of certain credits claimed by Norris for alleged over-

charges, freights, and breakage, by virtue of an understanding or compromise agreement which he testified was made and entered into between him and "a representative" of the plaintiff company, who came to see him in reference to his indebtedness to the plaintiff and canvassed with him matters in dispute. There was positive proof in behalf of the plaintiff company that—

No "agent, representative, officer, member or any one else authorized to act for Shores-Mueller Company ever orally or in any [way] except by written statement or instrument entered into any contract or agreement with W. J. Norris or either of the defendants C. R. Fitzpatrick or W. E. English, and no one was ever authorized to have any oral conversation with said W. J. Norris, C. R. Fitzpatrick or W. E. English prior to the time that the demand was made upon them for the payment of the balance due the Shores-Mueller Company."

Norris testified as to a definite agreement between himself and a representative of the plaintiff company, whose name he did not remember, as to the amount of claims for breakage, etc., to be allowed; but no testimony was presented to show that this representative (if indeed he was in fact a representative of the plaintiff company) ever presented any credentials whatsoever to establish his authority to even collect from Norris, and there is an entire absence of testimony showing authority on his part to make deductions or allowances or any agreements which might have the effect of modifying the written contract, and no evidence showing or tending to show that the alleged agreements had with this representative were ever in fact ratified thereafter by the plaintiff company. It is clear therefore that the verdict was not authorized by the evidence, for at least some of the items, deducted by the jury from the total claim of the plaintiff company, were not established by proof as proper credits on the account.

It is true that there was testimony from Norris to the effect that he had received a letter from the plaintiff company which had been lost or destroyed, in which they offered in reference "to the boxes * * * to take them back at certain amount," which "amount" he had forgotten, but which he testified made due the sum "set out here," and further that, when he had a sufficient amount of boxes to make a shipment to the plaintiff, the plaintiff declined to take them, and he had some of these boxes yet. This testimony, while apparently tending to establish that the alleged agreement to accept the return of certain boxes was made subsequently to the execution of the written contract and was likewise a written agreement, does not make it appear how many boxes the plaintiff company so agreed to accept, or even the price (except by inference) to be paid there-

for. While the evidence was not apparently objected to, and was therefore before the jury for what it may have been worth, considering its indefinite character, this fact does not remove the error committed by the trial judge in overruling the demurrer to the answer which failed to show precisely whether the agreement pleaded touching the return of the boxes was in writing or in parol and was made before, at the time, or subsequent to the execution of the contract.

[3] For the reasons above suggested, we think the trial judge erred in overruling the demurrers to the answer and the amended answer of the defendants, and likewise in thereafter overruling the motion for a new trial.

Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 312)

ORUMLEY v. STATE. (No. 10104.)

(Court of Appeals of Georgia, Division No. 2
Jan. 23, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1156(3)—APPEAL—DISCRETION OF TRIAL COURT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

"The state having made a counter showing to the alleged newly discovered evidence, this court cannot say that the trial judge abused his discretion in overruling the grounds of the motion for a new trial based on such evidence." *Champion v. State*, 21 Ga. App. 656, 94 S. E. 828 (4); *Cohen Co. v. Brown*, 21 Ga. App. 668, 94 S. E. 811; *Blount v. State*, 18 Ga. App. 204, 89 S. E. 78 (4); *Hayes v. State*, 16 Ga. App. 334, 85 S. E. 253 (1); *Fouraker v. State*, 4 Ga. App. 692, 62 S. E. 116 (1); *Bradford v. Brand*, 132 Ga. 642, 64 S. E. 688.

2. CRIMINAL LAW §366(4)—EVIDENCE—RES GESTE.

Complaint is made that the only eyewitness to the difficulty which resulted in the homicide was allowed to testify that after the shooting "Mr. Crumley turned and left and went back across the bridge, the other way from where the shooting was done. I went down there then to where Mr. Fitzgerald was. He didn't get up; he still lay right there. When I was looking at the place where he was shot, Mr. Fitzgerald told me that he was shot bad, that he was killed, and he told me to go and get him some water, and I went and got him a hat of water and gave it to him, and he taken a bad spell of throwing up, and after that it seemed like he revived up a little from what he was. When I was talking to Mr. Fitzgerald about I hoped he would be all right, he says, 'No, he has killed me,' and he says, 'You know he has killed me for nothing,' said, 'when I was trying to get that gun away from him.'" It appears from the evidence in the record that at the time

of the shooting the witness was about 25 feet from the participants; that the shooting occurred on the road near a bridge over a creek where there is a "fill"; that after the last shot the deceased fell and rolled down the embankment, and then occurred what is quoted above. It is true that the evidence does not show in minutes how long after the shooting the words complained of were uttered, but it does appear that it was almost immediately thereafter, and made while the witness was examining the wound of deceased, and the statements of deceased, of which complaint is made, seem to have been "natural and spontaneous," a part of the transaction, "free from all suspicion of device or afterthought," "an outburst of the feelings, and not a mere narration of a past event." In the decision in the case of Louisville, etc., Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883, it is said: "It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself." To support this proposition a large number of cases are cited. The courts of final resort in a number of states have held that "a condition of severe bodily injury, unmitigated by medical or other attendance, makes it probable that a statement made while this condition continues is spontaneous." We therefore hold that the court did not err in allowing in evidence, as a part of the *res gestæ* the statements of the deceased, of which complaint is made, especially under the charge of the court in reference thereto. "When the precise time which intervened between the homicide and the statements cannot be ascertained, it may be left to the jury to determine whether they were made without premeditation or artifice, and without a view to the consequences, or were merely made to color the transaction." *Hart v. Powell*, 18 Ga. 636. That decision was followed and cited in *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519.

3. CRIMINAL LAW ⇨741(1)—STATEMENTS OF DECEASED—WEIGHT.

The statements of the deceased having been properly admitted in evidence, the weight to be given them is a matter for determination by the jury, and there was no error harmful to the defendant in the excerpt from the charge complained of in the sixth ground of the motion for a new trial.

Error from Superior Court, Wilcox County; D. A. R. Crum, Judge.

Noah Crumley was convicted of crime, his

motion for new trial was denied, and he brings error. Affirmed.

H. A. Hodges, of Rochelle, and Hal Lawson, of Abbeville, for plaintiff in error.

J. B. Wall, Sol. Gen., of Fitzgerald, M. B. Cannon, of Abbeville, and Max E. Land, of Cordele, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 188)

DAVIS v. CITY OF ROME. (No. 9673.)

(Court of Appeals of Georgia, Division No. 1. Jan. 14, 1919. Rehearing Denied Jan. 23, 1919.)

(Syllabus by the Court.)

1. COURTS ⇨488(1) — SUPREME COURT'S TRANSFER OF CAUSE—EFFECT.

The writ of error in this case having been originally filed in the Supreme Court, and that court having by formal order transferred it to this court, the transfer of the case is equivalent to a holding by the Supreme Court that the constitutional questions which the plaintiff in error attempts to raise by the writ are not properly made.

2. JUDGMENT ⇨476—COLLATERAL ATTACK—JURISDICTION OF COURT.

Under the ruling made by the Supreme Court in *Marks v. Rome*, 145 Ga. 399, 89 S. E. 324 (2), the charter for that municipality establishes a recorder's court. Furthermore, if one in point of fact has been tried, convicted, and sentenced by the municipal authorities sitting as a recorder's court, and the defendant at time of the trial raised no objection as to the competency of the tribunal sitting as such, and entered no exception to the judgment thus rendered, he cannot, in an action subsequently brought against the city for the fine paid and the value of the services rendered under the sentence imposed, and for the alleged tortious and illegal acts of the subordinate municipal officers, done while he was in their custody, collaterally attack the competency of the court rendering judgment against him. *Mayor, etc., of Brunswick v. Sims*, 14 Ga. App. 315, 80 S. E. 730. See, also, *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795.

3. MUNICIPAL CORPORATIONS ⇨724, 731, 754 —GOVERNMENTAL FUNCTIONS—LIABILITY.

In so far as the petition shows, the alleged tortious acts complained of relate solely to the conduct of the city's subordinate officials done in the illegal performance of its governmental functions, and do not in any wise relate to any act done in connection with the corporate affairs of the municipality. For acts done in the performance of purely governmental functions, however illegally the authority may be exercised, the municipality is not liable. Thus, even though the sentence as imposed by the recorder

might have been wholly void, and although the alleged acts of the warden might have been both tortious and illegal, the court did not err in sustaining the demurrer interposed by the defendant municipality. *Attaway v. Cartersville*, 68 Ga. 740; *Gray v. Griffin*, 111 Ga. 361, 368, 36 S. E. 792, 51 L. R. A. 131; *Doster v. Atlanta*, 72 Ga. 233; *Hammond v. County of Richmond*, 72 Ga. 188; *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795; *Gillmor v. Salt Lake City*, 32 Utah, 180, 89 Pac. 714, and notes in 12 L. R. A. (N. S.) 537, 13 Ann. Cas. 1016, 20 Am. & Eng. Ency. Law (2d Ed.) 1193, 1194. Nor can a municipality ratify the unlawful acts of its subordinate officials done in pursuance of its governmental functions, so as thereby to make itself liable for such acts. *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; *Peters v. Landsborg*, 40 Kan. 654, 20 Pac. 490.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Joseph Davis against the City of Rome. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Walker, of Rome, for plaintiff in error.

Max Meyerhardt, of Rome, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 338)

**ATLANTA OIL & FERTILIZER CO. v.
PHOSPHATE MINING CO.**
(No. 9865.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1213—FORMER RECORD—ISSUES OF FACT—NONSUIT.

It was held when this case was formerly before this court (*Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co.*, 20 Ga. App. 660, 93 S. E. 532) that certain issues of fact were presented by the record then under consideration which should be submitted to a jury for determination at a subsequent trial under the second count of the petition. The entire former record having been introduced in evidence at the trial now under review, notwithstanding there was other and additional evidence, the same issues of fact necessarily remained for the jury, and the trial judge therefore erred in directing a verdict.

2. APPEAL AND ERROR ⇨1195(1, 3)—LAW OF CASE—RULING ON MOTION FOR NEW TRIAL—ISSUES.

The former decision of this court is the law of this case, and necessarily controlled the subsequent trial so far as the decision was applica-

ble to the issues then presented by the pleadings and the evidence. In that decision it was expressly held that none of the questions there decided arose on the trial of the first count of plaintiff's petition, and the affirmance of the judgment overruling the motion for a new trial on this count therefore did not operate to determine or foreclose the issues presented by the second count, which were thus expressly excepted.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by the Phosphate Mining Company against the Atlanta Oil & Fertilizer Company. Trial on second count of petition, and directed verdict for plaintiff, and defendant brings error. Reversed.

D. W. Blair, of Marietta, and King & Spalding, of Atlanta, for plaintiff in error.

Evins & Moore and Jones & Chambers, all of Atlanta, for defendant in error.

WADE, C. J. The Phosphate Mining Company brought suit against the Atlanta Oil & Fertilizer Company, alleging the breach of a contract in which the plaintiff agreed to sell and the defendant to buy certain phosphate rock to be delivered to the defendant f. o. b. at the mines of the plaintiff in the state of Florida, for an agreed price of \$3.50 per ton, of 2,240 pounds, at times and in quantities specified, to wit, 1,000 tons during the year 1909, 6,000 tons during the year 1910, and 6,500 tons during the years 1911, 1912, 1913, 1914, 1915, and 1916. Certain amounts of the rock contracted for were delivered to the defendant in accordance with the terms of the sale agreement, and the first count in the petition alleges that in accordance with the contract the plaintiff was ready to deliver, and did in fact tender, to the Atlanta Oil & Fertilizer Company during each of the months of June, July, August, and September, 1912, its monthly quota of 542 tons of phosphate rock as stipulated by the agreement, but that the defendant refused to receive the same or pay the contract price therefor. It is further alleged in this count that the contract price of said rock f. o. b. at the mines of the plaintiff in the state of Florida was \$3.50 per long ton during the months of June, July, August, and September, 1912, and that the market price of said rock at the time and place of delivery during these months was \$2.50 per long ton, wherefore the defendant was indebted to the plaintiff in the sum of \$1 per long ton, or \$2,168 on the 2,168 tons tendered and refused during these months.

The second count of the petition alleges that September 25, 1912, the plaintiff received a written notice from the defendant to the effect that the defendant was unable to carry out the terms of the entire contract, and declined to give any shipping instructions

in regard to the movement of any rock in the future, and that from time to time thereafter the defendant avowed its intention not to conform to the terms of said contract, and therefore breached the same in toto; that the Atlanta Oil & Fertilizer Company renounced the contract in toto and breached the complete contract to the end of its term by reason of which breach the plaintiff was damaged in the sum of \$27,626, as the difference between the cost of manufacturing and the contract price as set out in the contract would net to the plaintiff a profit of that amount if the plaintiff were allowed to fulfill and carry out the terms of said contract to its expiration. By amendment the month of April was substituted for June in the first count, and the amount claimed in the second count was changed to \$41,439.

The case was tried on both counts at the January term of the superior court, 1916, and the trial resulted in a verdict in favor of the plaintiff on the first count for \$1,734.40, and on the second count for \$1 only. A new trial was made by the plaintiff, and the same being overruled, the case came to this court on exceptions to the refusal of the plaintiff's motion for a new trial, and on July 26, 1917, this court rendered a judgment affirming the judgment of the lower court in part and reversing it in part on the main bill of exceptions, and affirming the judgment on the cross-bill of exceptions filed by the Atlanta Oil & Fertilizer Company. The original judgment of this court simply reversed the judgment of the court below on the main bill of exceptions, but this judgment was, on motion of counsel for the plaintiff and by consent of counsel for the defendant, amended, as will appear from the judgments themselves, taken from the minutes of this court, to wit:

"Phosphate Mining Co. v. Atlanta Oil & Fertilizer Co. This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the motion for a new trial.

"Wade, George, and Luke, JJ., concur."

The amended judgment was as follows:

"Phosphate Mining Company v. Atlanta Oil & Fertilizer Company, and vice versa. Upon consideration of these cases after rehearing it is ordered that the judgments rendered therein on July 26, 1917, be hereby adhered to, except that the judgment on the main bill of exceptions is by consent of counsel affirmed in so far as the recovery had upon the first count of the declaration is concerned. It is further ordered that the entry of judgment on the main bill be hereby vacated, and that in lieu thereof the following be now entered:

"July 26, 1917. The following judgment was rendered: Phosphate Mining Company v. Atlanta Oil & Fertilizer Company. This case came before this court upon a writ of error from the superior court of Fulton county; and, after

argument had, it is considered and adjudged that the judgment of the court below be affirmed as to the recovery had upon the first count of the plaintiff's petition; and that it be reversed as to the second count because the court erred in refusing a new trial.

"Wade, George, and Luke, JJ., concur."

The application on which the original judgment was amended was as follows:

"Now comes the Phosphate Mining Company, plaintiff in error on the main bill of exceptions in the above case, and moves that the judgment of the court rendered herein on the 26th of July, 1917, be amended by the court directing that the judgment of the superior court of Fulton county on the first count of the plaintiff's petition in the court below be affirmed. This 15th day of August, 1917.

"[Signed] Evins & Moore,

"Attorneys for Movant.

"We consent to the foregoing.

"[Signed] King & Spalding,

"Attorneys for Atlanta Oil & Fertilizer Co."

This application was duly filed in office on August 17, 1917, and was made a part of the record in the case.

The case was accordingly sent back for a new trial on the second count of the petition, and was again tried on April 8, 1918, during the March term of Fulton superior court. At that trial the entire record of the case, including the brief of the evidence adduced at the former trial, was introduced, besides other testimony tending to show the market value of phosphate rock at the various times when under the contract between the parties the defendant had bound itself to receive and pay for certain specified amounts—this last testimony being positive and undisputed, as the term covered by the contract had expired before this trial, and the testimony as to market value on the various dates was no longer opinion evidence merely. At the conclusion of the entire evidence the court on motion directed a verdict in behalf of the plaintiff, for \$39,060.39, over the objection of the defendant, the defendant insisting that the court had no right to withdraw the case from the jury, but that the issues of fact therein should be submitted to the jury for determination, and that the court had not the right to assess the damages, and that the amount claimed as damages was not correct. The defendant excepted to the direction of the verdict, upon the ground that under the facts of the case and the decision of the Court of Appeals therein (20 Ga. App. 660, 93 S. E. 532), the case should have been submitted to the jury upon the several issues raised by the pleadings, as, under the evidence in the case, issues were presented for determination by the jury, and that the court erred also in fixing the amount of damages, and in withdrawing that issue from the jury, and in holding that the testimony demanded a finding for \$39,060.39, and in directing a verdict therefor. There were other assign-

ments of error which need not be referred to or considered.

[1] When this case was formerly passed upon by this court (20 Ga. App. 660, 93 S. E. 532), the opinion delivered in behalf of the court by George, J., made the following explicit and distinct ruling:

"While one who repudiates an executory contract before the time of performance has arrived cannot call upon the opposite party to make forward contracts for his benefit, for the purpose of lessening the damages of the party at fault, nevertheless, if the opposite party accepts the tender of the breach, he is bound to abate his damages by reason of circumstances of which he ought reasonably to have availed himself. *Rhoem v. Horst*, supra [178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953]; Civil Code 1910, § 4398. The tender of an anticipatory breach does not change the time at which the damages are to be estimated, nor affect the general rule of damages; but if the tender is accepted by the opposite party, that party acts thereafter under the rule of avoidable consequences. * * * While the fact that the buyer of fertilizer material had sold its factory and discontinued its business, which fact was communicated to the seller, raised no legal obligation on the part of the seller to consent to a rescission of the contract, or to accept the buyer's transfer of the contract to its successor, yet, under the circumstances appearing in the present record, and in view of the special provisions of the contract, it was for the jury to decide whether the seller had in fact consented to the transfer of the contract."

It will be observed therefrom that this court indicated that one of the issues of fact for determination in the case was whether or not if in fact the Phosphate Mining Company accepted the tender of the breach of the contract by the Atlanta Oil & Fertilizer Company, the first-named company had properly complied with its obligation to abate the damages by reason of circumstances of which it ought reasonably to have availed itself. In other words and in simple plain English, did the Phosphate Company, after acceptance of the tender of the anticipatory breach of the contract, make the proper legal effort to lessen or mitigate the damages which might be expected to flow to it from the breach of the contract? The decision held that under the circumstances appearing in the record then before the court, "and in view of the special provisions of the contract," an issue of fact was created for decision by the jury as to whether or not the seller had in fact consented to the transfer of the contract from the Atlanta Oil & Fertilizer Company to another corporation. It is clear, from a reference to the record of the former trial, that the court, in referring to "circumstances appearing in the present record," meant such circumstances as might tend to support a finding that the Phosphate Company had impliedly or otherwise consented to the transfer of the contract. In the eleventh division of

the former decision this court again made clear its ruling that certain issues were involved in the second count of the plaintiff's petition which should be submitted at the next trial to a jury, the following language being used:

"The errors complained of in the cross-bill of exceptions will not require a reversal of the judgment, but since the issues involved in the second count of the plaintiff's petition are to be again submitted to a jury, instructions appropriate to the facts appearing in the record, and not inconsistent with the rulings made in the seventh and eighth divisions of this decision, should be given to the jury."

Obviously, then, under the distinct ruling of this court now under discussion which became the law of this case equally binding upon this court and the trial court wherever applicable, the trial judge was required to submit to the jury for determination certain questions of fact, and consequently it was error on his part to disregard these instructions and direct a verdict.

[2] It is insisted by the defendant in error that the court did not err in directing a verdict, since the last trial occurred after the expiration of the contract, and the undisputed evidence as to the market value of the commodity on the dates specified by the contract was no longer opinion evidence merely, but was definite and positive testimony as to actual facts, from which the court could make an exact computation; and that there was no error in directing a verdict for the further reason that notwithstanding the ruling in the seventh, eighth, and eleventh divisions of the former decision of this court in this case, to the effect that certain issues of fact should be submitted to the jury for determination at another trial of the second count of the petition, these issues were *res adjudicata*, because they must necessarily have been considered and passed upon by the jury in arriving at a verdict in favor of the plaintiff on the first count of the petition, and the judgment overruling the motion for a new trial on the first count had been affirmed by this court. The entire record of the former trial was introduced in evidence at the trial now under review, in order to establish the fact that all the issues, except merely the value of the commodity at the various times named in the contract, had been adjudicated by the verdict on the first count and the opinion of this court and the affirmance of the judgment sustaining that verdict. It is unnecessary to examine the record of the previous trial in connection with the verdict returned on the first count of the petition, and in connection with the judgment of this court sustaining the verdict on that count, in order now to determine whether at the last trial the judge could correctly hold as an original proposition from an inspection of the entire previous record that the issues raised under

the second count had been necessarily involved also in the determination by the jury of the respective rights of the parties under the first count. This court has expressly determined judicially that—

"None of the questions discussed in the foregoing divisions of this decision [which include the questions referred to in the seventh, eighth, and eleventh divisions of the decision] arose on the trial of the first count."

In other words, whether right or wrong, and whether an inspection of the record might or might not support the view that the identical issues referred to in the seventh, eighth, and eleventh divisions of the former decision were in fact involved in the trial of the first count of the plaintiff's petition, it has been definitely decided, and that decision is irrevocably fixed, that these issues did not arise on the trial of the first count. Much might be said to support the view that in fact the questions which it is insisted were determined by the judgment affirming the verdict on the first count were not actually involved therein, considering the alleged date when the breach of the contract was tendered and all the facts, circumstances, implications, and deductions which might be determined from the entire record; but *satis superque est*, to repeat what has already been said, that the former judgment of this court is the law of the case, and this court has positively and definitely held that under the pleadings and the evidence at the former trial, the issues which the court then held should be submitted to a jury at another trial on the second count of the petition, did not arise or were not involved in the trial of the first count. The entire eleventh division of the former decision is as follows:

"The petition in the instant case contained two counts. On the first count, predicated on the theory that under the terms of the contract between the parties the defendant company failed and refused to receive and pay for a certain quantity of phosphate rock, which under the contract it had obligated itself to take, the plaintiff recovered a substantial verdict. On the second count, which was predicated upon an alleged anticipatory breach of the entire contract to the end of its term, the plaintiff recovered nominal damages only. None of the questions discussed in the foregoing divisions of this decision arose on the trial of the first count, and neither party is complaining in reference thereto. This court will, in its discretion, affirm the judgment of the court below refusing a new trial on the first count of the plaintiff's petition, and, on account of errors in rejecting evidence and in giving to the jury instructions not in

accordance with the rulings announced in this decision, order a new trial only as to the issues involved in the second count. The errors complained of in the cross-bill of exceptions will not require a reversal of the judgment, but since the issues involved in the second count of the plaintiff's petition are to be again submitted to a jury, instructions appropriate to the facts appearing in the record, and not inconsistent with the rulings made in the seventh and eighth divisions of this decision, should be given to the jury."

Construing the entire opinion and the various paragraphs thereof in connection with each other, it is clearly evident that this court, in affirming the judgment refusing a new trial on the first count of the plaintiff's petition, based this affirmance on the consent of counsel for both parties, which appears in the foregoing statement of facts, and it is recited in that opinion that "neither party is complaining" of the verdict on the first count which was affirmed. Under the agreement of counsel, the language actually employed by this court in its former decision, and all the facts and circumstances of the case, it is obvious that the affirmance of the judgment overruling the motion for a new trial on the first count of the plaintiff's petition was without prejudice to the rights of either party touching the issues raised by the second count. The issues referred to in the seventh and eighth divisions of the former decision of this court have not, therefore, been adjudicated, so far as the second count of the petition is concerned, and under the former ruling of this court they should have been submitted to the jury for consideration, for while there was additional evidence offered at the last trial, the entire record of the first trial was in evidence, as has already been said; and since it has been determined by this court that the evidence adduced at the former trial raised certain issues for determination by the jury, it necessarily follows that these issues were again presented for solution by the jury when that identical evidence was presented, notwithstanding it was supplemented by other and further testimony.

We hold, therefore, that the trial judge erred in directing a verdict contrary to the direction given by this court in its former opinion. It is unnecessary to consider the remaining exceptions presented, or attempted to be presented, by the present record.

Judgment reversed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 355)

CLANTON v. ROWAN. (No. 9909.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***1. CASE DISTINGUISHED.**

The reasonable and necessary construction of the petition is that the proceeding was one to require the removal of an obstruction from a private way acquired by seven years' uninterrupted use through improved lands. *Hopkins v. Roach*, 127 Ga. 153, 56 S. E. 303. The ruling made in *Johnson v. Williams*, 138 Ga. 853, 76 S. E. 380 (2), is therefore not applicable.

2. PLEADING \S 406(5)—**DEFECTS—PETITION AND ANSWER—WAIVER.**

The petition set forth a cause of action. There was evidence sustaining the allegations as made. There was no demurrer challenging the legal sufficiency of the plaintiff's averments relative to the nature and character of the alleged obstruction. It was therefore not improper to try the case upon the issue thus made by the allegations of the petition and the denial thereof set up by the answer. *Southern Railway Co. v. Barfield*, 115 Ga. 724, 42 S. E. 96.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between J. D. Rowan and Bill Clanton. Judgment for the former, and the latter brings error. Affirmed.

W. D. Bule, of Nashville, for plaintiff in error.

C. A. Christian, of Nashville, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 323)

WHITTIER MILLS CO. v. JENKINS.
(No. 9772.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***1. SUFFICIENCY OF PETITION.**

This was a suit in the city court of Atlanta for damages on account of personal injuries. No defense was entered at the first term, and a judgment by default for the plaintiff was at that time entered, upon proof being made by her as to the amount of damage sustained. During the term at which judgment was rendered the defendant moved to open the default and vacate the judgment, and the motion was denied. The defendant moved also for a new trial, which the trial judge granted, and under

that motion the verdict and judgment were set aside. A bill of exceptions by the plaintiff complaining of the judgment granting a new trial was brought to this court, and in a cross-bill of exceptions the defendant assigned error upon the court's refusal to open the default. It was held by this court that the judge did not err, in the exercise of his legal discretion, in refusing to open the default, nor in setting the judgment aside on the defendant's motion for a new trial. When the case came on for another trial in the court below, the defendant made an oral motion to dismiss the petition, on the ground that no cause of action was set forth. This motion was overruled. A second motion to open the default had been filed immediately following the first grant of a new trial, and this motion was also overruled when the case came on for its second hearing. The second trial, for the purpose of determining the amount of damages, resulted in a verdict for the plaintiff in an increased amount. Exceptions are now taken to the refusal to dismiss the petition on the oral motion, and to the second refusal to open the default, and to the refusal of a motion for a new trial, in which it is complained that the verdict is excessive. Other exceptions are therein taken to rulings made at the second trial, all of which may be generally stated as presenting the question as to whether the statutory right to contest the amount of unliquidated damages in cases of default includes the right to contest the extent of the injuries, in contradiction of the averments made by the petition, and whether in contesting the amount of such damages the issue of contributory and comparative negligence, although excluded under the allegations as made by the petition, can be raised and submitted for the purpose of diminishing the amount of damages claimed. *Held*, the petition set forth a cause of action, and the court did not err in refusing to dismiss the case on oral motion.

2. JUDGMENT \S 150, 174—**DEFAULT—VACATION.**

The court did not err in refusing for the second time to open the default, although the judgment for the plaintiff had at that time been set aside under the motion for a new trial. The previous judgment was not a nullity, and never became such; but, having been legally rendered and not being void, although subsequently set aside as erroneous, its rendition fixed the continuing status of the suit as being in default.

3. EXCESSIVE VERDICT—REVIEW.

Under the allegations made by the petition, this court is unable to disturb the judgment in this case on the ground that the verdict is excessive. *Realty Bond, etc., Co. v. Harley*, 19 Ga. App. 186, 91 S. E. 254 (2), and cases there cited.

4. JUDGMENT \S 112 — **DEFAULT — EFFECT — DAMAGES.**

Where a suit for unliquidated damages becomes in default, the effect is the same as if every item and paragraph of the petition had been proved by testimony and judgment rendered thereon, save only as to the amount of the damages claimed; and while the defendant has the right to contest this, in doing so he is

not privileged to deny or dispute any of the material facts so adjudicated against him. Civil Code 1910, §§ 5857, 5862; *Lenney v. Finley*, 118 Ga. 427, 45 S. E. 317; *Southern Bell Tel. Co. v. Earle*, 118 Ga. 506, 45 S. E. 319; *Caldwell v. Freeman*, 146 Ga. 469, 91 S. E. 544 (4); *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731; *Pittman v. Colbert*, 120 Ga. 341, 47 S. E. 948.

5. ASSIGNMENTS OF ERROR.

Under the foregoing rulings, none of the assignments of error are sufficient to authorize this court to set aside the verdict and judgment.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Annie Jenkins, by next friend, against the Whittier Mills Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 20 Ga. App. 828, 93 S. E. 530.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error.

Hugh Howell, Morris Macks, and Brewster, Howell & Heyman, all of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 358)

BOYD v. NEWTON COUNTY. (No. 9729.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1919.)

(Syllabus by the Court.)

1. DEEDS ⇨117—LOGS AND LOGGING ⇨5—CONVEYANCE OF REALTY — PERSONALTY — CONVERSION.

Timber, when felled, cut, and stacked into cordwood, becomes personalty, and does not pass as a part of the realty upon the sale of the land upon which it lies. When, therefore, the owner of land, who was the owner of 43 cords of wood stacked thereon, sold said land and made to the purchaser a warranty deed conveying the land, the title to said wood did not thereby pass to such purchaser. There being no evidence of any contract of the sale of said wood, the title to the same remained in the vendor of the land, and he could recover such wood from the purchaser of the land by an action in trover.

2. LOGS AND LOGGING ⇨35—RECOVERY OF CORDWOOD ON LAND CONVEYED—EVIDENCE.

The court did not err in ruling out evidence that there was a tenant house on the place. Even if such evidence authorized the inference that at the time of the execution of the deed to said land it was occupied by a tenant having the right to cut and gather firewood, it did not negative the positive and uncontradicted testimony that the title to the particular wood in

question was at the time of said sale in the plaintiff.

3. DIRECTED VERDICT.

The trial judge did not err in directing a verdict for the plaintiff.

4. APPEAL—DELAY—DAMAGES.

The prayer of the defendant in error for the allowance of damages against the plaintiff in error for bringing this case to this court for the purpose of delay, as contended by defendant in error, is denied.

Error from Superior Court, Newton County; C. W. Smith, Judge.

Action by Newton County against Wm. Boyd. Judgment for plaintiff on a directed verdict, and defendant brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error.

King & Johnson, of Covington, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 354)

MERITAS MILLS v. WAY. (No. 9880.)

(Court of Appeals of Georgia, Division No. 1. Jan. 29, 1919.)

(Syllabus by the Court.)

1. AMENDED PETITION.

The plaintiff's amendment to the tenth paragraph of her petition made at the trial term, was not such as materially to change the cause of action, and thus open the whole petition to demurrer at that time; nor did the court err in overruling the demurrer to that paragraph as amended.

2. MASTER AND SERVANT ⇨177, 247(1)—TRIAL ⇨296(4, 5)—CONCURRENT NEGLIGENCE OF SERVANT AND FELLOW SERVANT—LIABILITY—INSTRUCTION.

"Except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business." Civ. Code 1910, § 3129. Nor is the master liable for injuries to a servant resulting from the negligence of the servant himself. Civ. Code 1910, §§ 3131, 4428; *Butler v. Atlanta Buggy Co.*, 10 Ga. App. 175, 73 S. E. 25; *Wing v. Savannah Guano Co.*, 17 Ga. App. 534, 87 S. E. 827. It necessarily follows, therefore, that the master is not liable for injuries resulting to a servant from the concurrent negligence of the plaintiff himself and a fellow servant. The court therefore erred in charging the jury that "if the plaintiff was injured as alleged, and her injury, that is, the breaking of her arm, the consequent injury to her, damage to her, was caused by the

negligence of the fellow servant and the negligence also of the plaintiff, then the plaintiff would be entitled to recover." Although in other and different portions of the charge the judge correctly instructed the jury upon the questions here involved, he did not undertake to correct the erroneous charge above quoted; and a new trial must be granted. See *Central of Georgia Ry. Co. v. Deas*, 22 Ga. App. 425 (3), 427, 428, 98 S. E. 267.

3. TRIAL \S 260(1)—REQUESTED CHARGES—GIVEN CHARGES.

There was some evidence to authorize a verdict in favor of the plaintiff, though it did not require such a verdict. The requests to charge set out in grounds 2, 3, 4, 5, and 9 of the amendment to the motion for a new trial, in so far as they were legal and pertinent, were sufficiently covered by the charge given; grounds 1, 6, 7, and 8, assigning error upon certain excerpts from the charge of the court, even though in some degree slightly inaccurate, are without substantial merit, when considered in connection with the context and the entire charge, as is also ground 10, which complains of the admission of certain testimony.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by Margaret Way against the Meritts Mills. Judgment for plaintiff, and defendant brings error. Reversed.

Battle & Hollis, of Columbus, for plaintiff in error.

Ed Wohlwender and Hatcher & Hatcher, all of Columbus, for defendant in error.

JENKINS, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 367)

WESTERN & A. R. CO. v. MALLETT. (No. 9811.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)

(Syllabus by the Court.)

1. CONTINUANCE \S 46(2)—DISCRETION OF TRIAL COURT—SURPRISE.

Where an amendment to the pleadings was offered and allowed, the trial judge did not abuse his discretion in overruling a motion made by the opposite party to continue the case on the ground of surprise, when the movant made no showing to the effect that he was "less prepared for trial, and how, than he would have been if such amendment had not been made, and that such surprise is not claimed for the

purpose of delay." Civil Code, \S 5714; *Ga. Life Ins. Co. v. Hanvey*, 143 Ga. 786, 85 S. E. 1036 (2).

2. TRIAL \S 143—CONFLICTING EVIDENCE—QUESTION FOR JURY.

Where the existence of a fact was affirmed by positive evidence and denied by negative evidence, an issue was raised, and the trial judge committed no error in properly submitting such issue to the jury. *Pendergrast v. Greeson*, 6 Ga. App. 47, 64 S. E. 282; *Innis v. State*, 42 Ga. 474.

3. CHARGE OF COURT.

The assignments of error complaining of the charge of the court, as set forth in the second and fourth grounds of the amendment to the motion for new trial, are without merit. The charge was full and fair, and correctly presented all of the issues in the case to the jury.

4. SUFFICIENCY OF EVIDENCE.

The testimony of plaintiff, however improbable, was not in "contradiction to the well-established physical laws of the universe." There was evidence to support the verdict, and no error of law was committed.

Error from Superior Court, Whitfield County; M. C. Tarver, Judge.

Action by C. C. Mallett against the Western & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tye, Peebles & Tye, of Atlanta, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error.

Glenn & House, of Dalton, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

BROYLES, P. J. (concurring specially). In my opinion it is a very close question as to whether the plaintiff was entitled to recover under the evidence adduced. The great preponderance and weight of the evidence was unquestionably in favor of the defendant, and the slight evidence which favored the plaintiff was weak, unsatisfactory, contradictory in spots, and improbable. However, I cannot say that the verdict was unauthorized by any evidence; and since it has been approved by the trial judge, and no error of law appears to have been committed upon the trial, this court is without jurisdiction to interfere, and I must concur in the affirmance of the judgment.

(28 Ga. App. 139)

TWYMAN v. AVERA LOAN & INVESTMENT CO.**AVERA LOAN & INVESTMENT CO. v. TWYMAN.**

(Nos. 9813, 9814.)

(Court of Appeals of Georgia, Division No. 2
Dec. 14, 1918. On Motion for Rehearing, Feb. 11, 1919.)*(Syllabus by the Court.)***1. BILLS AND NOTES — 102 — LIABILITY — FAILURE TO READ.**

The following cases support the general proposition that "one who executes and delivers a promissory note without reading or knowing its contents cannot avoid liability thereon because he acted ignorantly, without showing some justification of his ignorance, either by reason of his inability to read or by some misleading device or contrivance amounting to fraud on the part of the person with whom he was dealing": *Barnes v. Slaton Drug Co.*, 21 Ga. App. 580, 94 S. E. 896; *Tinsley v. Gullett Gin Co.*, 21 Ga. App. 512 (2), 516 (2), 94 S. E. 892; *Levy v. Bixler Co.*, 20 Ga. App. 766, 93 S. E. 233(1); *Sloan v. Farmers' & Merchants' Bank*, 20 Ga. App. 123 (a), 125 (a), 92 S. E. 893; *Parker v. Parrish*, 18 Ga. App. 258 (2), 89 S. E. 381; *Bostwick v. Duncan*, 60 Ga. 384; *Radcliffe v. Biles*, 94 Ga. 480, 20 S. E. 359; *Jossey v. Ga. S. & F. Ry. Co.*, 109 Ga. 439, 446, 34 S. E. 664; *Walton Guano Co. v. Copelan*, 112 Ga. 319 (1), 320 (1), 37 S. E. 411, 52 L. R. A. 268; *Georgia Medicine Co. v. Hyman*, 117 Ga. 851, 45 S. E. 238; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6 (2), 8 (2), 45 S. E. 730; *Stoddard Mfg. Co. v. Adams*, 122 Ga. 802, 50 S. E. 915; *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735 (2), 58 S. E. 1030; *Baker v. Patton*, 144 Ga. 502, 87 S. E. 659. Applying the rulings in these cases to the facts of the instant case, the court did not err in directing a verdict for the plaintiff.

On Motion for Rehearing.

*(Additional Syllabus by Editorial Staff.)***2. EVIDENCE — 589 — WEIGHT — CONSTRUCTION.**

Where the evidence of a party bears two constructions, the one less favorable to his interest should be adopted.

3. BILLS AND NOTES — 102 — FAILURE TO READ NOTE—LIABILITY.

Where defendant signed a note upon presentation without apprising himself of its contents, otherwise than by accepting statements as to it by representative of opposite party, and there was no fiduciary or confidential relation, he could not escape liability on the ground that it did not contain the contract as actually made.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Action by the Avera Loan & Investment Company against Reuben Twyman. Judgment for plaintiff upon a directed verdict,

and defendant excepts and brings error, and plaintiff takes a cross-bill of exceptions. Judgment on main bill of exceptions affirmed and cross-bill dismissed.

L. D. Moore, of Macon, for plaintiff in error.

B. J. Fowler, of Macon, for defendant in error.

BLOODWORTH, J. Judgment on main bill of exceptions affirmed.

Cross-bill dismissed.

BROYLES, P. J., concurs.

STEPHENS, J., not presiding.

On Motion for Rehearing.

BLOODWORTH, J. The motion for rehearing in this case is based upon the ground that the court overlooked the following evidence of defendant:

"He just handed me the deed and the other papers, and said, 'Sign here, right here,' and I thought I was signing a receipt for the deed. * * * He did not read to me this paper. I did not read the paper. Mr. Walker did not read it to me. I could not read it. No one read it to me."

[2] The court did not overlook the above-quoted evidence. It is a well established principle of law that, where the evidence of a party "bears two constructions, the one less favorable to his interest should be adopted." *Burkhalter v. Oliver*, 88 Ga. 478, 14 S. E. 704; *Baggett v. Trulock*, 77 Ga. 369, 3 S. E. 162 (3); *Southern Railway Co. v. Hobbs*, 121 Ga. 428, 49 S. E. 294; *Horne v. Peacock*, 122 Ga. 45, 49 S. E. 722 (2). In *Western & A. R. Co. v. Evans*, 96 Ga. 486, 23 S. E. 495, Justice Lumpkin said:

"A party testifying in his own favor has no right to be intentionally or deliberately self-contradictory; and, if he is so, the courts are fully justified in taking against him that version of his testimony which is most unfavorable to him. Being peculiarly in a position to state fairly and definitely the facts which he professes to know, he is under a duty of so stating them as to give a candid and intelligible account of what occurred. The courts are also authorized to give great weight to statements unwillingly made upon cross-examination, when these statements have every appearance of being the real truth, though reluctantly told."

On cross-examination the defendant said:

"I can write and read the English language. I can write some and read a little bit—nothing to amount to anything."

[3] In the evidence there is nothing to show that the defendant made any effort to read the note and found that he could not do so, or that at the time he signed it there existed any emergency which would excuse

his failure to read, or that his failure to read was brought about by any "misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent him from reading it." On the contrary, it clearly appears that he signed the note upon presentation, without apprising himself of its contents otherwise than by accepting statements with reference thereto made by the representative of the opposite party, and between whom and defendant there existed no fiduciary or confidential relation. See *Tinsley v. Gullett Gln Co.*, 21 Ga. App. 512 (2), 94 S. E. 892, and other cases cited in the opinion in the instant case.

Rehearing denied.

BROYLES, P. J., concurs. STEPHENS, J., not presiding.

(23 Ga. App. 366)

SCOGGINS v. STATE. (No. 9808.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 757(6), 823(2)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

The following excerpt from the charge of the court is complained of: "A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case; and, where a witness has been so successfully impeached, it is your duty to disregard his testimony altogether." Standing alone, this excerpt is error, as the jury have a right to determine for themselves the credibility of a witness, even if they find he has been "successfully" impeached. Civil Code 1910, § 5884. When, however, this excerpt is considered with its immediate context, it does not require a new trial of the case. Immediately following the excerpt complained of, the judge added: "But whether a witness has been so successfully impeached or not, *and what credit you will give to the testimony of each and every witness, is a matter entirely for you as jurors to determine.*" (Italics ours.)

In our opinion the excerpt complained of and the instructions just quoted, which immediately followed it, when considered together, clearly instructed the jury that, after all, even if they believed that any witness had been successfully impeached by proof of contradictory statements previously made by him as to a material matter, it was for them to determine what credit should be given his testimony. It was therefore

not contrary to section 5884 of the Civil Code. See cases cited in Park's Ann. Code, under section 5884.

2. MOTION FOR NEW TRIAL.

The remaining special ground of the motion for a new trial is without merit.

3. RULING ON MOTION FOR NEW TRIAL.

The verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Stephens, J., dissenting.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Proceeding by the State against Merritt Scoggins, and from the judgment he brings error. Affirmed.

Morris H. Bernstein and Shelby Myrick, both of Savannah, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). Where the judge makes an erroneous charge, it is presumably prejudicial, unless its harmful effect is removed and corrected in his language elsewhere, or unless it appears that such charge was harmless and did not affect the verdict. The judge charged the jury that, should they believe a witness has been "successfully impeached" by contradictory statements previously made, they should "disregard his testimony altogether." This is conceded to have been error. To my mind its harmful effect was not cured by the language immediately following it or appearing elsewhere in the charge. To tell the jury that "what credit you will give to the testimony of each and every witness is a matter entirely for you as jurors to determine" does not negative the idea that in passing upon the credit of a particular witness the jury is bound to reject his entire testimony when they disbelieve it in part. The testimony of the witness sought to be impeached was material to the defense, and if believed in part might have resulted in a different verdict.

The charge being erroneous and not cured, and upon the controlling issue in the case, I am of the opinion that a new trial should be granted.

(23 Ga. App. 334)

BERRYTON MILLS v. PARHAM.
(No. 9864.)(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***1. MASTER AND SERVANT ⇨149(1)—COM-
PLIANCE WITH NEGLIGENT ORDER—RECOV-
ERY.**

"In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or of his master's representative, the servant must show that the order was a negligent one."

**2. MASTER AND SERVANT ⇨185(22) — NEG-
LIGENCE OF FELLOW SERVANT—LIABILITY.**

In this case the injury received by the plaintiff was the result of the negligence of a fellow servant, and it was error to overrule the motion for a new trial.

Error from Superior Court, Chattooga County; J. E. Rosser, Judge pro hac.

Suit by R. M. Parham against the Berryton Mills. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed.

Denny & Wright, of Rome, for plaintiff in error.

Murray & Draper and Glenn & Napier, all of Chattanooga, Tenn., and Wesley Shropshire, of Summerville, for defendant in error.

LUKE, J. Parham brought his action for damages against the Berryton Mills, a manufacturing corporation, to the March term, 1917, of Chattooga superior court, alleging substantially that he was injured by defendant in the sum of \$10,000 on July 29, 1916; that he was employed some four months prior by the defendant, through one Gus Hudson, vice principal of defendant, as fireman of boilers; his regular duty under his employment was to fire the boilers, but he was required to perform such other services about said mill or plant as might be directed by defendant through said Hudson, foreman and vice principal; that on July 29, 1916, defendant had two boilers of approximate capacity of 150 horse power each; that these boilers are located in the boiler room of defendant's plant and are situated alongside and within a very few feet of one another, and are used for generating steam power to drive the machinery of the plant; that the boilers are connected by a pipe line through which the mud and sediment which accumulated in the boilers is drawn or allowed to escape; that along this pipe line are located two valves known as mud valves, one of which is located alongside and on the out-

side of each boiler, and by means of such valves the mud and sediment is forced by steam to escape from said boilers through said pipe line and into another waste line of pipe connecting about midway between said boilers, which also has a valve to open and close said waste pipe line; that the escape of steam is controlled by the valve nearest the boiler, and when the three valves are open, or waste valve closed and the other two opened, the steam from one boiler will escape into the other; that on said July 29th the plaintiff was directed by said vice principal, Hudson, to go into a boiler and fix a water pipe in one of the boilers which was leaking, the boiler having been cooled down; even that the plaintiff stated that he did not want to do so, for he did not know about the danger or anything about it, but he was assured by said vice principal, Hudson, that the place was safe, and that there was no danger, and Hudson directed him to enter and go right into the boiler and do the work; that he was not aware of the danger incident to said service, and, relying on the assurance of said vice principal, he entered said boiler, and entered on the discharge of said duties required of him therein; that he had not, and could not have had by the exercise of ordinary care, such means of knowing the risk as the defendant had; that while he was engaged in said work in the boiler, the fireman fired the other boiler under order of said vice principal, opened the mud valve nearest the boiler which was being fired by him, and allowed steam to escape into said pipe line connecting the boilers; that the defendant negligently and without proper care and inspection had left open the mud valve next to the boiler in which the plaintiff was engaged, performing service as directed, and that the steam entered the boiler in which he was engaged, and scalded, burned, and permanently injured him, causing him great pain and suffering; that the defendant had not exercised proper care to see that said valve was closed, or give him any notice thereof, or to warn him that the fireman was about to turn on steam, or any other warning whatever, and that the defendant did not inspect said valves, although it had full knowledge of his perilous position, and that no one was placed to guard said valve, and no direction was given to the fireman not to turn on the steam while the plaintiff was in the boiler; and that the defendant was negligent in failing to furnish and maintain a safe place for the performance of plaintiff's work.

[1, 2] The evidence in substance discloses that Parham had been employed for some time by the mills, sometimes firing these boilers and sometimes at other work. It became necessary to repair some of the tubes

in one of the boilers, and the boiler was accordingly cooled off. Mr. Alexander, the only witness upon the question of cooling off this boiler, testified that he drew the fire from under it about 6:30 or 7 o'clock at night; that he then drained the boiler through the valve above described, and, after closing this valve, filled the boiler with cold water, and then drained this, repeating this several times; that he finally let the water out about 1 o'clock a. m. and then closed the valve on this boiler. After this, Mr. Hudson, Parham, and several others went to work on this boiler. At 5:30 a. m. this same fellow servant, Alexander, turned the steam on from the live boiler, burning and scalding Parham. At that time (5:30 a. m.) the valve on the dead boiler was open, though it was underneath the boiler and the work was being done from above, and though no one was shown to have been anywhere near this valve after Alexander testified that he closed it. The two valves, the one on the dead boiler and the one on the live boiler, which Alexander opened, were only a few feet apart, and both were in sight of Alexander when he opened the valve on the live boiler. According to the testimony of Parham, both valves were not within the view of Hudson, where he was working, nor was Alexander within his view when he opened the valve on the live boiler. The testimony of Parham and all other witnesses showed that there was a standing order to the fireman to always close these valves after blowing off one of the boilers.

What was the proximate cause of the injury received by Parham? It cannot be said that the order from the vice principal and the entering of the boiler at the time by Parham was negligence, for at that time there was no steam in the boiler, and there was nothing dangerous about the task. Was not the proximate cause of the injury the act of Alexander, the fellow servant, in opening the valve on the boiler which had steam in it, or the leaving open of the valve on the boiler in which Parham was working. If either be true, and this is the negligence relied upon, it seems to us that the case is controlled by the rule laid down in Civil Code 1910, § 3129, that—

"Except in cases of railroad companies the master is not liable to one servant for inju-

ries arising from the negligence or misconduct of other servants about the same business."

In a case somewhat akin in principle to this case upon exceptions to a nonsuit, this court held that—

"It is the duty of a master to furnish to servants in his employ safe appliances for the work in which they are engaged; but when such appliances are furnished, and an injury to a servant is plainly attributable solely to negligence of fellow servants in the manner of using them or in failing to use them, the master is not chargeable therewith."

See *Henderson v. Ocean Steamship Co.*, 15 Ga. App. 790, 84 S. E. 230. The plaintiff, however, says that he was complying with a command from the master to engage about the work in the boiler, as against his objection so to engage himself. This court has held that—

"In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or of his master's representative, the servant must show that the order was a negligent one under the circumstances. If the order was negligent, and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received in complying with the order."

See *Simmons v. Southern Railway Co.*, 19 Ga. App. 524, 91 S. E. 917, and cases cited. See, also, *Whiters v. Mallom Steamship Co.*, 97 S. E. 453. We are convinced that the evidence in this case, even when viewed most favorably to the plaintiff, shows conclusively that his injuries did not result from a negligent command of his master's representative, but were the result of the negligence of a fellow servant, for which, under the law, the master is not liable in damages. We have carefully examined all the assignments of error, and, upon a consideration of the case as a whole, we cannot see that the evidence makes a case entitling the plaintiff to a judgment for his injuries. It was error for the trial court to overrule the motion for a new trial.

Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 359)

CHAPMAN v. STATE. (No. 9744.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)*(Syllabus by the Court.)*1. CRIMINAL LAW \S 656(9), 762(3)—APPEAL.

While, ordinarily, it is reversible error for a trial judge, in any case, in his charge to the jury, or during its progress, within the hearing of the jury, to express or intimate his opinion as to what has or has not been proved (Civ. Code 1910, \S 4863; Pen. Code 1910, \S 1058), it is not a violation of the statute, where such expression or intimation of opinion occurs when the judge is discussing with counsel the admissibility of testimony, the propriety of a nonsuit, the discharge of a defendant for the lack of evidence to convict, the direction of a verdict, or similar matters in the progress of the trial, or is explaining his rulings upon questions of this nature. Especially is this true where the party complaining of such expression is the one who invoked the ruling which occasioned it.

Stephens, J., dissenting.

*(Additional Syllabus by Editorial Staff.)*2. LARCENY \S 7—TITLE.

Where prosecutor was a tenant of the land upon which the stolen corn was grown, and at the time of the larceny the corn had not been gathered, but was in the shuck, the title to the corn was in the tenant, and not in the landlord.

3. CRIMINAL LAW \S 1166½(12)—HARMLESS ERROR—COURT'S EXPRESSED OPINION.

In a prosecution for larceny of corn in the shuck, where no other than a verdict of conviction could have been rendered upon the evidence, any error in court's expression of opinion as to what had or had not been proved could not be prejudicial to defendant.

Error from City Court of Jefferson; J. A. B. Mahaffey, Judge.

Arch Chapman was convicted of larceny, and he brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error.

S. J. Nix, Sol., of Jefferson, for the State.

BROYLES, P. J. The defendant was charged with the larceny of one bushel of corn in the shuck, the property of the prosecutor, O. P. Aiken. Upon the trial the undisputed testimony of a witness for the state showed that he caught the defendant in the prosecutor's cornfield, about 9 or 10 o'clock at night; that he saw the defendant break off more than a bushel of ears of corn and put them in a sack. The undisputed testimony of the prosecutor, Aiken, was that the stolen corn was his. He further testified that he rented the land upon which the corn

was grown from W. H. Smith, and that Smith was to get half of the corn raised thereon for the rent of the land, but that it was his (Aiken's) corn until it was made and gathered.

[1, 2] It clearly appears from the record, and a fair inference therefrom, that when Aiken had given this testimony counsel for the defendant made a motion that the defendant be discharged, or that a verdict of acquittal be directed, or some similar motion, on the ground that the evidence of Aiken showed that one-half of the corn belonged to Smith, his landlord, and that therefore the allegations in the accusation as to the ownership of the stolen property were not sustained by the proof. The judge, in passing upon this motion, and in denying it, said: "I will have to rule this is Mr. Aiken's corn under the testimony." This language was excepted to by the defendant as an expression of opinion to the jury on a material issue in the case, in violation of section 1058 of the Penal Code.

We do not think the provisions of that section apply to the facts of the instant case. In *Croom v. State*, 90 Ga. 430, 17 S. E. 1003, the third headnote is as follows:

"Generally what the court says in stating to counsel the reason for denying a motion to exclude or rule out evidence is, if pertinent to the question raised by counsel, not error, although the reason given involve a statement as to certain testimony which is already in, or as to there being nothing in evidence showing that the circumstances are as the counsel claim."

In *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832, the sixth headnote is as follows:

"It is not reversible error, under section 4334 of the Civil Code [of 1895; Code of 1910, \S 4863], for the judge, in discussing with counsel the admissibility of testimony, the propriety of a nonsuit, the direction of a verdict, or similar matters in the progress of the trial, or in explaining his rulings upon questions of this nature, to refer to the evidence or to the statements of witnesses, provided he does not go out of the line of legitimate discussion upon the point presented or use such language as to indicate apparent or actual judicial approval or disparagement of any witness or of any part of the testimony."

In *Jones v. Pope*, 7 Ga. App. 538, 67 S. E. 280, this court said:

"A trial judge can state his reasons for admitting or refusing to admit evidence, if such reasons are pertinent to the objections to evidence and the ruling made thereon; and this statement does not constitute such an expression of opinion as is violative of section 4334 of the Civil Code."

In *Louisville & Nashville R. R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765, the Supreme Court

held that, in overruling a motion to nonsuit, the judge may, within appropriate limits, state, in the hearing of the jury, his reasons for his decision. See, also, to the same effect, *Wyley v. Stanford*, 22 Ga. 397 (3); *Reinhart v. Miller*, 22 Ga. 403 (10), 68 Am. Dec. 506; *Milner v. State*, 30 Ga. 137 (3), 139 (3); *Perry v. Butt*, 14 Ga. 699 (2), 705 (2); *Scarborough v. State*, 46 Ga. 26, 33; *Claffin v. Continental Works*, 85 Ga. 28, 11 S. E. 721 (6); *Florida C. & P. R. R. Co. v. Lucas*, 110 Ga. 121 (2), 124 (2), 35 S. E. 283; *Brown v. State*, 119 Ga. 572, 46 S. E. 833 (1); *Hall v. State*, 7 Ga. App. 115 (5), 119 (5), 66 S. E. 390.

In the *Scarborough Case*, Judge McCay said (on page 33) that:

"It would be impossible to carry on a trial if this section of the Code, prohibiting a judge from expressing any opinion as to what is proven, is to be construed as is contended for. A judge, in deciding as to admissibility of testimony, must always, to some extent, decide as to its weight, since often its admissibility depends on that, so he must often determine what has been proven so as to say whether certain other things may be proven. To decide a nonsuit, he must decide if there be enough proven to justify a verdict, etc. The only practicable rule is to treat the jury as possessed of common sense, and as capable of understanding what is addressed by the judge to *them* and *what is not*. He may not express to the jury any opinion; but if in the decision of any legal question, as it arises, he must pass upon facts, the statute does not apply. It must be reasonably construed." (Italics ours.)

In *Oliveros v. State*, 120 Ga. 237, 47 S. E. 627, 1 Ann. Cas. 114, *Simmons, C. J.*, said:

"Expression of opinion as to the weight of evidence may or may not be error, according to the circumstances under which the opinion is expressed; but, even where error, it need not be a violation of Civil Code, § 4334. Again, speaking for myself, I think this court has given this section too broad and liberal a construction. It was doubtless enacted to correct a custom of the judges, which had descended to them from the common-law courts of England and this country, but which the Legislature thought was a usurpation of the functions of the jury. Whether this be true or not, *we all think* that, when an objection is made to evidence offered, the judge has a right, if he deems proper, to give the reasons for his decision on the objections; and such reasons so given, if pertinent to the objections made, do not constitute such an expression of opinion as to violate the Code section above cited." (Italics ours.)

Moreover, it has been held that, even where the expression of the judge's opinion occurs during his charge to the jury, this does not necessarily require the grant of a new trial. In *Southern Insurance & Trust Co. v. Lewis*, 42 Ga. 587, which was a suit on an insurance policy, the judge charged the jury that, in his opinion, the plaintiff had

an insurable interest in the policy, and the Supreme Court, while stating that this was improper, and that the judge ought to have called the attention of the jury to the facts, and then said to them: "If you believe," etc., "then, in the opinion of the court, under the law, you will find that he had an insurable interest," nevertheless ruled that under the facts of the case—the case being clearly made out—this error was not sufficient ground for a reversal of the judgment. In *Dexter Banking Co. v. McCook*, 7 Ga. App. 436, 67 S. E. 113, this court held that:

"Where a particular fact is established by uncontradicted evidence, it is not error for the judge to assume or intimate that the fact has been proved."

This ruling in the *Dexter Case* was approved in *Deen v. Wheeler*, 7 Ga. App. 507, 517, 67 S. E. 212.

The undisputed evidence in the instant case showed that the relation of landlord and tenant existed between the prosecutor, Aiken, and W. H. Smith, the owner of the land cultivated by Aiken, and upon which the stolen corn was grown, and that Aiken was the tenant. It was further undisputedly shown that at the time of the larceny the corn had not been gathered, but was in the shuck and upon the stalks in the field. It followed, therefore, as a matter of law, that the title to the corn was in Aiken, and not in Smith. *Teel v. State*, 7 Ga. App. 600, 67 S. E. 699. Clearly, therefore, the contention of the defendant's counsel, made to the trial judge during the progress of the case, that the defendant could not be legally convicted, since the proof of the ownership of the stolen property did not correspond with the allegations of ownership in the accusation, and his motion that the defendant be discharged, or that a verdict be directed in his favor, or some other motion of the same import, was without merit, and was properly denied by the judge. In passing upon this motion, and in stating his reasons for his ruling thereon, the judge necessarily had to pass upon the evidence which had been introduced, and to express his opinion thereon, and, under the authorities above cited, the case falls within the exception stated in the headnote.

[3] Moreover, aside from the precedents cited, the particular facts of this case show that the granting of a new trial would be a mere idle and useless ceremony, and of no benefit whatever to the accused, since no other verdict than the one returned is legally possible on another trial. The defendant introduced no evidence and made no statement; no exception to the charge of the court, as to errors, either of omission or commission, was made; no exception to any ruling of the court upon the admission or exclusion of evidence was made; the undisputed evidence showed that the defendant was

caught in the very act of the larceny charged, and that he made a free and voluntary confession of his guilt. No other verdict than the one rendered could possibly have been reached by the jury. The statement of the court, complained of, did not, therefore, prejudice or injure the cause of the defendant. We do not believe it was the legislative intent in enacting the statute, now codified in section 1058 of the Penal Code, to make its provisions apply to such a case.

Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). This was a conviction for simple larceny, the accusation alleging that the property stolen was one bushel of corn in the shuck, of the value of \$2, and the property of O. P. Aiken. The evidence of Mr. Aiken was:

"It was my corn. It was my corn until it was made and gathered. Part of the corn was Mr. Smith's. * * * He was to get part of the crop. He was to get one-half of it."

Upon a ruling upon a motion made by defendant's counsel, the trial judge, in the presence of the jury, remarked:

"I will have to rule this is Mr. Aiken's corn under this testimony."

Section 1058 of the Penal Code, codified from what is commonly called the "dumb act," says in express words:

"It is error for the judge of the superior court, in any case, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and a violation of the provisions of this section shall be held by the Supreme Court to be error, and the decision in such case reversed, and a new trial granted, with such directions as the Supreme Court may lawfully give."

This applies to trials in the city court of Jefferson. Acts 1903, p. 138. It is made mandatory on our court to grant a new trial when the trial judge has expressed his opinion on the facts. This rule is not altered merely because the fact stated as proved by the trial judge stands uncontradicted by testimony. The truth or falsity of the alleged fact is put in issue by the defendant's plea of not guilty, which plea is a denial of each and every allegation in the indictment against him. He is presumed to be innocent, and this presumption remains with him through-

out the trial and until after the rendition of a verdict against him. His plea of "not guilty" and this presumption of innocence continue throughout the entire trial, to challenge and deny the case of the state, as alleged in the indictment and made in the evidence. Where there is no admission in judicio, the uncontradicted evidence of the state is thus denied, and an issue of fact is made.

It was a violation of this section of the Code for the trial judge to state, in the presence of the jury, that this statement of a witness, uncontradicted by the testimony, was true. He went "outside of the line of legitimate discussion upon the point presented [and used] such language as to indicate * * * actual judicial approval * * * of * * * part of the testimony." Realty Co. v. Ellis, 4 Ga. App. 402, 61 S. E. 832, cited in the majority opinion. In Cooper v. State, 2 Ga. App. 730, 59 S. E. 20, it was held that:

"A plea of not guilty, by one accused of crime, is an express contention on his part antagonistic to every fact necessary to be proved by the state in order to establish his guilt; and unless the accused admits one or more of the facts which it devolves upon the state to prove, such fact must be established by evidence. To assume that an important fact in the case on trial has been admitted, and to so instruct the jury when no such admission has been made, is reversible error."

Also in the case of Southern Express Co. v. State, 1 Ga. App. 700, 58 S. E. 67 (5), the court said:

"To assume in a criminal case that the testimony for the state is the truth, though such testimony be not contradicted by evidence for the defendant, and to charge the jury that such testimony is the truth and that there is no contention to the contrary, is violative of section 4834 of the Civil Code, and demands a new trial. The plea of not guilty, filed by the defendant is a contention on his part as to every material and essential fact necessary to establish his guilt, and implies a denial of every such fact."

Although the evidence demands a verdict of guilty, the law commands that it be set aside. The trial judge should have kept dumb, as the statute requires. It was not at all essential to his ruling upon the motion made by counsel for defendant for him to express himself on the facts as he did. We are enjoined in mandatory terms to set this conviction aside. Mandatory statutes must be obeyed, not evaded.

(23 Ga. App. 369)

REYNOLDS v. STATE. (No. 10120.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW — 784(7), 824(9) — CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.

While in every criminal case, where the guilt of the accused depends wholly upon circumstantial evidence, it is the duty of the court, even in the absence of a written request, to charge the law of circumstantial evidence, it is immaterial what language is employed to convey this instruction, if every possible hypothesis arising from the circumstantial evidence, favorable to the defendant, be presented in concrete statement to the jury, and if they are instructed that if they believe any one of these hypotheses the defendant should be acquitted. *Mangum v. State*, 5 Ga. App. 445, 63 S. E. 543 (2); *Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (3); *Richards v. State*, 102 Ga. 569, 27 S. E. 726; *Jones v. State*, 105 Ga. 649, 31 S. E. 574; *Bush v. State*, 23 Ga. App. —, 97 S. E. 554.

Stephens, J., dissenting.

Error from Superior Court, Floyd County;
Moses Wright, Judge.

Martha Reynolds was convicted of having possession and control of intoxicating liquors, and she brings error. Affirmed.

W. B. Mebane, of Rome, for plaintiff in error.

C. H. Porter, Sol. Gen., of Rome, for the State.

BROYLES, P. J. The defendant was charged with having possession and control of intoxicating liquors, and upon the trial the undisputed evidence showed that several half-gallon jars containing whisky were found on her enclosed premises, two of the jars being within five or six feet of a window of her house. The sole question left for the determination of the jury was whether the defendant knew of the presence of the whisky on her premises. She introduced no evidence, and in her statement denied having any knowledge that the whisky was on her premises. This evidence, in our opinion, raised more than a mere suspicion of the defendant's guilt, and was sufficient to authorize the jury to find that it excluded every reasonable hypothesis save that of her guilt.

Under the particular facts of this case, we do not think the court erred in failing to charge the exact language of section 1010 of the Penal Code upon the law of circumstantial evidence. The only possible hypothesis consistent with her innocence, arising from the evidence and her statement, was that she did not have any knowledge of the whisky being on her premises. The judge

presented this hypothesis in concrete form to the jury, and instructed them that, before the defendant could be convicted, the state must show that she had a guilty knowledge of the whisky being on her premises, and that if it failed to do so she must be acquitted. Under the ruling in the cases cited in the headnote, we think the charge of the court sufficiently presented the principle of the law of circumstantial evidence applicable to the facts of the case.

Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). It is the well-settled law of this state that where a conviction depends entirely upon circumstantial evidence the trial judge must give in charge to the jury the law relative to the degree of proof necessary to convict upon such evidence. See Park's Penal Code, § 1010, and numerous citations under that section. It has been held, however, that, where the trial judge fails to expressly charge the law in reference to circumstantial evidence, but does, "fully and liberally to the defendant, instruct the jury as to the law of reasonable doubts, and the amount and character of testimony necessary to warrant a conviction," he fully complies with the duty incumbent upon him in respect to charging the law of circumstantial evidence. The above-quoted language is taken from the case of *Barrow v. State*, 80 Ga. 191, 5 S. E. 64 (3). The authorities which lay down this seeming exception are cases wherein the evidence either demanded a verdict, or so far authorized a verdict that the charge upon the law of circumstantial evidence would not have produced a different result. The very judge who rendered the opinion in the *Barrow Case*, supra (the oldest case cited and relied upon in the opinion of the majority of the court) said, in the case of *Toler v. State*, 107 Ga. 682, 33 S. E. 629:

"While the failure of the court upon a criminal trial, in which the evidence against the accused is entirely circumstantial, to instruct the jury concerning the rule applicable to evidence of this character would, in a close or doubtful case, be cause for a new trial, such failure will not require another trial when the guilt of the accused is clearly and convincingly proved, and the charge as to the amount and character of proof requisite to a lawful conviction is such as to leave no room for doubt that the verdict would have been the same even if the court had in terms stated to the jury that, in order to warrant a verdict of guilty, the evidence must not only be consistent with the guilt of the accused, but inconsistent with every other reasonable hypothesis. [*Italics mine.*]"

In *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528, Judge Samuel Lumpkin, who wrote the opinions in both the *Barrow* and the *Toler Cases*, said, in the headnote thereto:

"When in the trial of a criminal case the evidence against the accused was entirely circumstantial, it was the duty of the judge, not only to charge upon the law of reasonable doubt, but also, whether so requested or not, to state to the jury the rule usually applicable in such cases, to the effect that the evidence must connect the accused with the perpetration of the alleged offense, and must not only be consistent with his guilt, but inconsistent with every other reasonable hypothesis."

Further on in his opinion in that case the learned judge said:

"The law upon this subject is very concise and aptly stated in 12 Am. & Eng. Enc. of Law, p. 879, from which we make the following quotation: 'Where the prosecution relies solely upon circumstantial evidence to secure a conviction, it is incumbent on the trial court to instruct the jury as to the law applicable to such proof. No particular form of language is required; if the ideas conveyed are correct and so expressed as to meet the comprehension of the jury, it is sufficient.' And see the cases there cited. In *Barrow v. State*, 80 Ga. 191 [5 S. E. 64], this court *intimated* [italics mine] that in a case in which the court ought to instruct the jury specifically as to the law of circumstantial evidence, a failure to do so might be cause for a new trial, unless the court did in fact substantially give the jury all necessary instruction as to the amount and character of proof requisite in such a case to justify a conviction. That was hardly a case of purely circumstantial evidence; but on the assumption that it could be so regarded, this court thought that the charge of the trial judge, who is now the Chief Justice of this court, in effect conformed to the rule above laid down. *It would be easy to cite authorities in great number sustaining the doctrine announced in the headnote, but we are sure it will be accepted as good law without further support.* [Italics mine.]"

In his reference to the *Barrow* Case, made in the *Hamilton* Case just quoted from, Judge Lumpkin seems to have weakened on his position taken in the former case. He refers to what was said in the *Barrow* Case on this point as an *intimation*, rather than as a *decision*, using the word "intimated," and further states that "it was hardly a case of purely circumstantial evidence." So much, therefore, for the *Barrow* Case, the evident source of this doctrine. Its author restricted and confined it to its own special and peculiar facts. In that case the court, in the opinion, referring to the charge of the trial judge said:

"He charged fully the law of reasonable doubt; warned the jury not to convict unless morally satisfied of her guilt; impressed this upon them by repeated statements to this effect; informed them that if, after an honest and impartial investigation, they were uncertain as to her guilt, they ought to acquit; instructed them they had the right to believe her statement in preference to the sworn testimony offered by the state; and concluded by saying she entered

the trial with the presumption of innocence in her favor, that this presumption remained until the state rebutted it by proof, and that if the state had failed to do so she should be acquitted."

In the case of *Jones v. State*, 105 Ga. 649, 31 S. E. 574, also cited and relied upon in the majority opinion, suffice it to say that Mr. Justice Little, at the conclusion of the headnote therein, said:

"It would be otherwise if the evidence made the case close or doubtful, or if the account given of the manner in which the possession of the stolen goods was obtained was probable or consistent."

In the *Mangum* and *Bush* Cases, cited in the majority opinion, the charges were much fuller than in the case now under consideration. Both contained liberal cautions on reasonable doubt. In the *Mangum* Case the judge went so far as to define circumstantial evidence, charged more or less fully on presumption of innocence, and also used this expression:

"Whether dependant upon positive or circumstantial evidence the true question in all criminal cases is not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt."

This is the identical language of section 1013 of the Penal Code.

According to the view which I take of the evidence in the case now before us, the doctrine of the *Barrow* Case does not apply. I do not concede that the guilt of the accused is "clearly and convincingly proved." No liquor was found in the defendant's actual possession. Several small receptacles containing liquor were found on the defendant's premises, outside of her dwelling house. Only from the manner in which this liquor was placed, and the opportunity afforded thereby to charge the defendant with knowledge of its being on her premises, could she have been convicted. The circumstances were consistent with her innocence, and might not, in the minds of the jury, have excluded "every other reasonable hypothesis save that of the guilt of the accused." Nor does it appear that "the court very fully and liberally to the defendant instructed the jury as to the law of reasonable doubt, and the amount and character of testimony necessary to warrant a conviction." The charge of the court in this connection was:

"In order to convict the defendant of this offense, it is necessary for the state to show to your satisfaction that the defendant had a guilty knowledge of the whisky in question being on her premises, if you believe any whisky was found on her premises. If the whisky was

found on defendant's premises, and she had no knowledge of the whisky being there, then you will acquit the defendant."

Then, after the customary charge on the defendant's statement, the court concluded with a final instruction that:

"If you believe the defendant is guilty beyond a reasonable doubt, you will convict the defendant; otherwise acquit her."

The court did not "charge *fully* the law of reasonable doubt." (*Italics mine.*) He made no reference to it in connection with his charge as to knowledge by the defendant of the presence of whisky on her premises. He did not "warn the jury not to convict unless morally satisfied of her guilt"; he did not "impress this upon them by repeated statements to this effect"; he did not "Inform them that if, after an honest and impartial investigation, they were uncertain as to her guilt they ought to acquit her"; and he did not charge "that she entered the trial with the presumption of innocence in her favor [and] that this presumption remained until the state rebutted it by proof." Nowhere were "the ideas [of circumstantial evidence] conveyed so as to meet the comprehension of the jury." Even assuming, as the majority in the case sub judice holds, that "The only possible hypothesis consistent with her innocence, arising from the evidence, was that she did not have any knowledge of the whisky being on her premises," the trial judge did not, in my judgment, instruct the jury "fully and liberally" as to the "amount and character of [this] testimony."

I do not dispute the doctrine of the Barrow Case, although it is confessedly obiter dictum. I am content to leave it with its author's stricture upon it in the Hamilton Case. Suffice it to say that if it is an exception to the general rule, for that reason it should be very cautiously applied. It should be confined and restricted to those cases only which clearly fall within its compass, and where a failure to apply the general rule was harmless.

Had the law of circumstantial evidence been given in charge to the jury, the defendant might have been acquitted. The jury might have concluded, from the manner in which the liquor was located upon her premises, that she had no knowledge of its existence. The jury might have concluded that the circumstances were not sufficient to exclude every other reasonable hypothesis save that of the guilt of the accused.

The conviction depended entirely upon circumstantial evidence, and the verdict should be set aside and a new trial granted because of the failure of the trial judge to charge the

law relative to the degree of proof necessary to convict when a conviction depends entirely upon such evidence. *Lewis v. State*, 6 Ga. App. 205, 64 S. E. 701.

(28 Ga. App. 347)

ATLANTA & W. P. R. CO. v. MILLER.
(No. 9871.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)

(Syllabus by the Court.)

1. TRIAL \S 296(3) — INSTRUCTIONS — CONSTRUCTION.

The trial judge having repeatedly charged, and the plaintiff's counsel having admitted in open court at the trial, that the plaintiff could not recover if at the time her husband was killed by the car of their railroad company he was not at the public crossing as alleged, the jury could not have understood the judge to mean the contrary by any of the instructions complained of.

2. APPEAL AND ERROR \S 232(3)—FAILURE TO INSTRUCT—EXCEPTION.

Failure to give a certain instruction to the jury in connection with an instruction given, which was correct in itself, cannot be taken advantage of by excepting to the instruction given.

3. APPEAL AND ERROR \S 1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of testimony, the admissibility of which was doubtful, but which could not have been materially harmful, will not require a new trial.

4. TRIAL \S 260(1)—REFUSAL OF REQUESTED INSTRUCTIONS—INSTRUCTIONS GIVEN.

Failure to give requested instructions to the jury in the precise language requested is not cause for a new trial, where specific instructions to the same effect are given.

5. NEW TRIAL \S 150(4)—NEWLY DISCOVERED EVIDENCE—AFFIDAVITS—NECESSITY.

It not appearing by affidavit of the movant for a new trial and of each of the counsel for the movant that they did not before the trial know of the existence of the alleged newly discovered evidence, and that it could not have been discovered by the exercise of ordinary diligence on their part, the judgment refusing a new trial will not be reversed because of that evidence.

6. TRIAL \S 194(15)—INSTRUCTIONS — PROVISION OF JURY—NEGLIGENCE.

Refusal to give certain requested instructions as to what would constitute negligence was not error, that being peculiarly a question for the jury.

7. APPEAL AND ERROR \S 1068(4)—HARMLESS ERROR—INSTRUCTIONS—DAMAGES.

The instruction complained of as to the method of computation in reducing the gross earning capacity of a decedent to its present worth was harmless.

Error from Superior Court, Troup County; J. R. Terrell, Judge.

Action by Ada Miller against the Atlanta & West Point Railroad Company. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

The plaintiff sought to recover the value of the life of her husband, who it was alleged was killed by the negligent operation of the defendant company's cars at and upon a public crossing in the city of La Grange. It was admitted by her counsel upon the trial that if the deceased was not upon the public crossing at the time he was killed, she could not recover. The defendant denied liability, and contended that it was not negligent; that the deceased was not in the street when killed, but was some distance therefrom, in the yards of the defendant, on the track and leaning against the end of the car which ran over him, engaged in a conversation; and that his death was the result of his own negligent conduct. The jury returned a verdict in favor of the plaintiff for \$2,000. The defendant made a motion for a new trial, which was overruled, and to this ruling exceptions are taken.

Brewster, Howell & Heyman, of Atlanta, and A. H. Thompson, of La Grange, for plaintiff in error.

Hill & Wright, Harvey Hill, and Arminius Wright, all of Atlanta, and Hatton Lovejoy, of La Grange, for defendant in error.

JENKINS, J. (after stating the facts as above). [1] 1. The motion for a new trial assigns error upon the following excerpt from the charge of the court:

"There was no legal duty upon the part of the defendant to place a watchman either on the street crossing or on the box car which struck the deceased, if you believe that the deceased was not in the street and using it as a passageway, so far as relates to him, unless you find that failure to have been negligence upon the part of the defendant company."

While the language of the charge may be just here somewhat confused, we do not think that the excerpt, when considered in connection with the entire charge, constitutes harmful error and could properly require the grant of a new trial. That the jury could have been misled by the language of this isolated excerpt to the extent of believing that the defendant could be negligent in not having a watchman at the street or on the car, regardless of where the deceased was, or what he was doing at the time of the homicide, does not seem reasonably possible, in view of the plain and repeated instructions to the jury wherein the court stated to the contrary. At one point the judge charged as follows:

"If you should believe that the deceased was killed at some other place than a public crossing, if you believe from the evidence that the deceased was killed at a point not a public crossing, then you need not investigate further, but return a verdict for the defendant."

And again:

"So, gentlemen, you may consider the instructions I have given you, if you find from the evidence deceased was killed at a public crossing. But if you find from the evidence that he was not killed at a public crossing, that would end your investigation, and you would return a verdict in favor of the railroad company."

2. Error is assigned on the following excerpt from the charge of the court:

"It is contended by the plaintiff that the defendant was further negligent in that its servants kept no proper lookout ahead, and that no brakeman or lookout was stationed on its cars, or on the car which struck the deceased. I charge you that in looking to all the evidence, the circumstances, the scene of the homicide, and all of the surroundings, it is a question for you to determine as to whether or not ordinary care and prudence required that the defendant railroad company should have kept some one constantly on the lookout in front of its moving train to warn passers-by of danger, and whether or not a failure so to do was negligence upon the part of the defendant company. You may or may not determine that ordinary care and prudence on the part of the railroad company required this, or that the failure so to do constituted negligence on its part. But, if you should determine that ordinary care and diligence so required, and that the failure so to provide some one on the constant watch and lookout was negligence, and that such negligence contributed to or was the cause resulting in the homicide of the deceased, and that at the time, by the exercise of ordinary care and prudence upon his part, he could not have prevented the homicide, then that would make such a case as would authorize a recovery upon the part of this plaintiff."

The error assigned is not that these instructions are not abstractly correct, but that they were not applicable to the case being tried, without being properly limited, in that the jury would be authorized thereunder to find for the plaintiff, even though the deceased was at some place other than a public crossing at the time he was killed, or, if upon the crossing, was not using it as such. With this contention, however, we cannot agree. It was contended by the plaintiff that her husband was killed while attempting to cross the defendant's tracks at a public crossing, and that the defendant was negligent in not having some one on the lookout to warn him of the approaching cars. It was admitted in open court, and the judge repeatedly charged, that unless he was killed on the public crossing, she could not recover. The charge as quoted instructs the jury that it is for

them to determine whether or not a failure on the part of the defendant to keep some one constantly on the lookout in front of its moving train, to warn passers-by of danger, was negligence upon the part of the defendant. In giving this charge the court instructed the jury that they were to look to all the evidence, the circumstances, the scene of the homicide, and all the surroundings, and, as stated, repeatedly instructed them that the plaintiff could in no event recover if her husband was not killed upon the public crossing, and at one point specifically instructed them that the defendant owed no legal duty to the decedent to place a watchman either on the street crossing or on the car which struck the deceased, if they should believe that the deceased was not in the street and using it as a passageway. The charge as given was applicable to the plaintiff's contention, and we do not think that the jury could possibly have given it the construction placed thereon by counsel for the defendant.

[2] 3. A charge embracing an abstractly correct principle of law applicable to the case is not rendered erroneous merely because of the failure of the court to charge some other and further legal and pertinent principle of law in connection therewith. *Macon, etc., Railway Co. v. Barnes*, 121 Ga. 443, 49 S. E. 282 (3); *Smith v. Brinson*, 145 Ga. 406, 89 S. E. 363 (2); *Killian v. State*, 19 Ga. App. 750, 92 S. E. 227. The third ground of the amendment to the motion for a new trial comes within this general rule, and is therefore without merit.

[3] 4. The admission of the evidence complained of in ground 4 was of doubtful propriety, but could not have been materially harmful to the defendant, and therefore cannot afford a proper reason for setting aside the verdict and judgment.

[4] 5. Error is assigned upon the refusal of the court to charge as follows:

"A railroad track is a place of danger, and every one who goes on a railroad track is chargeable with knowledge of that fact, that it is a place of danger, and is under legal duty to exercise ordinary care to protect himself from injury by the operation by the railroad of cars and engines thereon. So under the law in this case, the husband of plaintiff was required to exercise ordinary care not to be injured when he went on the track of the defendant, whether he was on the public street or not. Even if under the evidence you should believe the place where the husband of the plaintiff was killed was on the public street, that would not excuse him from exercising ordinary care to avoid being injured."

The principle of law here involved was fully and repeatedly covered by the court in its charge to the jury. The court charged:

"Under the law in this case, the husband of the plaintiff was required to exercise ordinary care not to be injured, when he went on the

track of the defendant, whether he was on the public street or not. Even if, under the evidence, you should believe that the place where the husband of the plaintiff was killed was in the public street, that would not excuse him from exercising ordinary care. He would still be under the duty of exercising ordinary care not to be injured."

Furthermore, in five or six other portions of the charge the court instructed the jury that the deceased was required to exercise ordinary care not to be injured, and that if he was killed by reason of his failure to exercise such care, the plaintiff could not recover. While the language used in the first part of the requested charge—"A railroad track is a place of danger, and every one who goes on a railroad track is chargeable with knowledge of that fact, that it is a place of danger, and is under legal duty to exercise ordinary care to protect himself from injury by the operation by the railroad of cars and engines thereon"—embodies a sound principle of law (*Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 713, 39 S. E. 306, 54 L. R. A. 802), the failure to charge in the precise language requested is not cause for a new trial, where it appears that the principle involved was sufficiently covered by the general instructions given. *Cosby v. Reid*, 21 Ga. App. 604, 94 S. E. 824 (2), and cases cited. It may be that, in the opinion of the trial judge, the particular language above quoted, though embodying correct principles of law, forcibly stated, would nevertheless, if embodied in the charge, have appeared argumentative, and that for this reason he preferred to make a different statement of the same rules.

[5] 6. Ground 6 of the motion for a new trial being based upon newly discovered evidence, and it not appearing "by affidavit of the movant and each of his counsel that they did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence," the judgment refusing the motion for a new trial on this ground will not be disturbed. *Civ. Code* 1910, § 6086; *Pharr v. Davis*, 133 Ga. 759, 66 S. E. 917; *Southern Fertilizer, etc., Co. v. Carter*, 21 Ga. App. 282, 284, 94 S. E. 310 (2b).

7. Error is assigned on the following instruction:

"If the injury occurred at a place where the public was accustomed at all times to pass over and across the tracks of the defendant railroad company with knowledge and consent of the railroad company, and if this fact is shown to have been known by the agent or servant in charge of the engine or cars which killed the deceased, then the servant or agent in charge of the engine or cars which struck and killed the deceased owed him the duty to exercise ordinary and reasonable care, to anticipate and discover his presence on the track, and ordinary care and diligence to prevent an injury to

his person after discovery. * * * Then the company owed to the deceased, if he was at that point, not only to exercise ordinary care not to injure him after his presence on the track became known, but also to anticipate his presence and to take such measures as ordinary care would require to prevent injury to him in the event he was present. * * * Was this at a place constantly used by the public as a point of crossing the track, with the knowledge and consent of the defendant company, and was this fact known to the agent of the defendant company in charge of the engine or cars which killed the deceased? Was this a public crossing? These are questions for you to answer, and unless these questions can be answered in the affirmative, then the defendant company would owe the deceased no duty until his presence and peril became known to the servant and agent in charge of approaching locomotive or cars."

As has already been stated, counsel for the plaintiff admitted upon the trial that if the deceased was not killed while upon the public crossing alleged in the petition, there would be no liability upon the part of the defendant, and the plaintiff could not recover. Upon the trial no question was raised as to whether the street upon which the plaintiff claimed her husband was killed was in point of fact a public crossing, and the issue as to whether it was a public street is not involved. This being true, any inaccuracy in defining a public street, if there was such inaccuracy, could not have been harmful to the defendant. The contention of counsel for the defendant, that the charge as given permitted the jury to find in favor of the plaintiff if her husband, at the time he was killed, was not on the public crossing as alleged, is not well founded, for the court further charg-

ed the jury, in this same connection, as follows:

"So, gentlemen, you may consider the instructions I have given you, if you find from the evidence deceased was killed at a public crossing. But if you find from the evidence that he was not killed at a public crossing, that would end your investigation, and you would return a verdict in favor of the railroad company."

Moreover, if a more full and complete definition of a "public street" was desired, a timely and appropriate written request should have been presented.

[6] 8. Negligence being peculiarly a question for the jury, there is no merit in the exception taken in ground 8 of the motion for a new trial, relative to the request to charge. Civ. Code 1910, § 4863; Southern Railway Co. v. Grizzle, 131 Ga. 287, 288, 62 S. E. 177 (3).

[7] 9. The excerpt from the charge complained of in ground 9 of the motion, relative to the method of computation in reducing the gross earning capacity of a decedent to its present worth, is conceded by counsel for both plaintiff and defendant to have furnished no rule or guide by which the amount of the particular verdict or a verdict in any amount could have been arrived at, and it must therefore necessarily be taken as meaningless and harmless. In other portions of the charge the rule relative to this subject-matter was correctly stated. Florida Central, etc., R. Co. v. Burney, 98 Ga. 1, 26 S. E. 730.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 323)

LINDSEY v. INDEPENDENT ORDER OF PURITANS.**INDEPENDENT ORDER OF PURITANS v. LINDSEY.**

(Nos. 9690, 9731.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)*(Syllabus by the Court.)***1. INSURANCE — 679 — ASSUMPTION OF RISK — VALIDITY OF POLICY.**

A life policy for \$2,000 had lapsed before the death of the insured and before the defendant company, by written agreement, assumed the liabilities set forth in the insurance contract. The policy itself being void at the time the assumption of liability was undertaken by the defendant company, no liability attached against the original insurer, and hence none was assumed by the defendant company.

2. INSURANCE — 452 — LIFE INSURANCE — LIABILITY.

The other contract of insurance provided for the payment of 50 monthly installments of \$20 each to the beneficiary upon proof of the death of the insured, but provided that if his death resulted solely from an "accident of travel," only 100 monthly installments of \$20 each be paid to the beneficiary. It further provided that the beneficiary, "if the widow of the insured," should be entitled "after having received 100 monthly payments provided for above," to a continued benefit of \$20 per month during the full term of her widowhood, to cease upon her remarriage or death. There being no proof that the death of the insured resulted from an accident of travel, the beneficiary was not entitled to the 100 consecutive monthly installments of \$20 each provided for by the contract, and was not entitled to the continued benefit of \$20 per month during her widowhood, which was only due and payable after the 100 monthly payment provided for in the event of accidental death should have been received by her. Both the payment of the 100 monthly installments of \$20 each and the continued benefit of \$20 per month during her widowhood depended, by the terms of the contract, upon the accidental death of the insured, resulting solely from an accident of travel.

3. DENIAL OF MOTION FOR NEW TRIAL.

The verdict in favor of the defendant on the two counts based on alleged liability under the two separate policies of insurance was demanded by the evidence, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by E. M. Lindsey against the Independent Order of Puritans. Judgment for defendant, motion for new trial overruled, plaintiff excepts and brings error, and defendant takes a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

Shipp & Kline, of Moultrie, for plaintiff in error.

Douglas & Douglas, of Atlanta, and Parker & Gibson, of Moultrie, for defendant in error.

WADE, C. J. On June 27, 1910, the National Life Annuity Association, a mutual benefit order, issued two certificates of insurance on the life of Ralph Clifton Lindsey, in which his wife was named as the beneficiary. One certificate (No. 2602) provided for the payment to Mrs. Lindsey, upon satisfactory proof of the death of the insured, of the sum of \$2,000, in 100 consecutive monthly installments of \$20 each; and provided, further, that in the event of the accidental death of the insured before attaining the age of 60 years, the amount payable should be \$3,000, in 100 consecutive monthly installments of \$30 each; but should the accidental death of the insured be caused solely by and result from accident of travel, the amount payable should be \$4,000, in 100 consecutive monthly installments of \$40 each. This policy or certificate further provided that the widow of the insured should be entitled, "after having received 100 monthly payments provided for above," to a continued benefit of \$20 per month during the full term of her widowhood, but that this continued benefit should cease upon her remarriage or death. The other certificate (No. 2603) provided for the payment to the wife of the insured, upon satisfactory proof of his death, of "the sum of \$1,000, in 50 consecutive monthly installments of \$20 each"; and also provided that in the event of the accidental death of the insured before attaining the age of 60 years, the amount payable should be \$1,500, in 75 consecutive monthly installments of \$20 each; but should the accidental death of the insured be caused solely by or result from accident of travel, the amount payable should be \$2,000, in 100 consecutive monthly installments of \$20 each. This policy or certificate further provided that—

"The named beneficiary under this certificate, if the widow of the insured, shall be entitled, after having received 100 monthly payments provided for above, to a continued benefit of \$20 per month during the full term of such widowhood; but this continued benefit shall cease upon the remarriage or death of the beneficiary."

[1] It appears, under the allegations in the first count of the plaintiff's petition, that the insured died on the 7th day of December, 1911, and proof of death was made under policy No. 2602 for \$2,000, and the National Life Annuity Association began in February following to pay the \$20 per month as stipulated therein, and continued to pay the same until that policy or certificate was assumed by the Independent Order of Puritans, of Pittsburg, Pa., on April 6, 1912, which as-

sumption was in writing and attached to the policy or certificate; and that the Independent Order of Puritans continued the payment of \$20 per month as stipulated in the policy or certificate until 50 payments had been made and thereupon ceased to make further payments. Plaintiff alleged that the defendant was due her the sum of \$20 per month for each month beginning with February, 1916. The second count of the plaintiff's petition alleged the same facts as to the death of the insured and the assumption of the obligation of the National Life Annuity Association by the Independent Order of Puritans, arising under policy No. 2603 for \$1,000; the obligation sought to be enforced under that policy being, however, the payment of \$20 per month, to continue during the full term of the widowhood of the beneficiary, Mrs. Lindsey, and until her remarriage or death, based upon the averment that the plaintiff was still the widow of Ralph Clifton Lindsey. The only assumption of risk by the defendant company was evidenced by a writing executed with due formality, in which the defendant agreed to assume the insurance contract liabilities "as set forth in the contract to which this rider is attached, being No. 2602, issued by the National Life Annuity Association of Atlanta, Ga.," and this writing, denominated a "rider," was dated April 6, 1912, and was sent to the beneficiary by the defendant, to be attached to said certificate No. 2602.

The undisputed evidence showed that policy No. 2602 for \$2,000 had elapsed and was absolutely void and of no effect a considerable time before its transfer and before the death of the insured, and that only the policy for \$1,000 was in effect at the time of his death; and therefore it is apparent that no liability under the policy for \$2,000 rested on the defendant company, unless its assumption of liability under and by virtue of the contract signed by it and which was by its terms to be attached to policy No. 2602 could or did of itself create such a liability or obligation. It is hardly necessary to say that if the policy for \$2,000 was null and void at the time this assumption of liability was executed by the defendant, no obligation was thereby created against the Independent Order of Puritans. The original contract having been void absolutely by the failure on the part of the insured to pay the premiums or assessments provided for therein, there was no existing obligation on the part of the National Life Annuity Association of Atlanta, under this contract, in favor of the insured or his beneficiary at the time the assumption of liability was executed by the Independent Order of Puritans, and that assumption of liability merely declares that the defendant "agrees to assume the insurance contract liabilities *as set forth* [italics ours] in the contract to which this rider is attached, being No. 2602, issued by the National Life Annuity

Association of Atlanta, Ga." Consequently, if the National Life Annuity Association had no liability under certificate No. 2602, the Independent Order of Puritans assumed none. Certificate No. 2602, as a consideration for the contract, provides for "the payment of \$3.22 monthly premium, and the further payment of all premiums regularly and promptly as they become due on the first day of each calendar month hereafter." As this condition was breached by the insured, the policy had lapsed and become void, under the undisputed evidence, before the assumption of liability therein by the present defendant, and therefore no recovery could possibly be had thereunder.

There was evidence that this rider was issued by mistake and was intended for policy No. 2603 for \$1,000; and to bear out this evidence, there was testimony from the plaintiff herself that the \$20 coupons surrendered by her on payment of the several monthly installments which she received, 50 in number, aggregating \$1,000, were coupons from policy No. 2603 for \$1,000—the policy which was in life at the time of the death of the insured. Likewise, the undisputed testimony showed that the proof of death was made under policy No. 2603, and no proof of death was made under policy No. 2602. Therefore no recovery whatsoever was authorized by the evidence under the first count of the plaintiff's petition, which sought to recover under policy No. 2602, which had lapsed long before the death of the insured and had not been revived by the assumption of liability referred to above and entered into by the defendant company on April 6, 1912.

[2] The only question, therefore, is whether or not, under the terms of certificate No. 2603, which was of force and under which plaintiff had already received at the time the suit was brought the sum of \$1,000, which it is therein provided shall be paid upon proof of the death of the insured, the beneficiary is entitled to a further payment of \$20 monthly during her life and widowhood. There was testimony to show that this policy should not have contained the provision as to a continued benefit of \$20 per month during the life and widowhood of the beneficiary, which testimony was objected to when offered, and, under the pleadings in the case, was perhaps of doubtful admissibility. This testimony was undisputed, and, if competent and admissible under the pleadings, might have negated the right of the plaintiff to the continued benefit sued for in the second count of her petition. In the view we take, it is not necessary however, either to consider the various assignments of error as to the admission of this and other testimony tending to attack or explain the contract as written or authorize a reformation thereof, or to consider the exceptions to the charge of the court touching this feature of the case; for, even if it

be conceded that the evidence was inadmissible, and that the exceptions to the charge referred to were well taken, we think that no recovery could be had, under the contract as written, by placing any reasonable interpretation on the language therein employed.

The contract makes several different provisions as to the benefits arising thereunder: First, upon proof of the death of the insured, \$1,000 shall be paid to the beneficiary in 50 consecutive monthly installments of \$20 each. Second, in the event that the death of the insured be caused by accident before he attained the age of 60 years, the amount payable shall be \$1,500, in 75 consecutive monthly installments of \$20 each. Third, should the death of the insured be accidental and "be caused solely by and result from accident of travel, the amount payable shall be \$2,000, in 100 consecutive monthly installments of \$20 each." Fourth, "the named beneficiary under this certificate, if the widow of the insured, shall be entitled, after having received 100 monthly payments provided for above, to a continued benefit of \$20 per month during the full term of such widowhood; but this continued benefit shall cease upon the remarriage or death of the beneficiary." It will be observed that there is no provision whatsoever for the payment of 100 consecutive monthly installments of \$20 each, except in the case of the accidental death of the insured caused solely by and resulting from "accident of travel." It will be further observed that the provision for the payment of a "continued benefit" of \$20 per month during the life and widowhood of the beneficiary expressly stipulates that such beneficiary, "if the widow of the insured," shall be entitled to receive said continued benefit "after having received 100 monthly payments *provided for above* [italics ours]." The only 100 monthly payments "provided for above" which are referred to in the contract of insurance were to be paid in the event only that the deceased met his death solely on account of or as a result of an "accident of travel." Construing the contract altogether, and being not unmindful of the rule that contracts of insurance are to be construed most liberally in favor of the insured and against the insurer,

without any reference whatsoever to the testimony or the pleadings relative to a mistake in the original writing of the contract, and without taking into consideration whether or not the reformation of the contract contended for by the defendant could be effected in this action under the pleadings and the evidence adduced, the plain, unambiguous, and reasonable meaning of the contract as it was actually written, and which is relied upon as the basis of a right of action in the plaintiff, is that only in the event the insured came to his death by an accident of travel would his beneficiary be entitled to 100 monthly installments of \$20 each, and only in the event that his death occurred by reason of an accident of travel would she be entitled to receive, after the payment of the 100 monthly installments of \$20 each due her in that event, the continued benefit of \$20 per month during the remainder of her life and widowhood. No proof was offered to show that the death of the insured occurred as a result of an "accident of travel" wherefore no obligation arose to pay to his beneficiary under the certificate of insurance which was in effect at the time of his death \$20 per month for 100 consecutive months, due only in that event; and therefore no obligation exists under the provisions of the contract to pay a continued benefit of \$20 per month during the full term of her widowhood, "after having received 100 monthly payments provided for above"; the only 100 monthly payments "provided for above" never having become due and payable.

[3] Under the construction we give the contract, and our view of the case as presented by the record, but one verdict could have been returned by the jury, and that was a verdict for the defendant on both counts of the petition. It is therefore unnecessary to consider the various alleged errors referred to in the amendment to the motion for a new trial, and, as the verdict was demanded, the trial judge did not err in overruling the motion for a new trial.

Judgment affirmed on main bill of exceptions; cross-bill dismissed.

JENKINS and LUKE, JJ., concur.

(23 Ga. App. 364)

RANSOM v. STATE. (No. 9752.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW — 1064(4)—HOMICIDE — 200—DYING DECLARATIONS—HEARSAY—MOTION FOR NEW TRIAL—SUFFICIENCY OF GROUND.**

The first special ground of the motion for new trial complains that the court erred in admitting in evidence certain dying declarations, the objection urged being that "there was not sufficient foundation laid for the admission of a dying statement, because the state has failed to prove that the deceased was in a dying condition, and because the statement is hearsay." There is no merit in the objection, that "the statement is hearsay." That "dying declarations constitute one of the exceptions to the rule which rejects hearsay evidence" is clearly announced in *Mitchell v. State*, 71 Ga. 128(2). The ground of objection that "the state has failed to prove that the deceased was in a dying condition" is not complete. In order to ascertain what evidence was introduced in connection with these declarations, and thus determine whether they are admissible, it is necessary to refer to the brief of evidence. "Under repeated rulings of this court and of the Supreme Court, a ground of a motion for a new trial must be complete in itself. When it is so incomplete as to require this court to refer to the pleadings or to the brief of the evidence, it will not be considered." *Bridges v. Griffin*, 20 Ga. App. 599, 93 S. E. 170. See, also, *Southern Ry. Co. v. Williams*, 19 Ga. App. 544, 91 S. E. 1001 (4), and cases cited.

2. AMENDMENT TO MOTION FOR NEW TRIAL.

Under the qualifying notes of the trial judge, there is no merit in grounds 2 and 4 of the amendment to the motion for a new trial.

3. ADMISSION OF EVIDENCE.

No error harmful to the defendant was committed in admitting in evidence the testimony of Hattie King, complained of in the third special ground of the motion for new trial.

4. MOTION FOR NEW TRIAL.

When considered in connection with the entire charge of the court and in the light of all the evidence, there is no error harmful to the defendant in the excerpts from the charge embodied in the fifth, sixth, seventh, eleventh, twelfth, thirteenth, fourteenth, and fifteenth grounds of the amendment to the motion for a new trial.

5. CHARGE ON VOLUNTARY MANSLAUGHTER.

The evidence authorized the charge on voluntary manslaughter, and the court did not err in charging thereon as complained of in the eighth, ninth, and tenth grounds of the motion for a new trial.

6. SUFFICIENCY OF EVIDENCE.

There is evidence to support the verdict, and the judgment is affirmed.

Error from Superior Court, Dooly County;
D. A. R. Crum, Judge.

Mary Ransom was convicted of an offense, her motion for a new trial was denied, and she brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error.

J. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, P. J., concurs.

STEPHENS, J. (concurring specially). Generally hearsay evidence is inadmissible. A ground of a motion for new trial which sets out the evidence admitted and alleges that its admission was excepted to "because the statement is hearsay" is, in my opinion, a complete ground within itself. This is not altered by the fact that such evidence may have been offered as a dying declaration and as an exception to the hearsay rule.

None of the assignments of error being meritorious, I concur in the judgment of affirmance.

(23 Ga. App. 346)

CENTRAL OF GEORGIA RY. CO. v. SWIFT & CO.**SWIFT & CO. v. CENTRAL OF GEORGIA RY. CO.**

(Nos. 9866, 9867.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919. Rehearing Denied
Feb. 11, 1919.)*(Syllabus by the Court.)***1. CONTRIBUTION ⚡5—INDEMNITY ⚡13(2)—JOINT TORT-FEASORS.**

Where one of two or more joint tort-feasors has been sued for and compelled to satisfy damages arising from a jointly tortious transaction, he cannot, as a general rule, maintain an action either for contribution or indemnity over against those connected with him in the tort; but if the liability of the tort-feasor in the original suit arises merely from negative acts of omission on his part, such as a failure in his duty to inspect, and the proximate cause of the injury, so far as the joint tort-feasors are concerned, lay in active, positive acts of negligence on the part of the other tort-feasor, in which the original defendant did not in any way participate, then an exception to the general rule would exist. *Central Ry. Co. v. Macon Ry., etc., Co.*, 140 Ga. 309, 78 S. E. 931.

2. INDEMNITY ⚡13(2)—JOINT TORT-FEASORS.

A railroad company brought suit for indemnification against a company operating an oil mill to recover the amount of a judgment paid by the railroad company for the homicide of one of its own employes, whose death was occasioned by the operation of its train of cars along a private track maintained by it to the oil mill, and under a dangerously low shed maintained by the oil mill company over said track at the oil mill. The allegations of negligence set out against the railroad company in the tenth and also in the eleventh paragraphs of the original suit, such as were not disproved by it in the present proceeding, were to the effect that at the time of the homicide the railroad company

had full and actual knowledge that the shed was so dangerously low as to constitute a menace to its operatives; that, notwithstanding such knowledge, it failed in its duty to warn the decedent of his peril, and proceeded to operate its train under said shed on a dark and rainy night without having in any way provided lights "to indicate the presence of the shed," so that the decedent might have avoided the peril to which he was unknowingly exposed by the operation of said cars. The case was tried by agreement before the judge of the superior court without a jury, and judgment was rendered for the defendant. *Held:*

(a) Under the facts of the case, the general rule above stated, rather than the exception indicated, would have application. The act of the railroad company in thus voluntarily operating its train along said private track and under said shed, and in such undisproved negligent manner, did not amount to mere legal, passive acquiescence in the negligence of the oil mill company in maintaining the shed in a dangerous condition, but such active, positive, and negligent conduct on the part of the railroad company itself amounted to an actual participation by it in the proximate cause of the homicide.

(b) It is unnecessary to decide the question raised by the cross-bill of exceptions.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by the Central of Georgia Railway Company against Swift & Co. Judgment for defendant, and plaintiff excepts, and defendant takes a bill of exceptions. Affirmed on main bill of exceptions, and cross-bill dismissed.

Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

Smith, Hammond & Smith, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed on main bill of exceptions; cross-bill dismissed.

WADE, O. J., and LUKE, J., concur.

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(83 W. Va. 316)

ELLISON v. NORFOLK & W. RY. CO.
(No. 3627.)(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919.)*(Syllabus by the Court.)*1. RAILROADS \Leftrightarrow 415(2) — KILLING STOCK —
CARE REQUIRED.

A railroad company is not bound, in the exercise of the ordinary care and prudence required of it for the safety of trespassing animals, to maintain such a constant and rigid observation of the track as will enable it to discover, at the inception of their trespass, animals coming on it near a curve, in advance of a train, and quickly proceeding around the curve and beyond the range of view.

2. RAILROADS \Leftrightarrow 415(3) — KILLING STOCK —
NEGLIGENCE.

Nor can it be deemed or held to be guilty of negligence for failure to discover animals on its track, at the end of a curve around which a train is passing, at a point so near to the curve as to allow the enginemen only two or three seconds in which to discover them, determine what course to pursue, and apply the brakes.

3. TRIAL \Leftrightarrow 252(1)—INSTRUCTION—EVIDENCE.

The trial court may properly give an instruction lacking a qualification by an hypothesis unsupported by evidence and refuse to give an instruction embodying such hypothesis.

Error to Circuit Court, McDowell County.

Action by C. W. Ellison against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and new trial awarded.

Theodore W. Reath, of Philadelphia, Pa., and Graham Sale and J. Randolph Tucker, both of Welch, for plaintiff in error.

Cook & Howard, of Welch, for defendant in error.

POFFENBARGER, J. The principal ground of assault upon the verdict underlying this judgment for \$300, obtained in an action against the defendant for the alleged negligent killing of the plaintiff's two mules, is insufficiency of the evidence to sustain it.

While the defendant's east-bound train running at the rate of 30 or 35 miles an hour, upgrade, on a moonlight night, and carrying not less than seven or eight coaches, was running on a straight stretch of track about half a mile long, towards a sharp curve, the plaintiff's two mules went on the track ahead of the train, at a point about 246 feet from the beginning of the curve, trotted along on the track for a distance of about 375 feet, and then ran to the point at which they were struck by the engine, 759 feet distant from the place at which they had come on the track and practically, if not quite, be-

yond the curve. As nobody saw them until just before they were struck, the time at which they came on the track with reference to the approach of the train, and what they did before they were struck, are matters of inference arising from their tracks made in the cinders on the railroad track. Witnesses testified that their inspections of the mule tracks enabled them to say they had trotted a portion of the distance and run the balance of it. A mathematical calculation based upon the assumed rate at which the mules traveled and the rate of speed at which the train was running indicates that they were on the track only about 43 seconds. If the evidence justified the jury in finding that they were there, only for that period of time, not more than 17 seconds elapsed from the time they went on the track until they disappeared around the curve. That they went beyond sight around the curve in a few seconds, is clear. The engineer swears he saw them at a distance of only 30 or 40 feet, before the engine struck them, and that, for his own safety and that of the passengers, he applied the emergency brake and stopped the train with a considerable jar, but was unable to do so in time to avoid the injury. He further testifies that he could not have stopped the train within less than 150 feet. Evidence was adduced to prove opportunity on the part of the engineer to discover the mules at a distance of 150 or 200 feet, after they had passed around the curve; but it is not very clear. The plaintiff testified that the point at which they were struck was beyond the curve about six rail lengths and on practically straight track. He does not say it was straight. Another witness says this point was on straight track at a distance of four or five rail lengths from the curve. A photograph introduced by the defendant indicates that they were struck right at the end of the curve. One of the mules was knocked off of the track, and the other went under the engine and was dragged about six rail lengths. The engineer swears he was looking ahead, but not that he could not have seen the mules earlier, nor that he maintained a lookout upon the track. His statement that he was looking ahead may have been evasive.

[1, 2] The inference that the rays from the headlight and noise of the train more than 1,000 feet away excited the mules into a trot, upon their arrival upon the track, and the increase of the light and noise frightened them into a run, is, no doubt, permissible; but, whether the short period of their visibility at this point brought them within the duty of the defendant, through its servants in charge of the train, to observe them is one of the crucial questions in the case. As to passengers, the duty imposed by law upon a carrier is strict and rigid. But, as to persons and property wrongfully upon the

track of a railroad company, the measure of the company's duty is ordinary care. *Carper v. Traction Co.*, 78 W. Va. 282, 88 S. E. 843; *Robbins v. Railroad Co.*, 62 W. Va. 535, 59 S. E. 512; *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842; *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. 123. To require a railroad company, through its servants, to maintain a rigid and constant outlook upon its track, to discover trespassing livestock, in order to avoid injury thereto, would amount to an exaction of more than reasonable and ordinary care. An engineer ought reasonably to be expected to discover stationary objects on a track, several hundred feet distant, or moving objects remaining visible; but to require him to observe an object that comes upon the track, more than a thousand feet in advance of the train and almost instantly disappears around a curve, would be clearly and manifestly inconsistent with the measure of his principal's duty. Some of his time must be devoted to necessary attention to his engine. Moreover, it is not to be assumed, nor is it permissible to infer, that his vision always takes in at the same instant the entire length of the visible track ahead of him. Though the engineer does not say he did not discover the mules before they went around the curve, in so many words, his language plainly implies he did not, for he says he first saw them at a distance of not more than 30 or 40 feet. While his testimony in denial of negligence on his part, before they reached the curve, might have been more direct and positive, there was no duty on the part of the defendant to repel, by such evidence, a charge of negligence not *prima facie* established by the plaintiff's testimony. As the mules came within the possible range of view and almost immediately passed beyond it, the defendant cannot be held liable for failure to discover them within the few seconds of their visibility at that point.

The assumption that the mules were struck after they had passed around the curve and proceeded 150 or 200 feet on straight track does not warrant the inference that the engineer could have seen them at that distance; for both the engine and the mules were going in the same direction, when the latter first came within the range of view, and continued to do so until the instant of contact. The mules were running ahead of the train at an estimated rate of 15 miles per hour, or 22 feet per second, while the train maintained a rate of 44 feet, or more, per second. If the engineer's judgment as to the distance of the mules in advance of the train, when he says he first saw them, is correct, and he immediately applied the emergency brake, the rate of speed of the train may have been

so far reduced as to have left it only slightly in excess of that of the mules, when they were struck. Hence the engineer may have discovered them at the first opportunity. Facts and circumstances, however, tend to disprove this theory. The engineer says he could have stopped the train within 200 feet. With a mule under his engine and impeding its progress, it ran six rail lengths, 198 feet, after the collision. If the mules were struck at a point four or five rail lengths beyond the curve, 132 or 165 feet, the engine must have been more than 300 feet from the curve, when it stopped, and the brake must have been put on at a point about 132 feet from the curve. If this is a sound inference and the engineer's estimate of the distance between the engine and the mules, when they were discovered, is correct, only about two seconds elapsed from the time at which the mules became visible until they were discovered. Within that brief period he must have made the discovery, decided what to do, and applied the brakes. On the best showing that can possibly be made for the plaintiff, therefore, the engineer had an unreasonably short period of time in which to take necessary precautions for the safety of the animals, including that of lookout, and the proof is that he did everything in his power to avoid injury after he discovered the danger.

[3] In this state of the evidence, the court erroneously refused the prayer of the defendant for a peremptory instruction directing the jury to find for it. In view of the award of a new trial, it becomes necessary to pass upon exceptions to the court's rulings respecting other instructions, one given for the plaintiff and one asked for by the defendant and refused. In both instances, the rulings were proper; there being no evidence to sustain the hypothesis embodied in the instruction sought by the defendant, which had for its purpose qualification of the instruction given for the plaintiff. The proposition invoked, as a proper qualification of the plaintiff's instruction, and as the subject-matter of the defendant's rejected instruction, was that the engineer was under no duty to stop his train in such manner, or under such circumstances, as would jeopardize the safety of himself or his passengers. The proof is that he put on the emergency brake and endeavored to stop the train in the shortest possible distance. If delay was excusable under the circumstances, the defendant did not take the benefit of it, at the time of the collision. Hence it was not involved in the trial.

These principles and conclusions result in reversal of the judgment, setting aside of the verdict, and award of a new trial.

(83 W. Va. 307)

MAUDRU v. HUMPHREYS et al.(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919.)*(Syllabus by the Court.)***1. VENDOR AND PURCHASER — 203—CONDITION OF PROPERTY — PARTY SUSTAINING LOSS.**

Where a vendor, having good title and capacity to perform, makes a valid enforceable contract for the sale of land, and thereafter, and before a deed is executed passing the legal title, a fire destroys a building thereon, without his fault or neglect, the loss is sustained by the purchaser. In such case there is no implied warranty that the condition of the property at the time of sale shall continue until after deed is made.

*(Additional Syllabus by Editorial Staff.)***2. JUDGMENT — 780(7)—JUDGMENT AGAINST ADMINISTRATOR — LIEN UPON LAND OF HEIRS.**

There being no privity of estate between an administrator and the heirs, a judgment against the administrator is not a lien on the lands in the hands of the heirs.

3. JUDGMENT — 688 — JUDGMENT AGAINST ADMINISTRATOR — DEBT OF HEIRS — EVIDENCE.

There being no privity of estate between an administrator and the heirs, a judgment against the administrator is not even prima facie evidence of debt against the heirs.

4. VENDOR AND PURCHASER — 188—EXECUTION OF CONTRACT FOR SALE—TITLE.

After the execution of a valid contract of sale and before the legal title passes by deed, the vendor is regarded in equity as the holder of legal title in trust for the purchaser, and the latter as holding the purchase money in trust for the vendor.

5. DESCENT AND DISTRIBUTION — 8—CONTRACT FOR SALE OF LAND — INTEREST OF PURCHASER.

After the execution of a valid contract of sale and before the legal title passes by deed, the purchaser has a vendible interest, an equitable estate which at his death descends to his heirs in the same manner as a legal estate.

Appeal from Circuit Court, Cabell County.

Suit in equity by Joseph Maudru against G. L. Humphreys, administrator, etc., James T. Mynes, and others. Decree for plaintiff, and the administrator and James T. Mynes appeal. Reversed, and bill dismissed.

C. E. Copen, of Winfield, for appellants.

R. L. Blackwood and C. W. Freeman, both of Huntington, for appellee.

WILLIAMS, J. This suit in equity was instituted by Joseph Maudru against the administrator and heirs at law of James T. Mynes, deceased, to recover damages for the loss of

a house by fire after a valid contract for the exchange of lands had been made between said Maudru and Mynes and before deeds were executed. From a decree in favor of plaintiff, defendants prosecute this appeal.

Joseph Maudru resided in Colorado, and James T. Mynes in Cuba. The former owned a one-third undivided interest in a tract of about 3,000 acres of land in Cuba, and the latter a number of houses and lots in the city of Huntington, W. Va. By a writing dated September 13, 1910, they contracted to exchange lands, Maudru agreeing to convey his Cuban property in exchange for certain ones of Mynes' houses and lots in Huntington, the properties to be conveyed by general warranty deeds and free from all liens and incumbrances.

Mynes' deed to Maudru for the Huntington property bears date December 28, 1910, was acknowledged February 23d, and recorded March 23, 1911. The deed from Maudru to Mynes for the Cuban property was executed by J. S. Jump, attorney in fact for Maudru, April 8, 1911. The fire occurred January 24, 1911, without default of either party.

J. S. Jump, attorney in fact, knew the house had been burned before he executed Maudru's deed to Mynes and says he told Mynes that Maudru would hold him responsible for the loss, but it does not appear what Mynes' reply was, if anything. C. L. Humphreys was looking after the Huntington property for Mynes until the exchange was completed, and produced a receipt for \$55, bearing date May 1, 1911, signed by C. W. Freeman, who had become Maudru's agent to collect the rents. This receipt states that it is "for house rent collected for Joseph Maudru since transfer of J. T. Mynes to him," and Humphreys swears it included rent for the house that burned. Just when Maudru learned the house was burned does not appear. But he wrote a letter, dated Brush, Colo., April 17, 1911, addressed to C. L. Humphreys, Huntington, W. Va., in which he says:

"I am informed that the big double house on one of the lots I recently bought from Mr. Mynes has burned down. Wish you would kindly forward me the insurance policy covering this property so that I can proceed for collection."

And on the 24th of the same month he again wrote Humphreys, acknowledging receipt of a letter of April 20th, in which he was told by Humphreys that no insurance was carried by Mynes on any of his houses, and further said:

"Also note that you have in your possession money collected for rent. Would ask that you turn this over to Mr. C. W. Freeman of your city whom I have engaged to look after the property and who will in the future collect rents."

This evidence shows that Maudru collected rents after he had knowledge of the destruction of the house, if that fact is material. Apparently he supposed the loss was covered by fire insurance and he could get the benefit of it. But Mynes carried no insurance, nor did his contract of sale obligate him to do so.

Mynes' title to all the Huntington lots seems to have been perfect, except lot No. 36, block 189, not the one on which the burnt house was located. A defect in the title to this particular lot existed on account of the failure of J. F. Brown to unite with his wife, Rebecca Brown, in a deed from her bearing date January 17, 1898, to Eliza A. Mynes, through whom James T. Mynes traced title. This defect, however, was cured by a deed made by said Rebecca Brown and her husband direct to Joseph Maudru on April 12, 1911.

In September, 1914, Maudru instituted an action at law against C. L. Humphreys, administrator of James T. Mynes, deceased, to recover damages for the destruction of the house on the theory that its occurrence prior to the execution of the deed rendered the vendor liable, and on October 15, 1915, recovered a judgment for \$1,500. No writ of error was taken to this judgment, and a fieri facias was issued and returned "No property."

The parties agreed that the evidence taken in the trial of that action might be read and considered as evidence by Commissioner T. J. Bryan, to whom this cause was referred to report upon certain matters, and such evidence was read and considered by him. He found and reported that the house destroyed by fire was worth \$1,500 as of October 15, 1915, the date of the judgment, to which sum he added interest to the date of his report, \$172.50, and costs of the lawsuit, \$198.10, thus making the sum of \$1,870.60. The court overruled defendants' exceptions to the commissioner's report, confirmed the same, and rendered the decree complained of.

The controlling question of law presented is, Which party to the contract should bear the loss, neither being at fault?

James T. Mynes was an unmarried man, and died intestate in December, 1912, leaving as his heirs at law his mother, four brothers and sisters, and one half-brother. C. L. Humphreys, a brother-in-law of deceased, qualified as his administrator. All the real estate in Huntington, which descended to the heirs, was sold by them prior to the bringing of the action against the administrator, one lot to J. C. Henson, and the remaining ones to C. L. Humphreys and wife, the latter being one of the heirs.

The present suit was instituted January 27, 1916, and the decree complained of pronounced October 27, 1917, decreeing \$1,870.60 in plaintiff's favor, apportioning the liability

among the several heirs and holding them personally liable for their respective proportions, and decreeing the whole thereof to be a lien on two tracts of land, aggregating 97½ acres in Putnam county, inherited by the heirs, and a lien on certain other lots in Huntington likewise inherited by them, in which said C. L. Humphreys and Anna L. Humphreys, his wife, had purchased the interests of the other heirs of said James T. Mynes, deceased, and directed a sale of said lands to be made, if the decree was not paid in 30 days, selling first the Putnam county land, and second the Huntington lots, if necessary to pay the debt.

[2, 3] There being no privity of estate between the administrator and the heirs, the judgment against the former is not a lien on the lands in the hands of the latter, not even prima facie evidence of debt against them. *Board v. Callihan*, 33 W. Va. 209, 10 S. E. 382, and *Broderick v. Broderick*, 28 W. Va. 378. Still there is proper evidence in the case to prove the value of the house, if the loss thereof should fall on the vendor.

Although the authorities are not uniform on the subject, the general rule supported by the weight of the decisions is that from the time of the execution of a valid contract for the sale of land, the purchaser is entitled to any enhancement in its value, and, conversely, must sustain any loss happening thereto, without the fault or neglect of the vendor, after the execution of the contract of sale and before deed is delivered. The application of this rule depends upon the vendor's having good title and an enforceable contract. Here there was a defect in Mynes' title to one of the lots sold or exchanged, but it was curable and was, in fact, cured by the deed of April 12, 1911, from Brown and wife to Maudru.

[4, 5] After the execution of a valid contract of sale and before the legal title passes by deed, the vendor is regarded in equity as holding the legal title in trust for the vendee, and the latter as holding the purchase money in trust for the vendor. The purchaser thereby acquires a vendible interest, an equitable estate which, at his death, descends to his heirs in the same manner as a legal estate. 1 Story on Eq. Juris. (14th Ed.) § 84; 39 Cyc. 1641; 2 Warvelle on Vendors (2d Ed.) § 842; *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582; *Sewell v. Underhill*, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795; *Thompson v. Norton*, 14 Ind. 187; *Marion v. Wolcott*, 68 N. J. Eq. 20, 59 Atl. 242; *Marks v. Tichenor*, 85 Ky. 536, 4 S. W. 225; *Walker v. Owen*, 79 Mo. 563; *Manning v. Insurance Co.*, 123 Mo. App. 456, 99 S. W. 1095; *Woodward v. McCollum et al.*, 16 N. D. 42, 111 N. W. 623. Numerous other decisions could be cited, but the foregoing are sufficient. This is the rule in England also. See *Paine v. Meller*, 6 Ves. Jr. 350, and 1 Dart on Ven-

dors and Purchasers (7th Ed.) 287. The foregoing authorities do not make the rule depend upon the transfer of the possession, but rest it upon the rights of the parties under the contract of sale and the ability of the vendor to comply therewith by making good title to the vendee.

[1] There is no warranty or condition in the contract between Mynes and Maudru that the property should be in the same condition when the transaction was completed as it was when the contract was made; Mynes did not guarantee that its then existing condition would continue until the legal title had passed, nor is such guaranty to be implied; neither did the loss occur on account of any negligence or wrongful act of his. It was purely an accident, and in such case equity places the loss upon the vendee, the equitable owner of the property.

The courts of some of the states, however, hold that the loss should fall on the vendor. See *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271, *Wells v. Calnan* 107 Mass. 514, 9 Am. Rep. 65, *Wilson v. Clark*, 60 N.H. 352, *Phinlzy v. Guernsey*, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207, *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383, and *Powell v. D. S. & G. R. R. Co.*, 12 Or. 488, 8 Pac. 544. Some of these cases, however, are distinguishable on other grounds and therefore are really exceptions to the rule rather than authority for a different one. Some of them turn on the point that the vendor, at the time of executing the contract, was not in position to make good title free from incumbrances, according to the terms of his contract.

Having reached the conclusion that Maudru must sustain the loss in this case, it becomes unnecessary to consider other questions raised, for instance, whether or not Humphreys and wife were bona fide purchasers from the other heirs.

The decree must be reversed and plaintiff's bill dismissed.

(148 Ga. 700)

MANDLE v. MANDLE et al. (No. 908.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

Pleading \S 356(1) — AMENDMENT TO PETITION — COMPLIANCE WITH ORDER — DISMISSAL.

On the hearing of the demurrers to the petition in this case the following order was passed: "The demurrers, general and special, are sustained, and the petition dismissed, unless within 20 days the plaintiff show substantially the sums going into said transactions, and the dates and payments on same." Within the 20 days an amendment to the petition was offered, and the following order was granted: "The

above and foregoing amendment is hereby allowed and order filed by the court, subject to demurrer." Subsequently the demurrant moved that an order be granted dismissing the case as to the demurrant, in accordance with the first order granted in the case. This motion was overruled. *Held*, that the amendment substantially complied with the first order, and it was not error to refuse to dismiss the case on the motion made.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between Helen Mandle and D. Mandle and others. From an order denying a motion to dismiss the case, the former brings error. Affirmed.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, for plaintiff in error.

McCallum & Sims, of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(148 Ga. 710)

MORGAN v. IRWIN et al. (No. 1020.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 327(5)—BILL OF EXCEPTIONS—PARTIES.

A mortgagee instituted in the superior court a proceeding against the administrator of the mortgagor, to foreclose the mortgage; and he prayed for the reformation of the instrument in certain particulars, so as to make the description of the part of the property mortgaged more complete, as well as more definite and specific. He prayed, further, that the heirs at law of the mortgagee, whose names were set forth in the petition, be made parties defendant. These heirs were duly served. Three of them filed a demurrer and answer. Several of them, though served, did not appear and plead. The general demurrer, filed by the heirs who appeared, was sustained. After this an amendment was tendered by the plaintiff, asking that the names of all the heirs be stricken as parties. The court refused to allow the amendment. The plaintiff sued out a writ of error, assigning error upon the rulings just stated. The bill of exceptions was duly served upon the administrator and upon the three heirs who appeared and pleaded; but the other heirs, who were defendants, were not named as parties to the bill of exceptions, nor were they served. *Held*, that the heirs who were not served with the bill of exceptions were interested in sustaining the judgment rendered, and were necessary parties to the bill of exceptions. Consequently the motion to dismiss the writ of error is sustained. *Wiley v. Jones*, 129 Ga. 635, 59 S. E. 709; *Humphrey v. Powell*, 145 Ga. 458, 89 S. E. 427.

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Suit by Elizabeth Morgan against Viola Irwin and others. General demurrer filed by some of the defendants sustained, amendment as to parties refused, and plaintiff brings error. Writ of error dismissed.

J. B. Hoyl, of Leesburg, for plaintiff in error.

Shipp & Sheppard, of Americus, for defendants in error.

BECK, P. J. Writ of error dismissed. All the Justices concur.

(148 Ga. 698)

VALDOSTA MOTOR CO. v. STUDSTILL, Deputy Sheriff. (No. 1062.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

FOLLOWED CASE.

This was a proceeding to condemn an automobile under section 20 of the act approved March 28, 1917 (Acts Ex. Sess. 1917, pp. 7, 18). The constitutional questions made in the record were ruled adversely to plaintiff in error, in *Mack v. Westbrook*, 93 S. E. 339. Upon its facts the case is controlled by the decision in *Shrouder v. Sweat*, 148 Ga. 378, 96 S. E. 881.

Error from Nashville City Court; C. A. Christian, Judge.

Proceeding between the Valdosta Motor Company and J. M. Studstill, as Deputy Sheriff, relating to condemnation of automobile as having been engaged in the conveyance of intoxicating liquor. Judgment for the latter, and the former brings error. Reversed.

Geo. E. Simpson, of Valdosta, for plaintiff in error.

H. L. Jackson, of Adel, for defendant in error.

GEORGE, J. Judgment reversed. All the Justices concur.

(148 Ga. 770)

JONES v. LUFFMAN. (No. 1031.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. TRUSTS ¶99—IMPLIED TRUST—BREACH OF AGREEMENT.

Where a purchaser of land took from the vendor a bond for title, and, after paying half of the purchase price and being unable to pay the balance thereof, agreed with a third person that the latter should pay the balance due on the purchase price, that he and the original purchaser should own the land as tenants in common, and that a deed should be taken conveying the property to them; but the third person, after paying the remaining half of the pur-

chase-money, had the property conveyed to a stranger, and by the latter conveyed to himself (the third person), an implied trust arose in favor of the original purchaser, who had surrendered his bond for title when he made the agreement first referred to, and he was entitled to a decree establishing his right as tenant in common and an owner of an undivided half interest in the property.

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Suit by W. W. Luffman, administrator, against Oscar Jones. Decree for plaintiff, new trial denied, and defendant brings error. Affirmed.

Starr & Paschall, of Calhoun, for plaintiff in error.

Wm. E. Mann, of Dalton, and A. L. Helson, of Calhoun, for defendant in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 773)

CAIN v. HEDDEN et al. (No. 1045.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS ¶31—FRAUD—ACTION FOR RESCISSION—SUFFICIENCY OF PETITION.

This was a suit based on fraud for rescission of a contract, whereby the plaintiff and one of the defendants had made an exchange of property. The allegations of the petition on the subject of fraud and tender were substantially the same as alleged in the petition as amended, filed by the same plaintiff against several of the same defendants, in the suit of *Cain v. Ragdale*, 146 Ga. 372, 91 S. E. 119. The petition in that case was held to be subject to general demurrer, and the ruling there made is applicable to the petition in the present case. It follows that the judge did not err in dismissing the petition on general demurrer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by Ollie Cain against Ed Hedden and others. Petition dismissed on general demurrer, and plaintiff brings error. Affirmed.

James & Bedgood, of Atlanta, for plaintiff in error.

Geo. F. Gober and R. R. Jackson, both of Atlanta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(148 Ga. 689)

FREEMAN v. McKAY. (No. 812.)

(Supreme Court of Georgia. Feb. 12, 1919.)

*(Syllabus by the Court.)***MINES AND MINERALS §58—OIL AND GAS LEASE—PETITION—GENERAL DEMURRER.**

The action is by the lessor against the lessee for the cancellation of two leases to the oil and gas which may be in or under certain described lands in Early county, this state. The ground stated in the petition for the relief prayed is alleged fraud practiced upon the lessor by the agent of the lessee in procuring the leases. The petition alleges, in brief, that the plaintiff had no knowledge of what should be embraced in leases for oil and mineral deposits under land, or the prices and conditions upon which they should be executed, and so informed the defendant's agent, and stated that he would have to rely upon the agent's representations as to such matters; that the agent represented to the plaintiff that the terms of the leases which plaintiff executed "were in accordance with what was usual in such cases, and were in every respect reasonable"; that these statements were knowingly false, "for that it was provided in each of said leases * * * that the said defendant is to have, under said leases, the rights in the described lands conveyed for the term of twenty years from the date of the leases, and as much longer as the premises are being drilled or operated for the production of oil, with the right in the grantor to declare a forfeiture unless 'one producing well shall have been completed on the premises described in such lease within two years of the date' of said lease, or unless the grantee should pay a rental of ten cents per acre per year, payable quarterly in advance, so that, under the terms of said leases, the grantee therein could perpetuate the same for twenty years upon the payment of the mere pittance of ten cents per acre per year"; that this stipulation is not usual and reasonable in such cases, as plaintiff has learned since the execution of the leases. The petition alleges and the leases show that the plaintiff should receive a given percentage of the oil produced. The leases were dated April 24, 1917, and the petition to cancel them was filed on October 1, 1917. The action was dismissed on demurrer, and the plaintiff excepted. *Held*: The terms, stipulations, and conditions of the leases are clear, certain, and unambiguous; there is no suggestion that the plaintiff is not a man of ordinary intelligence, able to read and fully understand all the terms of the leases, which appear to have no purely technical meaning as applied to oil leases; nor was he confronted with any sudden emergency which threw him off his guard; nor was there any trick, artifice, or deception on the part of the defendant's agent, whereby plaintiff was precluded from investigating the agent's representations, or whereby plaintiff was induced to execute the leases without fully acquainting himself by consideration, or advice of others, with their contents, purport, legal and practical meaning and effect. It does not appear that any stipulation between the parties was inadvertently or fraudulently omitted, or that any unintentional

provision was inserted through fraud, accident, or mistake. In view of these facts, and of many decisions of this court under like circumstances, it was not error to sustain the general demurrer to the petition.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by Joseph Freeman against R. J. McKay. General demurrer to petition sustained, and plaintiff brings error. Affirmed.

L. M. Rambo, of Blakely, for plaintiff in error.

Glessner & Collins, of Blakely, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur

(148 Ga. 768)

JOHNSTON v. CHAMBERS. (No. 1011.)

(Supreme Court of Georgia. Feb. 13, 1919.)

*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS §142 — POLICE COMMISSIONER — QUALIFICATION — MEMBERSHIP ON LOCAL DRAFT BOARD.**

Membership on a local board created under the provisions of the Selective Draft Act passed by Congress on May 18, 1917 (chapter 15, 40 Stat. 76, U. S. Rev. St. Temp. Supp. 1917, p. 61), did not disqualify the member from holding the position of police commissioner of the city of Atlanta, under the provisions of the charter of that municipality.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Quo warranto by S. R. Johnston against Aldine Chambers. From a judgment for defendant, plaintiff brings error. Affirmed.

Atkinson & Born, of Atlanta, for plaintiff in error.

Jos. L. Mayson and Jas. K. Hiner, both of Atlanta, for defendant in error.

BECK, P. J. Johnston brought quo warranto proceedings to have Chambers declared ineligible for the office of police commissioner of the city of Atlanta, and to oust him from that office. Upon hearing the petition and the evidence, the judge of the superior court refused the application.

It is provided in one section of the charter of the city of Atlanta that—

"It shall be unlawful for any person holding an office or position of trust, or emolument, or regular employment, under appointment by the President of the United States, or any department of the federal government, * * * to occupy or hold the position of mayor, alderman, or councilman of the city of Atlanta, or membership on any executive board of said city, or

any other office or position of trust, honor, or emolument, or regular employment in or under said city government, whether said office or position be by election or regular appointment during the time he holds said federal * * * office or position."

It is alleged that at the time of the election of Chambers to the office of police commissioner, and at the time of his induction into the office, he held "an office under the government of the United States, the same being an office and position of trust and emolument under the United States government, that is to say, a member of the local board of division No. 3 for the city of Atlanta in the state of Georgia, the same being the board of exemption from military service created under the laws of the United States, and the said defendant being commissioned thereto, as petitioner is informed and believes, by Hon. William M. Ingraham, Assistant Secretary of War of the United States, by authority of the President of the United States"; and that Chambers entered upon and is still discharging the duties of said office as a member of said exemption board. It is contended by Johnston that the fact that Chambers is a member of the exemption board disqualifies him from holding the office of police commissioner of the city of Atlanta, under that provision of the charter which is set forth above.

With this contention we cannot agree. Membership in one of the exemption boards provided for under the act of Congress approved May 18, 1917, known as the "Selective Draft Act" (chapter 15, 40 Stat. 76, U. S. Rev. St. Temp. Supp. 1917, p. 61), is not such an office as would disqualify one holding the membership from holding an office in the city of Atlanta under the provision of the charter referred to. Membership of the board is in its nature temporary and transitory, and purely for an emergency. In the Selective Draft Act, under one section of which the local board referred to was created, the situation or condition is referred to as "the existing emergency." Under another section of the act it is provided (referring to the local and district boards which are to carry out certain of the provisions of the act):

"Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the military establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction."

And under the terms of this act the President was vested with authority to call upon the "local authorities" and officials of the state to act as members of these boards. The duties which those thus called upon

were expected to fulfill were of a patriotic nature, from which a citizen could not escape without evading his patriotic duty to aid in a temporary emergency his country and his government, in selecting and organizing an army fit for the high and imperious duty confronting it. The duties which these boards were called upon to perform were of the most exalted character, but they were as transitory and ephemeral as they were exalted; and it was the duty of any citizen called to membership upon one of these boards, whether a private citizen or the holder of any office, to lay aside all other duties for the hour and respond to the call. The court below properly denied the application.

Judgment affirmed.

All the Justices concur.

(148 Ga. 756)

PEARLSTINE v. PEARLSTINE. (No. 893.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

DIVORCE §64 — "VOLUNTARY SEPARATION AND LIVING APART" — WIFE'S SEPARATE DOMICILE—STATUTE.

In the trial of an action for divorce brought by a wife, the court instructed the jury as follows: "If you find there has been a voluntary separation and living apart between these two people, then the domicile of this plaintiff is not necessarily that of her husband. It is contended that the plaintiff, at one time, was a resident of the state of New York, and that she has changed her domicile." The error assigned upon this instruction, in the motion for a new trial by the husband, was that it was not supported by the evidence, and not adjusted to the facts of the case: "(a) Because the evidence failed to show that there had ever been a voluntary separation and living apart between the plaintiff and the defendant; (b) because the uncontradicted evidence showed that the plaintiff had left the defendant in the state of New York; (c) because the evidence failed to disclose that the defendant ever voluntarily left the plaintiff; and (d) because the evidence disclosed that after the plaintiff had left the home in New York, in which she had been living after the occasion of the alleged cruel treatment, she then maintained an action begun in New York state for separation, and this action was still pending at the time she alleges she came to Georgia and there made up her intention to become a resident of this state." Our statute provides: "The domicile of a married woman shall be that of her husband, except in two cases: (1) Of voluntary separation and living apart. (2) Of a pending application for divorce. In which case her domicile shall be determined as if she were a feme sole." Civil Code 1910, § 2183. The words "voluntary separation and living apart," as employed in the statute, do not necessarily mean a mutual agreement for a separation; for, where the husband has been guilty of such

dereliction of duty in the marital relation as entitles the wife to have it either partially or totally dissolved, she may acquire a separate domicile of her own for the purpose of conferring jurisdiction on the proper tribunal in a proceeding for divorce or separation. 14 Cyc. 848, and a number of cases there cited, among them *Cheever v. Wilson*, 76 U. S. (9 Wall.) 108 (6), 19 L. Ed. 604. To the same effect is *Williamson v. Osenton*, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758. To the like effect, see 6 *Rose's Notes U. S. R. (Rev. Ed.)* 943, where there is a collation of numerous cases on the same line as those above cited.

None of the assignments of error upon the instruction excepted to is meritorious. The evidence on the controlling issues in the case was conflicting. The jury in their discretion believed the evidence submitted in behalf of the plaintiff, and it cannot be held that the court erred in refusing a new trial.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, Voluntary Separation.]

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action for divorce by Phoebe Pearlstone against A. S. Pearlstone. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Morris H. Bernstein, of Savannah, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur; ATKINSON, J., specially.

(148 Ga. 699)

MUTUAL BEN. LIFE INS. CO. v. DRISKAL (No. 885.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

JUDGMENT \S 572(2)—**RES JUDICATA**—**DECISION OF DEMURRER**—**MERITS OF CASE**.

In an action upon a life insurance policy, the petition was dismissed upon special demurrer, which ruling was affirmed by this court. 144 Ga. 534, 87 S. E. 668. Subsequently the plaintiff brought a second action on the same policy, and the defendant pleaded the judgment dismissing the former action as *res adjudicata*. The trial judge who passed on the case without a jury sustained the plea. Upon review by the Court of Appeals the judgment of the trial court was reversed. 21 Ga. App. 777, 95 S. E. 268. The case came before this court on certiorari. The original petition having been dismissed on special demurrer, and not on general demurrer going to the merits of the case, it was properly decided, on writ of error, that the trial judge erred in sustaining the plea of *res adjudicata*; and that decision is affirmed.

Certiorari from Court of Appeals.

Action by Ella Driskal against the Mutual Benefit Life Insurance Company. Plea of *res adjudicata* sustained, and, from a judgment of the Court of Appeals reversing the judgment of the trial court, the defendant brings certiorari. Affirmed.

Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, for plaintiff in error. Sibley & Sibley, of Milledgeville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(148 Ga. 708)

KIRKPATRICK v. HOLLAND. (No. 1008.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

EQUITY \S 39(1) — **INJUNCTION** \S 118(4) — **PROSECUTION OF SUIT**—**JURISDICTION**—**FULL RELIEF**.

"Equity seeks always to do complete justice, and having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject-matter of the suit, provided the court has jurisdiction for that purpose." *Markham v. Huff*, 72 Ga. 874. Applying this principle to the facts as alleged in the petition in the instant case, the plaintiff should have been allowed to maintain the action, and it should not have been dismissed upon general demurrer.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. W. Kirkpatrick against J. H. Holland. Demurrer to petition sustained, and petition dismissed, and plaintiff excepts and brings error. Reversed.

Kirkpatrick brought his petition against Holland, who filed a demurrer, which demurrer the court sustained, and dismissed the action. To this order the plaintiff excepted. The petitioner showed that the defendant had filed suit against petitioner in the municipal court of Atlanta to recover the sum of \$390, with interest, which defendant claimed to have paid petitioner under a contract of sale of certain land; that petitioner demurred to that suit, and answered, denying liability; that the demurrer to that suit was overruled; that on the trial judgment was rendered in favor of petitioner; and that a new trial was granted, and the case was in order for trial again in the municipal court. It is further alleged that the petitioner holds purchase-money notes against the defendant, in the principal sum of \$710, growing out of the same contract set up by the defendant

in his suit in the municipal court; that it is the right of petitioner to file a cross-action in the municipal court and recover upon said notes in the same action brought against him by the defendant, but that on account of the limited jurisdiction of the municipal court, which does not exceed \$500 in amount, petitioner cannot file his cross-action upon the notes; and that in order to obtain full relief it is necessary for him to invoke the aid of a court of equity, procure a restraining order against the prosecution of the suit in the municipal court, and have all the issues between the parties adjudicated in the equitable proceeding.

Green, Tilson & McKinney, of Atlanta, for plaintiff in error.

Burruss & Dillard, of Atlanta, for defendant in error.

BECK, P. J. (after stating the facts as above). We are of the opinion that the court erred in sustaining the general demurrer in this case. Holland, the plaintiff in the pending suit in the municipal court, had sued Kirkpatrick to recover certain payments made upon the purchase price of a lot of land. He claimed in that suit that the vendor, Kirkpatrick, could not comply with his undertaking in the bond for title, relating to the laying of certain sidewalks and the improvement of the street, and the laying of certain mains and sewers without cost to the purchaser; that he was therefore entitled to recover the money which had been paid on the purchase; and that the bond for title had been tendered back to Kirkpatrick, accompanied with the demand that Kirkpatrick return to Holland the unpaid notes for the purchase money. If the case in the municipal court should be tried and gained by Kirkpatrick, he would still have to bring another suit in a court having jurisdiction of the amount to enforce a demand against the defendant. The petitioner's claim, that the defendant is indebted to him \$710 upon the promissory notes, and the issue made by the suit against the present plaintiff in the municipal court, can all be adjudicated in this one case when the defendant, Holland, shall have filed his answer and raised the issues of fact which he seeks to have adjudicated in the suit in the municipal court. And this full and complete relief can be afforded to both of these parties in the one action. Why have two trials, when one in the superior court will end the entire controversy between these litigants, especially where the demands of each grow out of the same transaction? *Lewis v. State*, 33 Ga. 132; *National Bank of Athens v. Carlton*, 96 Ga. 469, 23 S. E. 388 (3).

Judgment reversed. All the Justices concur.

(148 Ga. 757)

**NATIONAL LIFE INS. CO. OF VERMONT
v. BECK & GREGG HARDWARE CO.
et al. (No. 932.)**

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. INSURANCE — 121, 203 — LIFE INSURANCE — ASSIGNABILITY.

On June 4, 1907, the National Life Insurance Company of Vermont issued a "renewable term policy" on the life of Martin H. Roop payable to "the executors, administrators, or assigns of the insured," for a stated amount in consideration of specified premiums. The contract of insurance contained the clause: "The insured may renew this policy for further periods of ten years each, without medical examination (provided there has been no lapse in the payment of premiums), by written notice to the company at its home office before the expiration of any period of the insurance hereunder, and by the payment in each year, on the dates above specified, of the premium for the age attained by the insured at the beginning of any such renewal period in accordance with the table of rates on the back hereof." On September 21, 1907, the insured made a written assignment of the policy to Beck & Gregg Hardware Company, as collateral security for a debt, which assignment was acknowledged by the insurer, in writing entered thereon, to be "received and original filed this 27th day of September A. D. 1907, assuming no responsibility as to its validity." The assignment was of "all my right, title, and interest in and to said policy or contract of insurance (except that the cash value of all dividends from the surplus apportioned to this contract may be used by the insured) subject to all of its conditions and to the rules and regulations of the said National Life Insurance Company." *Held*, the "assigns" of the insured being included among the beneficiaries of the policy, the contract should be construed as contemplating assignment by the insured, and it was assignable. *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355.

2. INSURANCE — 213 — LIFE INSURANCE — ASSIGNMENT OF POLICY — "ALL RIGHT, TITLE, AND INTEREST."

The assignment of "all my right, title, and interest in and to said policy or contract of insurance," as employed in the written assignment, was an assignment of every right the insured had under the policy, including the right to maintain the life of the policy by payment of premiums, and to make a written demand for renewal of the policy for ten-year periods.

3. INSURANCE — 219 — CONTRACT OF LIFE INSURANCE — REFUSAL OF EXTENSION.

When the company refused to grant such extension after demand and compliance with the stipulated conditions as to payment of premiums, specific performance at the instance of the assignee was an available remedy.

4. PLEADING — 64(1) — MULTIFARIOUSNESS — ALTERNATIVE PRAYER.

A suit instituted by the assignee for specific performance against the company and the as-

signor, which contained an alternative prayer for damages on account of premiums paid by the assignee on faith of the assignment, was not multifarious.

5. SPECIFIC PERFORMANCE OF INSURANCE CONTRACT—JUDGMENT.

Applying the principles announced in the preceding notes, there was no error in overruling the demurrer to the petition, and in rendering judgment for the plaintiff upon the trial of the case submitted to the judge without the intervention of the jury on the agreed statement of facts.

Fish, C. J., and George, J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit for specific performance by the Beck & Gregg Hardware Company and others against the National Life Insurance Company of Vermont. Demurrer to petition overruled and judgment for plaintiffs, and defendant brings error. Affirmed.

Reuben R. Arnold and Ronald Ransom, both of Atlanta, for plaintiff in error.

Rosser, Slaton, Phillips & Hopkins and Dorsey, Shelton & Dorsey, all of Atlanta, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., and GEORGE, J., who dissent.

(148 Ga. 698)

DEATON v. DAY. (No. 879.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐781(1)—REVERSAL—COSTS.

J. F. Day instituted an action of complaint for land, and for mesne profits alleged to be of the yearly value of \$25, against Marcena Majors. The defendant set up a judgment setting apart the land as dower from her deceased husband's estate. At the conclusion of the evidence at the trial, the plaintiff disclaimed all right of mesne profits, and a verdict was directed in his favor for the land. The defendant made a motion for new trial, and excepted to the judgment overruling the same. While the case was pending in the Supreme Court the plaintiff in error died, and the administrator upon her estate was made a party plaintiff in error. Upon the call of the case for hearing the defendant in error moved to dismiss the writ of error, on the ground that the dower estate had terminated and no interest passed to the administrator. In response to the motion it was not made to appear that the estate of the widow had any further interest in the property or other property right involved. Held:

Under the circumstances a reversal of the

judgment could not affect any right other than the payment of costs.

2. APPEAL AND ERROR ⇐781(1)—DENIAL OF NEW TRIAL—REVERSAL—COSTS.

The judgment refusing a new trial will not be reversed merely to enable the movant to recover costs. *Tabor v. Hipp*, 136 Ga. 123, 70 S. E. 886, Ann. Cas. 1912O, 246; *Carter v. Gabrels*, 136 Ga. 177, 71 S. E. 3; *A. & W. P. R. Co. v. Golightly*, 148 Ga. 582, 97 S. E. 516. Accordingly the motion to dismiss must prevail.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Action by J. F. Day against Marcena Majors. Verdict directed for plaintiff, motion for new trial overruled, and defendant excepts and brings error, and after her death N. G. Deaton, her administrator, was made a party plaintiff in error. Writ of error dismissed.

H. L. Patterson, of Cumming, for plaintiff in error.

Geo. F. Gober and W. I. Heyward, both of Atlanta, and C. L. Harris, of Cumming, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(148 Ga. 758)

FORDHAM v. STATE. (No. 941.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. JUDGES ⇐47(1)—QUALIFICATION—FORMER ACTION AS ATTORNEY.

The fact that an attorney at law instituted a number of suits in favor of the holders of certain promissory notes, to whom the notes had been transferred by a bank as collateral security, against the makers of the notes and the bank, in which it was alleged that the bank was insolvent, did not disqualify the attorney, after severance of his relation with the case and subsequent elevation to the bench, from presiding as judge at the trial of an officer of the bank indicted under Pen. Code 1910, § 204, charging that the bank had become insolvent while defendant was such officer.

2. CRIMINAL LAW ⇐1151—DENIAL OF CONTINUANCE—DISCRETION OF TRIAL COURT—REVIEW.

A motion for a continuance is addressed to the sound legal discretion of the court, and his judgment overruling the motion will not be disturbed unless it appears that there was a manifest abuse of his discretion. Under the evidence submitted in support of the motion to continue, there was no abuse of discretion in refusing the motion. *Leathers v. Leathers*, 132 Ga. 211, 63 S. E. 1118; *Carter v. Pitts*, 125 Ga.

793, 54 S. E. 695; Dale v. Beasley, 141 Ga. 594, 81 S. E. 849.

3. JURY \Leftrightarrow 90—DISQUALIFICATION—RELATIONSHIP.

On the trial of a case of the character mentioned in the first headnote, a juror who is related within the prohibited degrees to a stockholder or depositor in the insolvent bank is disqualified. Pen. Code 1910, § 999, par. 4; Bank of the University v. Tuck, 107 Ga. 211, 33 S. E. 70; McElhannon v. State, 99 Ga. 672, 26 S. E. 501; Moore v. Farmers', etc., Ins. Co., 107 Ga. 199, 33 S. E. 65; Lyens v. State, 133 Ga. 600, 66 S. E. 792.

4. CONSTITUTIONAL LAW \Leftrightarrow 250, 266—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS—PUNISHMENT OF OFFICERS OF INSOLVENT BANK.

Section 204 of the Penal Code of 1910, which declares that "every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank-bills passing at par value, shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years: Provided, that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner"—is not violative of the Fourteenth Amendment to the Constitution of the United States on the ground that it denies to persons indicted thereunder due process of law or equal protection of the law. Griffin v. State, 142 Ga. 636, 83 S. E. 540, L. R. A. 1915C, 716, Ann. Cas. 1916C, 80.

(a) The decision of McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 Sup. Ct. 498, 60 L. Ed. 899, dealt with a statute which was construed differently from the construction placed upon Pen. Code 1910, § 204, by this court in Griffin v. State, supra; and while, on the construction placed upon the different statutes, the results were not the same, there was no conflict of principle in the rulings in the two cases.

(b) There was no error in overruling the demurrer to the indictment.

5. MOTION FOR NEW TRIAL.

The grounds of the motion for new trial, relating to rulings upon admissibility of evidence, to the charge of the court, other than that dealt with in the note next following, and to the refusal to charge, in so far as they were sufficient to present any question for decision, show no cause for reversal.

6. BANKS AND BANKING \Leftrightarrow 84—INSOLVENCY—CRIMINAL LIABILITY OF OFFICERS—CAPITAL STOCK.

The capital stock of a bank issued and paid for is not a liability that should be included and taken into account in determining the question of solvency or insolvency of the bank, on the trial of one of its officers indicted under Pen. Code 1910, § 204.

Error from Superior Court, Wheeler County; D. A. R. Crum, Judge.

J. B. Fordham was prosecuted for being an officer of a bank when it became fraudulently insolvent, and from the judgment he brings error. Reversed.

Jas. K. Hines, of Atlanta, and W. W. Bennett, of Baxley, for plaintiff in error.

S. D. Dell, Sol. Gen., pro tem., of Hazlehurst, for the State.

ATKINSON, J. [1-5] 1-5. The rulings announced in the first five headnotes do not require elaboration.

[6] 6. The indictment charged that the bank did "become fraudulently insolvent," while the defendant was an officer thereof; and a material question was whether the bank was insolvent within the meaning of the Penal Code, § 204, quoted in the fourth headnote. The judge charged:

"The stock of a bank issued and paid for is a liability that should be included and taken into account in determining the question of solvency or insolvency."

Error was assigned upon this charge, on the ground that it did not state the law. A similar charge was involved in Spence v. State, 20 Ga. App. 61, 92 S. E. 555. The majority ruled that the assignment of error based on the ground of the motion for new trial complaining of the charge had been abandoned, and did not rule upon the question. Judge George filed a specially concurring opinion, holding that the assignment of error was not abandoned, and stating reasons why the charge was erroneous. In the course of his opinion it was said:

"Does this charge lay down a correct test by which the solvency of a chartered bank is to be determined? Is a bank solvent only when its assets are sufficient to pay not only its creditors, including depositors, but its stockholders as well? If this rigid test is to be applied, every bank, immediately upon its organization, will be found to be insolvent. Furniture and fixtures and general supplies must be purchased by every bank commencing business. A newly organized bank would hardly, in any case, be able to dispose of its furniture and fixtures, to say nothing of its general supplies, at cost. The officers and directors of a bank usually own a large part of its capital stock. It is stretching the law too far to say that bank officers and directors owning a large percentage of the stock of the bank become criminals the moment its assets fall below its liabilities, including the liability of the bank upon the stock held by such officers and directors. The individual stockholders and the corporation are not one and the same, it is true; but if the officers of a bank, who own practically its entire capital stock, are able to pay, out of its assets, all creditors of the bank, they ought neither to be presumed nor held guilty of the offense declared in section 204 if the assets of

the bank are insufficient to pay the stockholders, including themselves. If, on account of the fraudulent acts of the officials, the assets of the bank are insufficient to pay the general creditors of the bank, including the depositors, such officials are criminally liable. If, through the criminal conduct of the officers and directors of the bank, its capital stock is impaired, the stockholder has his recourse against such officials under other sections of our Penal Code. The capital stock, it is true, is both an asset and a liability upon the civil side of the law, but to regard the stock as a liability in determining the solvency of a bank under the Penal Code section referred to is, in the opinion of the writer, untenable. No consideration of public policy requires such a construction of this section of the Code. The stockholders in a banking corporation become such for pecuniary gain to themselves. In no other corporation are stockholders, by any section of the Code, given the benefit which the charge of the trial court in this case affords the holders and owners of bank stock. Sound public policy will protect the owners of bank stock no further than the owner of any other corporate stock. He must look for his protection to the embezzlement statutes and other statutes enacted for his benefit, and to the honesty of the officials of his own choosing. Further, an individual is not considered insolvent so long as he is able to pay his creditors. A corporation should not be considered insolvent so long as the corporation is able to pay out of its assets, including its original capital stock, all of its creditors. The stockholder is in no proper sense a creditor of the bank."

There might be elaboration; but the reasoning there stated sufficiently shows that the liability of a bank to its stockholders on shares of stock fully paid for should not be taken into account as a debt of the bank in ascertaining its insolvency within the meaning of the statute, which is highly penal and is to be strictly construed.

Judgment reversed.

All the Justices concur.

(148 Ga. 767)

HOLSTON NAT. BANK v. HOWARD et al.
(No. 994.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. TRIAL §253(1)—CHARGE OF COURT—CORRECTNESS.

"It is no valid ground of criticism upon a charge, correct and proper in itself, that it fails to state some other rule or principle of law pertinent to the issues of the case." *Powers v. State*, 138 Ga. 624, 75 S. E. 651 (4).

Applying this principle, the criticism of the charge made in the third, fourth, and fifth grounds of the motion for new trial show no cause for reversal.

2. CHARGE OF COURT.

The charge relative to the purposes for which certain reports to a bank and a commercial agency were admitted was somewhat confusing; but, considered in the light of the pleadings and evidence and the entire charge, it did not so restrict the purposes for which the evidence could be considered as to show cause for a reversal.

3. MOTION FOR NEW TRIAL.

Other grounds of the amended motion for new trial are without merit, and not of such character as to require special mention.

4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in refusing the plaintiff's motion for new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by the Holston National Bank against G. P. Howard and others. Judgment for defendants, motion for new trial denied, and plaintiff brings error. Affirmed.

R. H. Jones and Little, Powell, Smith & Goldstein, all of Atlanta, for plaintiff in error.

Colquitt & Conyers, of Atlanta, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(148 Ga. 767)

COLEMAN et al. v. LANCASTER. (No. 919.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. EXECUTION §53—JUDGMENT FOR DEBT—SECURITY—LEVY.

An execution issued upon a judgment rendered for a debt secured by a deed made to realty cannot be levied upon the realty conveyed as security until after the creditor has executed, filed, and had recorded a deed reconveying the property to the debtor; and a sale of the property made under a levy thereon, when no reconveyance has been previously made, filed, and recorded, would be void. *Coates v. Jones*, 142 Ga. 237, 82 S. E. 649. Applying the ruling just announced to the facts of this case, the court erred in directing a verdict finding the property levied on subject to the execution.

2. APPEAL AND ERROR §302(3) — MOTION FOR NEW TRIAL—SUFFICIENCY.

A ground of a motion for a new trial complaining of the admission of "parol evidence of an alleged year's support * * * in the property in question," without setting forth such evidence or its substance, presents no question for adjudication.

3. APPEAL AND ERROR §302(3) — MOTION FOR NEW TRIAL—SUFFICIENCY.

A ground of a motion for a new trial alleging error of the court in refusing to admit a

certain administrator's deed because "the decree in equity upon which same was based did not authorize the sale," where neither such decree or its substance was set forth in the motion, is insufficient to raise any point for decision.

4. MOTION FOR NEW TRIAL.

None of the other grounds of the motion for new trial is meritorious, nor is such as to require further discussion.

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Executory process by Lizzie Lancaster against Mrs. M. E. Coleman and others. Verdict directed finding the property levied on subject to the execution, and defendants bring error. Reversed.

E. V. Heath, of Waynesboro, for plaintiffs in error.

Brinson & Hatcher, of Waynesboro, for defendant in error.

FISH, C. J. Judgment reversed.
All the Justices concur.

(148 Ga. 770)

WILLIAMS v. AMERICAN SLICING MACH. CO. et al. (No. 1037.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. ASSIGNMENTS OF ERROR—DEMURRER TO ANSWER.

The assignments of error based on the refusal to continue the case, and on sustaining the demurrer to portions of the answer, show no error.

2. BANKRUPTCY \S 398(2)—"JUDGMENT FOR PURCHASE MONEY"—ACTION IN TORT.

Where the seller of personal property brings an action in trover against one not the original purchaser, to recover the property or its value, a money judgment therein is not a "judgment for purchase money."

Error from Superior Court, Carroll County; G. H. Howard, Judge.

Petition by the American Slicing Machine Company, the National Cash Register Company, and Frank W. Burr against N. A. Williams. Judgment in favor of plaintiffs, and defendant excepts and brings error. Judgment affirmed in part, and reversed in part.

Smith & Smith, of Carrollton, for plaintiff in error.

Buford Boykin, of Carrollton, for defendants in error.

HILL, J. The American Slicing Machine Company, the National Cash Register Com-

pany, and Frank W. Burr brought an equitable petition against N. A. Williams, alleging that he was indebted to them respectively in certain amounts specified, had been duly adjudged a bankrupt in the District Court of the United States, and that in the bankruptcy proceedings a homestead exemption had been set apart to him out of certain named personal property. It was sought to enjoin the trustee from delivering the property so set apart to the bankrupt, and to have a receiver appointed for it, in order that it might be subjected to the claims of petitioners, who averred that their claim was superior to the homestead claim. In some way the American Slicing Machine Company seems to have been eliminated from the case, and it was agreed that Burr have a verdict subjecting the property. No objection seems to have been made to the pleadings on the ground of misjoinder of parties plaintiff.

The claim of the National Cash Register Company was resisted, but a verdict in its favor was rendered, and a decree was entered giving to that plaintiff a judgment in rem, which was declared to be a lien on the property set apart to the bankrupt. The defendant excepted.

[1, 2] The petition alleged that the defendant was indebted to the National Cash Register Company in the sum of \$70, plus interest at 7 per cent. since December 16, 1915, "said indebtedness being due for one register, and being judgment rendered by the city court of Carrollton on above date." In paragraph 7 of the petition it was alleged that the account due the National Cash Register Company was for the purchase price of "one cash register valued in his homestead exemption at \$40." It appeared in the evidence that the cash register in question had been purchased by Williams from a third person; and that the judgment upon which the company declared in the equitable suit was rendered in a trover suit brought by the company in the city court of Carrollton, in which it was alleged that Williams was in possession of the register, that it was the property of the plaintiff and of the value of one hundred dollars, and that the plaintiff claimed title thereto. The plaintiff having obtained judgment, an execution for the sum of \$70 principal was issued thereon, and was levied upon the cash register in question, which, at the sale under the execution, was bought by Williams for \$40, which sum was credited on the execution; and the deficiency still due thereon was the basis of the claim to a judgment in rem against the exempted property.

In order for the superior court legally to decree a lien on the property which the bankrupt claimed as an exemption, the claim which the plaintiff was urging against the bankrupt must have been one which was su-

perior to the bankrupt's right of homestead under the laws of this state. In the present case it was alleged to be superior to the exemption, on the ground that it represented purchase money of the cash register which the bankrupt scheduled among his assets. We cannot see, however, how an alternative judgment for the money value of property in an action for tort, which is the character of a trover suit, can be said to be in any sense a judgment for purchase money. Purchase money is defined as being "the original debt or consideration which the purchaser agrees to pay for a thing in money." See *Bouvier's Law Dic.* (3d Ed.) 2772; also *Taylor v. Allen*, 131 Ga. 416, 62 S. E. 291, in which it was said that the purchase money of land included only the actual consideration paid for the land. In *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568, it was ruled:

"Where an execution is issued upon a judgment recovered in an action for taking personal property without the consent of the owner, and converting and disposing of the same, such execution is not to be considered as issued on a demand for the purchase money of the property, so as to bring the case within the proviso of the first section of the exemption act."

In the present case it does not appear that N. A. Williams ever purchased the cash register from the National Cash Register Company, or that there was any privity of contract between them. On the contrary, the only evidence of any dealings between them consists in the proceedings in the suit in trover, in which the company was suing him as a tort-feasor, to recover the cash register or its value. Certainly a judgment rendered in that action was not one for purchase money.

The judgment in favor of Burr was based upon notes which contained a homestead waiver, and was rendered by consent. That part of the judgment decreeing a lien in his favor against the exempt property is affirmed; but the judgment is reversed in so far as it declares a lien in favor of the National Cash Register Company as against the exemption set apart to the bankrupt.

Judgment affirmed in part, and reversed in part.

All the Justices concur.

(23 Ga. App. 330)

WYNNE, Clerk of City Court, v. SMITH,
Solicitor. (No. 9854.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 29, 1919.)

(Syllabus by the Court.)

1. FINES — 20 — DISPOSITION — COSTS IN
CRIMINAL CASES—"INSOLVENT COSTS."

The costs accruing in favor of the clerk of the city court of Eastman in criminal cases, on motions for new trial and for transmitting

the records therein to this court, where the defendants have been convicted and the judgment has been affirmed by this court, and executions have been issued against the defendants primarily liable therefor, and returns of nulla bona made thereon by the sheriff, are "insolvent costs," within the meaning of section 1113 of the Penal Code of 1910, and as such are entitled to participate in the fine and forfeiture fund of that court.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Insolvent (Criminal Costs.)]

(Additional Syllabus by Editorial Staff.)

2. COSTS — 292—CRIMINAL PROCESS—"FINAL TRIAL."

Under Pen. Code 1910, § 1105, providing that costs of a prosecution, except fees of his own witnesses, shall not be demanded of a defendant until after conviction on "final trial," that term means such trial in the court having original trial jurisdiction as is the basis of entry of judgment finally disposing of action in that court, and does not apply to proceedings in appellate court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Hearing or Trial.]

Error from City Court of Eastman; O. W. Griffin, Judge.

Action by Bob Wynne, Clerk of the City Court of Eastman, against D. D. Smith, Solicitor. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Milner, of Eastman, for plaintiff in error.

D. D. Smith, of Eastman, for defendant in error.

JENKINS, J. No question is made in this case as to the correctness of the items contained in the bill of costs presented by the clerk, or as to whether the items are properly chargeable as costs, but the sole question to be determined is whether or not insolvent costs accruing in favor of the clerk in criminal cases subsequent to conviction, where the judgment is affirmed, are to be treated as "insolvent costs" within the meaning of section 1113 of the Penal Code of 1910, so as to be entitled to participate in the fine and forfeiture fund. Section 1105 of the Penal Code provides that:

"The costs of a prosecution, except the fees of his own witnesses, shall not be demanded of a defendant until after conviction on final trial. If convicted, judgment may be entered up against him for all costs accruing in the committing or superior courts, and by any officer pending the prosecution. The judgment shall have a lien on all the property of the defendant from the date of his arrest, and the clerk shall issue an execution, on the judgment, against said property. The court may also direct the defendant to be imprisoned until all costs are paid."

[1, 2] It is contended by the defendant that under the terms of this section, the only costs entitled to participate in the fine and forfeiture fund are such insolvent costs as accrue in the trial court up to the time of conviction in that court; but with this contention we cannot agree. Under this section of the Code, no judgment for any of the costs can be taken until after conviction on final trial; but the words "final trial," as here used, mean "such trial, in the court having original trial jurisdiction of the case, as is the basis of the entry of judgment finally disposing of the action in such court, and do not apply to proceedings in an appellate court." *Wynne v. Stonecypher*, 146 Ga. 5, 90 S. E. 234. It was also held in that case that:

"Where no supersedeas is obtained, the clerk of the trial court is entitled to have judgment awarded against the defendant for the costs accruing in connection with his prosecution of a writ of error to the Court of Appeals while his case is pending in that court."

If a supersedeas be obtained (as was done by each of the defendants in the cases now involved), a judgment cannot be taken for any of the costs until the case is disposed of by the reviewing court. Thus, at the first opportunity which the clerk had for taking a judgment for his costs, the costs to which he is entitled on motions for new trial and for transmitting the records to this court had already accrued in the court below, and the Code section above quoted provides that, if the defendant is convicted, judgment may be entered up against him for all costs accruing in the committing or superior courts. Nothing in this section limits the right to take a judgment for costs to such costs only as accrue up to the time of conviction in the trial court, but to the contrary it provides that upon conviction, judgment may be entered up against the defendant for all costs accruing in the trial court, and certainly the costs here claimed accrued in the court below.

Section 1113, supra, is as follows:

"In cases where a bill of indictment is preferred and not found true by the grand jury, or where a defendant shall be acquitted by a jury, or *where persons liable by law for the payment of costs shall be unable to pay the same* [italics ours], the officers severally entitled to such costs may present an account therefor to the judge of the court in which the prosecutions were pending, which, being examined and allowed by him, he shall order to be paid in the manner prescribed by law, and such account and order shall be entered on the minutes of the court."

There is no contention in this case that the several defendants in the cases in which costs are claimed are not "liable by law for the payment of such costs," and it is conceded that they are "unable to pay the same," since executions have been issued against the

several defendants primarily liable therefor, and returns of nulla bona made thereon by the sheriff. How, then, can it be said that the costs claimed are not insolvent costs? In this section of the Code there is no provision whereby the only costs which may be considered as insolvent costs are those accruing up to the time of conviction in the lower court, and it would seem to us that the costs claimed are properly so chargeable, and as such are entitled to participate in the fine and forfeiture fund. Section 1114 of the Penal Code provides that:

"Money arising from fines, or collected on forfeited recognizances in the superior courts, or for a violation of the penal laws, shall be first applied to the extinguishment of the insolvent lists of the officers bringing it into court and those of justices and constables pro rata, and then to the orders of former officers in proportion to their claims."

See, also, *Mayor, etc., of Macon v. Hoge*, 71 Ga. 696, 698, where it was said that the state—

"has made provision to compensate all her officers who aid in the administration of penal laws; no service is required of any of them, with a very few exceptions, for which compensation is not provided."

It is there held that:

"The officers of the superior, city and county courts have recourse to the funds arising from fines and forfeitures in the respective courts, to pay costs where they cannot be collected from defendants in criminal proceedings."

We are of the opinion, therefore, that the judge erred in refusing to audit and approve the claim as presented by the clerk.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(23 Ga. App. 376)

SOUTHERN EXPRESS CO. v. STATE (No. 10132.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS \Leftrightarrow 138—OFFENSES —TRANSPORTATION.

Under the act passed by the General Assembly of the state of Georgia at its extraordinary session held in March, 1917, pure alcohol for medicinal purposes cannot be legally shipped from one point to another, both of which are in the state of Georgia.

2. INTOXICATING LIQUORS \Leftrightarrow 138—OFFENSES —TRANSPORTATION—POSSESSION AND CONTROL.

Under the law referred to above, the act of transporting alcoholic liquors is a separate and

distinct offense from that of having, controlling, and possessing such liquors.

Stephens, J., dissenting.

Error from Superior Court, Mitchell County; W. M. Harrell, Judge.

The Southern Express Company was convicted of unlawfully transporting, and of having control and possession of intoxicating liquors, and it brings error. Affirmed.

The Southern Express Company was indicted for a violation of the law passed by the General Assembly of the state of Georgia at its extraordinary session held in March, 1917 (Acts Ex. Sess. 1917, p. 7). The indictment contained two counts, the first charging that the Southern Express Company "did then and there transport, ship, and carry from Valdosta, Ga., to Camilla, Ga., both being points within this state, spirituous, vinous, malted, fermented, alcoholic, and intoxicating liquors and beverages, the last-named point, to wit, Camilla, Ga., being in the county of Mitchell, and said defendants did so transport, ship and carry said liquors and beverages in the said county of Mitchell." The second count alleged that said company did "unlawfully and with force and arms, in the county aforesaid, have, control, and possess spirituous, alcoholic and intoxicating liquors." The case was submitted to the judge on the following agreed statement of facts:

"The Southern Express Company was a corporation and common carrier at all times herein mentioned. In April, 1917, said express company received for transportation, from the Mashburn Drug Company, which was at all times herein mentioned a wholesale druggist of Valdosta, Ga., at said Valdosta, Ga., one gallon of pure alcohol, to be transported by said Southern Express Company to Dr. H. G. Fussell at Camilla, Ga., and did transport the same from said Southern Express Company's office in Valdosta, Ga., to its office in Camilla, Ga., in Mitchell county. Said alcohol was not delivered by said express company to Dr. Fussell, but was seized in the office of said express company by the sheriff at Camilla, Ga. Dr. Fussell was at all times mentioned herein a practicing physician of Camilla, Ga., but was not a pharmacist or apothecary holding license as such from the state board of pharmacy, but kept a stock of drugs and medicines, costing at wholesale from \$100 to \$200 in his office at Camilla, Ga., for use in putting up his own prescriptions and dispensing medicines from his own office, and in his practice of his profession as a doctor of medicine; and said alcohol was wanted by him for medicinal purposes in connection with said stock of drugs and medicines. He had ordered the same from said Mashburn Drug Company of Valdosta, Ga., and the Southern Express Company did transport the same for said Dr. Fussell, from said Mashburn Drug Company, which was undertaking to fill said order therefor. Camilla and Valdosta are both points within the state of Georgia, and said alcohol was conveyed from Valdosta, Ga., to Camilla,

Ga., and into the county of Mitchell, and was in said Southern Express Company's custody at its office in Camilla, in Mitchell county, for the purpose aforesaid, when seized by the sheriff. Subsequently said Fussell applied in due form to the ordinary of Mitchell county, for a permit to receive said alcohol for medicinal purposes, stating in said application that the business or occupation of applicant was that of a physician, said application being supported in due form by the affidavits of said Fussell and a certificate of two citizens of Mitchell county, as required by law, and said application was approved and granted by said ordinary, and said sheriff then delivered said alcohol to said Fussell. All of the above-stated transactions occurred in the month of April, 1917, and prior to April 11, 1917, the date when said special presentment was returned and filed. Neither said defendant nor any agent or officer thereof intended to violate any law in said transaction, or knew that it was a violation of the law to do any of said things, if it was such in fact."

The trial judge rendered a judgment against the defendant, and it excepted.

Pope & Bennet, of Albany, and Robt. C. & Phillip H. Alston, of Atlanta, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

BLOODWORTH, J. (after stating the facts as above). [1] 1. In the brief of one of the counsel for the plaintiff in error, the issue to be settled is thus stated:

"The case can be stated in one question, to wit: Can a wholesale druggist doing business in Georgia ship alcohol under the restrictions contained in section three of the act of the Legislature of the state of Georgia approved March 28, 1917, to a practicing physician who is the sole proprietor of a drug store in the state of Georgia?"

Under the act above referred to we are convinced that the question propounded by counsel for the plaintiff in error must be answered in the negative. Section 1 of said act is as follows:

"Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act it shall be unlawful for any common carrier, corporation, firm or individual to transport, ship or carry, by any means whatsoever, with or without hire, or cause the same to be done, from any point without this state to any point within this state, or from place to place within this state, whether intended for personal use or otherwise, any spirituous, vinous, malted, fermented or intoxicating liquors, or any of the prohibited liquors or beverages, as are defined in the act approved November 17, 1915, being 'An act to make clearer and more certain' the prohibition laws of this state, etc., or any alcoholic compound or malt or liquors whether intended for beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication. It shall be unlawful for any corporation, firm,

person or individual to receive from any common carrier, corporation, firm, person or individual, or to have, control or possess, in this state, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted."

It will be noticed that the first portion of the above section of the act deals with the transportation of intoxicating liquors, and absolutely prohibits their transportation "from any point without this state to any point within this state, or from place to place within this state." (Italics ours.) The liquors "defined in the act approved November 17, 1915," just referred to, embrace all kinds of intoxicating liquors, as follows:

"(1) Alcohol, alcoholic liquors, spirituous liquors and all mixed liquors, any part of which is spirituous, foreign or domestic spirits, or rectified or distilled spirits; absinthe, whisky, brandy, rum and gin; (2) vinous liquors and beverages; (3) all malted, fermented or brewed liquors of any name or description, manufactured from malt, wholly or in part, such as beer, lager beer, near beer, porter and ale and all brewed or fermented liquors and beverages in which maltose is a substantial ingredient, whether alcoholic or not or whether intoxicating or not; (4) and any drinks, liquors or beverages containing one-half of one per cent. of alcohol or more by volume at 60 degrees Fahrenheit; or any other liquids or liquors manufactured or sold, or otherwise disposed of, for beverage purposes, containing said amount of one-half of one per cent. of alcohol or more; (5) any intoxicating bitters or beverages by whatever name called; (6) all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, ale, wine or whisky, or other alcoholic or spirituous, vinous, or malt liquors, including those liquors and beverages commonly known and called near beer." Ga. Laws 1915, Ex. Sess. p. 79, § 1.

Thus it will be seen that if section 1 of the act approved March 28, 1917, stood alone, it would absolutely prevent the transportation of alcohol "from any point without this state to any point within this state, or from place to place within this state." Section 2 of the act approved March 28, 1917, is as follows:

"Be it further enacted by the authority aforesaid, that nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes as is prescribed in sections 426, 427, 428, 429 and 430 of the Criminal Code of 1910, said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act."

It will be observed that this section provides for "the use of pure alcohol for medicinal purposes as is prescribed in sections 426, 427, 428, 429 and 430 of the Criminal Code of 1910." Section 430 of the Criminal Code just referred to is as follows:

"Nothing in the preceding sections of this article shall be so construed as to prevent wholesale druggists from selling or furnishing alcohol

in wholesale quantities to regular licensed retail druggists, or to public or charity hospitals, or to medical or pharmaceutical colleges. All wholesale druggists shall be required to keep a complete record of all their sales of alcohol, which record shall at all times be open for inspection to the regular authorities of such counties or cities in which such wholesale stores are located."

The mention of section 430 in section 2 of the act approved March 28, 1917, causes counsel for plaintiff in error to insist that section 2 of the act approved March 28, 1917, among other things, "preserved the life of sections 426, 427, 428, 429, 430, of the Criminal Code of 1910, and added thereto by reference the provisions which are set out in section 3. It thereby brought into section 2 the terms of section 3. The purpose of this was to make the same requirements as to shipments of alcohol from points within the state to other points within the state as was required as to shipments from points without the state to points within the state." We cannot agree with this conclusion of learned counsel. While section 2 of the act approved March 28, 1917, provides for the use of pure alcohol, as provided in sections 426 to 430, inclusive, of the Penal Code of 1910, this same section provides that:

"Said alcohol, however, to be shipped, received and possessed *only as is provided in section three of this act.*" (Italics ours.)

The word "only" as here used is exclusive, and while under this section (2 of the act of 1917) alcoholic liquors after being received can be *used* as prescribed by sections 426 to 430, inclusive, they can be "shipped, received and possessed only as is provided in section 3 of this act." What does section 3 of said act say in reference to shipping alcohol? So much thereof as is necessary for determination of the question at issue is as follows:

"Any common carrier may transport, ship or carry from any point without this state, to any point within this state, pure alcohol to be received only by any practicing physician who is the sole proprietor of a drug store, licensed druggists, pharmacists, manufacturers, chartered colleges, chartered hospitals, or state institutions, and to be used only for medicinal, mechanical and scientific purposes not contravening in any way the prohibition laws of this state, under the following conditions [then follow the conditions]."

This section does not make any provision whatever for the shipping of alcohol "from place to place within this state." Construing together sections 1, 2, and 3 of the act under consideration, it seems to us that the only logical conclusion that can be reached is that pure alcohol for medicinal purposes can be "shipped, received and possessed" only when transported, shipped, or carried "from

any point without this state to any point within this state."

[2] 2. Under the act approved March 28, 1917, the act of transporting alcoholic liquors as set out in the first count of the indictment is a separate and distinct offense from that of having, controlling, and possessing alcoholic liquors as charged in the second count thereof.

3. The agreed statement of facts shows that the defendant was guilty on both counts of the indictment, and the judgment is affirmed.

BROYLES, P. J., concurs.

STEPHENS, J. (dissenting). The questions here presented for determination are: First, Is it a violation of the criminal laws of this state for a common carrier, upon the conditions set forth in the agreed statement of facts, to haul and transport, from one point within this state to another point within this state, wholesale shipments of pure alcohol; and, second, is the possession by such carrier of such alcohol for the purpose of such transportation likewise a violation of the criminal laws of this state? Answering the first question in the negative would eliminate and dispose of the second question, since if it be not unlawful for the carrier to transport alcohol as above set out, it certainly would not be unlawful for such carrier, for the purpose of effecting such transportation, to have such alcohol in its possession and control.

The prosecution in this case is brought under what is popularly called the "Bone Dry" Act of 1917. Section 1 of this Act provides that:

"It shall be unlawful for any common carrier, corporation, firm or individual * * * from any point without this state to any point within this state, or from place to place within this state, whether intended for personal use or otherwise, any spirituous, vinous, malted, fermented or intoxicating liquors, or any of the prohibited liquors or beverages, as are defined in the act approved November 17, 1915, being 'An act to make clearer and more certain' the prohibition laws of this state," etc.

The act of 1917, in section 1, also provides that it shall be unlawful for any "corporation, firm, person, or individual * * * to have, control or possess, in this state, any of the said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted." The prohibited liquors above referred to by reference to the prohibition act of 1915 include pure alcohol. Without more, therefore, the defendant corporation and common carrier would be guilty of the offense charged in both counts of the indictment, the one for transporting, and the other for having in possession such prohibited liquors.

By way of defense, defendant, admitting the facts charged in both counts of the indictment, relies upon the provision of section 2 of the act of 1917, claiming that it received for shipment at a point within this state pure alcohol in wholesale quantities from a wholesale druggist for the purpose of transportation to another point in this state, and to be delivered to a person authorized to receive the same under the terms of the exception provided for in section 2 of this act.

The case, therefore, turns upon the proper construction to be placed upon section 2 of the act of 1917, which section reads as follows:

"Be it further enacted by the authority aforesaid, that nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes as is prescribed in sections 426, 427, 428, 429 and 430 of the Criminal Code of 1910, said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act."

Section 2 of the act of 1917, therefore, modifies the broad and sweeping terms of the preceding section making it unlawful to transport or possess alcohol and other prohibited liquors therein mentioned, by expressly providing that pure alcohol of a certain description and for certain purposes as prescribed in a former act of the Legislature may be "shipped, received and possessed only as is provided in section 3 of this act," which said section 3 provides for the receipt, under certain restrictions and by certain designated parties, of shipments of pure alcohol when transported by a common carrier into this state from points without this state. It seems, therefore, that the clear intent of the act of 1917, despite the exhaustive terms in its first section absolutely prohibiting the transportation or possession for any purpose of intoxicating liquors generally, including pure alcohol, is to permit the possession or transportation of pure alcohol for certain purposes, under certain conditions to and from certain designated and authorized persons or parties. This intent is manifest, not only by the terms of section 2 and section 3, but by the title of the act making it "unlawful to transport," or "to have, receive, possess or control," such liquors, excepting in the former case "alcohol and wine under certain restrictions and limitations," and in the latter case, "alcohol for medicinal, mechanical and scientific purposes." Thus the act of 1917 sanctions and legalizes the possession and transportation of pure alcohol for certain purposes under certain well-defined restrictions. Indeed it had been the settled policy of this state, prior to the enactment of the act of 1917, to authorize the sale and use of pure alcohol for medicinal purposes. This was expressly provided in the first state-wide prohibition law of 1907, re-

ferred to, and declared and reaffirmed in the act of 1915 (Acts 1907, p. 81; Acts Ex. Sess. 1915, pp. 100, 101, 103; Acts 1916, p. 72).

It is clear beyond question that by the precise terms of the act of 1917, as set out in section 8 thereof, a common carrier may legally transport under the restrictions therein provided as to delivery, etc., pure alcohol from a point *without* this state to a point within this state. Can such a shipment of alcohol by a common carrier be legally made under the terms of this act as set out in section 2 thereof from a point *within* this state to another point *within* this state? I think it can, under certain restrictions and for certain designated purposes. Section 2 of the act, as has already been pointed out, provides that:

"Nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes as is prescribed in sections 426, 427, 428, 429 and 430 of the Criminal Code of 1910, said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act."

By reciting and re-enacting said code sections, it expressly saves and preserves the prohibition act of 1907 in so far as this act permits the "use of pure alcohol for medicinal purposes." The act of 1907, which had never been repealed, but expressly preserved (Acts 1915, Ex. Sess. p. 89, § 24), being thus declared and re-enacted by the act of 1917, and by the terms of the latter act made a part thereof, the latter act must be read and construed as if these sections of the act of 1907 were copied and reproduced therein. *Nunes v. Wellisch*, 12 Bush (Ky.) 363. The Act of 1907, so far as it serves our purpose here, provides in section 430 of the Penal Code of 1910, as follows:

"Nothing in the preceding sections of this article shall be so construed as to prevent wholesale druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists, or to public or charity hospitals, or to medical or pharmaceutical colleges. All wholesale druggists shall be required to keep a complete record of all their sales of alcohol, which record shall at all times be open for inspection to the regular authorities of such counties or cities in which such wholesale stores are located."

It is therefore lawful for wholesale druggists in the state of Georgia to possess and sell to certain designated parties in wholesale quantities pure alcohol for medicinal purposes. Pure alcohol, therefore, having been continuously recognized by the Legislature as a legitimate article of commerce, and its importation from other states being expressly permitted and provided for as set out in section 3 of the act of 1917, it is hardly conceivable that *intrastate* traffic and transportation therein should be considered and regarded as criminal, except by an unambiguous and unqualified legislative enactment.

If there be any doubt, therefore, as to the legislative intent to legalize such intrastate shipments the doubt should be resolved in favor of the legality of same. Therefore the clause in section 2 of the act of 1917, which provides that "said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act" should not be construed as meaning that the phrase "said alcohol" refers back to, and has reference only to, the phrase "pure alcohol," appearing a few words back towards the beginning of this section, but should be construed as having reference to alcohol mentioned in the recited code sections 426 to 430 contained therein. Giving to this clause in section 2 of the act of 1917 the first construction would be in accordance with the contentions of the state, and would be as if said section read as follows:

"Nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes, * * * said alcohol, however, to be shipped, received and possessed only as is provided in section 3 of this act"

This would mean that section 3 would be exhaustive as to the transportation of pure alcohol for medicinal purposes, and therefore *only* interstate shipments as provided therein could be legally made. But giving to this clause the second construction would be equivalent to its reading as follows:

"Nothing herein contained shall prohibit the use of pure alcohol for medicinal purposes as is prescribed in [section 430 of the Penal Code providing that 'nothing in the preceding sections shall be construed as to prevent wholesale druggists from selling or furnishing alcohol in wholesale quantities to regular licensed retail druggists, or to public or charity hospitals, or to medical or pharmaceutical colleges'], said alcohol, however, to be shipped, received and possessed only as is prescribed in section 3 of this act."

Placing this latter construction, which I think is correct, upon section 2 of the act of 1917, intrastate shipments of alcohol under certain restrictions are permitted and legalized. The alcohol mentioned in code section 430, just quoted as from section 2 of the act of 1917, being alcohol manifestly sold in this state and by wholesale druggists in this state, could only be shipped from a point within this state, and if received as provided in section 3 of said act of 1917, said section 3 providing for a reception in this state only, it could only be received in this state. The latter construction being equally as plausible as the former, and, moreover, being favorable to the defendant in a criminal prosecution, I am constrained, in accordance with the well-recognized maxim that a criminal statute should be construed in favor of innocence, to adopt this latter construction and to conclude that section 2 of the act of 1917 legalizes intrastate shipments of pure alcohol

under certain restrictions, which alcohol shall, in the terms of the act of 1917, "be shipped, received, and possessed only as prescribed in section 3 of this act," providing for interstate shipments.

I understand my Colleagues in the majority opinion to hold that section 2 of the act of 1917 goes no further than to preserve and secure the right only to use pure alcohol for medicinal purposes as prescribed in sections 426 to 430 of the Penal Code, and that the concluding clause in this section with reference to *shipping*, *receiving*, and *possessing* pure alcohol, instead of providing for the shipment of such alcohol by the parties named in the code sections referred to, such as wholesale druggists, operates as a precautionary proviso guarding the act against a construction that would permit alcohol to be shipped otherwise than in interstate shipments coming into this state as provided in section 3 of the act of 1917. This position, to my mind, is untenable. If this be the proper construction to be placed upon section 2 of this act, the clause, "said alcohol, however, to be shipped, received and possessed only as provided in section 3 of this act," is mere surplusage, and adds nothing to the meaning of the act. It is a mere vermiform appendix which can be cut out and dispensed with without harm to the body of the act. If section 3 were exhaustive as to shipment, receipt, and possession only when coming in interstate shipments from points without the state, section 2 would as well read as if the above-quoted clause were omitted and stricken entirely therefrom. The transportation of alcohol mentioned therein, necessarily intrastate, would then be prohibited under the provisions of section 1, and only *interstate* shipments, as contended in the majority opinion, and as provided in section 3, could move in this state. It is a well-recognized principle of statutory construction that the Legislature meant something by every provision contained in a statute, and that all provisions therein should be construed as adding to or giving to the statute a meaning or construction different to that attached to the remaining part of the statute with the provision in question eliminated. Applying this rule, and giving to this clause a construction that would add to or modify the meaning of section 2 were this clause omitted, the only conclusion that could be arrived at would be that section 2, with this clause retained, provides for shipments of alcohol by parties authorized to sell it under the code sections mentioned therein, the same being parties within this state, such as wholesale druggists; and when such shipments are received "as provided in section 3," they would be received at points within this state. Giving to this clause such a construction, section 2 of the act of 1917 must therefore be construed

as recognizing and legalizing intrastate shipments.

Furthermore, each and every word in a statute is supposed to have a distinctive meaning, and is to be given a construction accordingly. Otherwise it is uselessly inserted. The clause referred to provides that alcohol shall be "*shipped, received and possessed.*" [Italics mine.] Giving, therefore, to the words "*shipped,*" "*received,*" and "*possessed*" each a separate and distinct meaning, there are three ideas contained in this clause: The subjective idea of *shipping*, the objective idea of *receiving*, and the *passive* idea of *possessing*. All three of these are applied by section 2 to alcohol mentioned in Code, §§ 426 to 430. *Shipping* in the subjective sense is going out from or leaving the shipper, the opposite of *receiving*. Used in this sense when applied to alcohol mentioned in Code, §§ 426 to 430, it is necessarily applied to alcohol within this state, which, of course, cannot be shipped in this sense of the term otherwise than from a point within this state. Applying to the word "shipped" any other meaning would render it objective, and would attribute to it the sense of coming in towards the point of destination. This latter idea is covered by the word "received." Therefore, in order to give the word "shipped" any significance whatever and to concede that the Legislature meant something by the insertion of this word in the statute, the word "shipped" must be given the construction first suggested, which could only mean that alcohol already in this state, when shipped, must be shipped from and start from a point within this state. Of course, when the alcohol mentioned in these code sections is "received" or "possessed," it must necessarily be received or possessed within this state. Any other conception would be absurd.

It will be noticed in this connection that when the Legislature in section 3 of the act of 1917, the section following section 2 containing the clause under consideration, uses the word "shipped" in the objective sense—the sense of coming towards the point of destination—where it refers to the receipt in this state of incoming shipments from without the state, uses the phrase "have shipped." This would indicate that the word "shipped" used in this clause in the act is to be given the subjective construction suggested.

The word "shipping" is defined by Mr. Justice Hall in *Robertson v. Wilder & Co.*, 69 Ga. 345, as "putting the cargo into a vessel." Webster's New International Dictionary defines the verb "ship":

"To put for transportation aboard a vessel."

The Century Dictionary defines it:

"To put or take on board a ship or vessel; as, to ship goods at Liverpool for New York. To send or convey by ship. To deliver to a

common carrier * * * for transportation;
* * * as, to ship by express"

—quoting from Child's Ballads:

"The tane is shipped at the pier of Leith,
The tother at the Queen's Ferrie."

Bouvier's Law Dictionary defines "shipper" as:

"One who ships or puts goods on board a vessel to be carried to another place."

Abbott's Law Dictionary, referring to the word "shipper," says:

"Shipper generally means one who places his goods on board a vessel for transportation."

Rapalje & Lawrence's Law Dictionary says a "shipper" is:

"The owner of goods who entrusts them on board a vessel for delivery abroad."

See 7 Words and Phrases (First Series) p. 6487; 4 Words and Phrases (Second Series) p. 571.

In *State v. Carson*, 147 Iowa, 561, 126 N. W. 698, 140 Am. St. Rep. 330, it is held:

"The words 'ship' and 'shipment' are * * * used to express the idea of goods delivered to carriers for the purpose of being transported from one place to another. * * * The ordinary meaning of the word 'shipped' is to load for transportation."

In *Bowes v. Shand*, L. R. 2 App. Cases, 455 (House of Lords), the court was unanimous in the opinion that the word "shipped," according to its natural and ordinary signification, was "the putting of goods on board." It was said in that case by Lord Hatherley:

"I think the meaning of the word 'shipped' is sufficiently understood by this time in commerce. But if it were needed, I think we have sufficient evidence before us that by the word 'shipped' all the witnesses understood 'put on board.' I read the contract therefore as if it said 'put on board,' etc.

See, also, *Ledon v. Havemeyer*, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245; *Fisher v. Minot*, 76 Mass. (10 Gray) 260.

In the language of the court in *State v. Carson*, cited supra, "the court is not to presume that the Legislature intended the word 'ship' to mean something different from its ordinary signification."

The Legislature of this state in adopting the clause under consideration, providing for the shipment of alcohol, did not intend to prescribe rules and regulations governing the manner in which a shipment may be begun or initiated in a foreign state beyond its jurisdiction. It certainly will not be presumed that the Legislature intended to exceed its powers and go beyond its jurisdiction and enact a futile and inoperative statute. "Extra territorium jus dicenti impune non paretur." Giving to the word "shipped" any signification other than its use in the

subjective and ordinary sense, as defined above, would be to hold that the Legislature intended to enact just such an inoperative and ineffective statute, and meant to control shipments made in other states. Section 2 of the act of 1917 must for this reason be construed as authorizing and legalizing shipments of pure alcohol for medicinal purposes between points within this state. The majority opinion of this court, I respectfully suggest, ignores the first or subjective idea of "shipping," and plants itself upon the two ideas of "receiving" and "possessing" only. This, I take it, is not the true construction to be placed upon section 2 of this act.

How is a shipment, in its accepted sense of being put on board a carrier, provided for in section 3, when, according to the terms of this section, no such shipment is made from a point within this state? How can alcohol in this state be "shipped" or put on board in accordance with the provisions of section 3, which makes no provisions for such shipments, but only provides for the possession or receipt of alcohol from other states? The answer is this: The word "shipped" as used in section 2, in addition to the idea of being put on board a ship or carrier, contains the further idea of transportation, i. e. *transported, hauled, or carried* from the point of shipment. See Kipling's "Ship me somewhere east of Suez." Unless the idea of transportation or movement from the shipping point is lodged somewhere between the ideas "shipped" and "received," the alcohol when "shipped" merely would remain stationary, and would not be transported or carried away. So when alcohol mentioned in section 2 is transported, shipped, or carried, or hauled from a shipping point within this state, it is transported, shipped, or carried, or hauled as provided in section 3, which section provides that the carrier may "transport, ship or carry * * * pure alcohol." Furthermore the instrumentality by which such alcohol is "shipped" or "carried," under the provisions of section 3 is by a "common carrier," and not otherwise. Therefore, the alcohol referred to in section 2 must be "shipped" only as provided in section 3, i. e., by a *common carrier*. Construing the two sections 2 and 3 together, I take it that they mean that pure alcohol may be shipped and transported from a point within this state to another point within this state, and shall be so shipped and transported by a *common carrier* only, and that these sections do not mean that only interstate shipments shall be made. It can readily be seen that the Legislature, for police regulation, would restrict the means of transportation to *common carriers*.

If section 2 of the act of 1917 is ambiguous or susceptible to two constructions, I am unwilling to presume that the Legislature of this state, when authorizing the sale and use of pure alcohol within this state, as it does

in section 2 of the act of 1917 and the act of 1907 there ratified, intended to discriminate against its own wholesale druggists in favor of those of other states by denying the means of transportation to the former while permitting the same to the latter. For this reason, if the language of the act does not imperatively demand the view taken by my Colleagues in the majority opinion, I must give to section 2 a construction that will permit the citizens of this state to do business within this state on an equal footing with citizens of other states. However plausible may be the view taken in the majority opinion, it curtails the rights and privileges of the common carriers and citizens of this state. It is in derogation of the common law and common right. Sound judicial policy, therefore, precludes any such construction upon a purely statutory enactment unless its unambiguous terms imperatively so demand.

The act of 1907 (Penal Code, §§ 426 to 430, inclusive) provides that pure alcohol may in wholesale quantities be furnished by "wholesale druggists" to "regular licensed retail druggists," and others. It seems to be conceded in the arguments and briefs that the shipment as made by the defendant carrier in this case was a wholesale shipment as provided in the act of 1907. However that may be, in my opinion the act of 1907 is to be construed as recognizing pure alcohol in excess of one pint as "wholesale quantities." Therefore, when transported in wholesale quantities as authorized by the act of 1907, as declared and reaffirmed by the act of 1917, such alcohol must be shipped from one authorized by the act of 1907 to sell or furnish it, viz. a "wholesale druggist" within this state, to one authorized to receive it within this state.

Did the Southern Express Company, a common carrier, ship or transport a consignment of pure alcohol in wholesale quantities from and to such persons as is provided by law? The shipment was without doubt received from one authorized to ship under the act of 1907, namely, a "wholesale druggist," but whether it was transported by

the defendant to one who was authorized to receive it is not quite so clear. It was consigned to one Dr. H. G. Fussell, at Camilla, Ga., a person, who, it subsequently appears, was not within the class authorized to receive such shipments. It would seem that, in order to defend against a criminal charge of transporting prohibited liquors between points within this state, it must appear that a wholesale shipment of pure alcohol was received for transportation by the defendant carrier from one authorized to ship it under the law, such as a wholesale druggist, and it must appear that said carrier transported the same only for the purpose of delivering it on one authorized to receive it. There being nothing to put the defendant carrier on notice that said shipment was not consigned to a person authorized to receive it under the law, there could in this respect be no blame attached to the defendant carrier, in the absence of an intent on its part to haul such shipment to an unauthorized person. Upon the seizure of the alcohol by the sheriff before the delivery of the same to the consignee by the defendant carrier, the defendant's further responsibility ceased, and, without more, the defendant carrier did not violate any criminal statute of this state.

The Southern Express Company, defendant in this case, a common carrier, having received a wholesale shipment of pure alcohol from a wholesale druggist within this state, for the purpose of transporting the same to another point within this state, and with the intention to there deliver it to a person authorized to receive it, acted within its legal rights and violated no criminal law. The conviction, therefore, under the first count in the indictment was contrary to law. The possession of such alcohol being necessary to its transportation, which transportation was not criminal, but in accordance with law, such possession by said common carrier was perfectly legal, and a conviction cannot be sustained under the second count of the indictment. I am of the opinion that the judgment should be reversed.

(23 Ga. App. 392)

MASHBURN DRUG CO. v. STATE.
(No. 9947.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919.)*(Syllabus by the Court.)***COMPANION CASE.**

This is a companion case to that of Southern Express Co. v. State (No. 10132) 98 S. E. 272, this day decided by this court, and grew out of the same transaction, was tried by the judge on the same agreed statement of facts, and the principle announced in the first head-note and discussed in the first subdivision of the opinion in that case controls this case.

Stephens, J., dissenting.

Error from Superior Court, Mitchell, County; W. M. Harrell, Judge.

The Mashburn Drug Company was adjudged guilty of an offense, and it brings error. Affirmed.

E. K. Wilcox, of Valdosta, for plaintiff in error.

R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper, of Atlanta, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., concurs.
STEPHENS, J., dissents.

(177 N. C. 125)

CRADDOCK v. BRINKLEY. (No. 11.)(Supreme Court of North Carolina. Feb. 19,
1919.)**1. JUDGMENT ⇨518—COLLATERAL ATTACK.**

A proceeding to set aside a consent judgment against plaintiff, on the ground that she was then insane and not represented by guardian, *held* a direct proceeding to set aside the judgment, and not a collateral attack.

2. JUDGMENT ⇨406—SETTING ASIDE—PROCEDURE.

Where the ground alleged for setting aside a judgment is not based on fraud, the proper remedy is by motion in the cause; but when a party by mistake brings an independent action, the court may treat the summons and complaint as a motion in the original cause, where brought in the same county.

3. INSANE PERSONS ⇨100 — JUDGMENT AGAINST INSANE WIFE.

Where plaintiff was then insane, she could not be represented by her husband in the matter of a consent judgment against her as to boundary line of her separate land, and the judgment is voidable.

4. HUSBAND AND WIFE ⇨238(1)—MARRIED WOMAN—JUDGMENT BY CONSENT.

Under Revisal 1905, § 563, subd. 4, expressly providing that judgments may be taken

against married women, whether plaintiff or defendant, the same as against other persons, husband need not be joined; but, where they sue jointly, he is *prima facie* her authorized agent, with authority to consent to judgment against her.

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action by Sallie A. Craddock against David O. Brinkley. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff, a married woman, owned land adjoining the defendant. Prior to 1906, controversy arose as to the line of division between the two tracts, and a suit was instituted in the name of herself and husband against the defendant. Summons was issued, but it does not appear that any pleadings were filed. At the time of the commencement of the suit in 1906 the plaintiff was insane. No next friend was appointed for her, and at fall term, 1906, of Washington, what purports to be a consent judgment was signed, establishing the line giving the defendant 20 acres of land, which the jury now find belonged to the plaintiff. The plaintiff at that time was insane and confined in an asylum, and it appears that the husband, after conference with defendant's attorney, accepted \$50 in consideration of which the judgment was entered.

Ward & Grimes, of Washington, N. C., for appellant.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., Meekins & McMullan, of Elizabeth City, and Z. V. Norman, of Plymouth, for appellee.

CLARK, C. J. The jury find that the plaintiff was insane and confined in an insane asylum at the time the former action was instituted, and also at the time the consent judgment was entered, and that the 20 acres in controversy are her property. The defendant enters two assignments of error: (1) That this proceeding cannot be maintained, because it is a collateral attack upon the former judgment, and that plaintiff's remedy is by a motion in the cause. (2) That the judgment in the former action is an estoppel on the plaintiff, and conclusive, because the action was brought in the joint name of her husband and herself, and that he was her legal representative in the action.

[1, 2] As to the first proposition, this is not a collateral attack, but a direct proceeding to set aside the judgment. The insanity of the plaintiff, and the invalidity of the judgment for that reason, are alleged, and there are both ground and prayer to set aside the judgment and also a demand for the recovery of the property. It is true that, when the ground alleged for setting aside the judgment

is not based upon fraud, the proper remedy is by motion in the cause; but we have no distinct forms of action now, and it has been held that when a party by mistake brings an independent action, when his remedy is by motion in the original cause, the court may, in its discretion, treat the summons and complaint as a motion. *Jarman v. Saunders*, 64 N. C. 367. It is true that an independent action, when brought in another county, cannot be treated as a motion in the cause (*Rosenthal v. Roberson*, 114 N. C. 802, 19 S. E. 667); but that does not obtain here, as the proceeding is in the same county.

[3] As to the second point, the jury having found that the plaintiff was insane, she could not be represented by her husband, since, even if she had been present in person or by counsel, the judgment would have been invalid. The judgment was not void, but voidable as between the parties (*Thomas v. Hunsucker*, 108 N. C. 724, 13 S. E. 221), and on the finding of the jury was properly set aside. The same would have been true as to a deed executed by her. *Odom v. Riddick*, 104 N. C. 515, and cases cited in the Anno. Ed., 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686.

[4] Revisal, § 563 (4), expressly provides that judgment may be taken against a married woman, whether plaintiff or defendant, "in the same manner as against other persons," and we would not be considered as affirming the ruling (by a divided court) in *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129, in which it was held that a wife would not be bound by her assent in person in open court to a compromise judgment in an action to which she is a party defendant; but we rest our decision upon the proposition that though when she and her husband sue or are sued jointly, he is ordinarily to be taken as her authorized agent, when she is not present in person or by counsel. *Smith, C. J.*, in *Vick v. Pope*, 81 N. C. 22; *Neville v. Pope*, 95 N. C. 346; *Grantham v. Kennedy*, 91 N. C. 148, and cases cited thereto in the Anno. Ed. In this case, the jury having found that when the writ was issued by her husband in their joint names, and also when the judgment was taken, the plaintiff was insane, it follows that he could not have been authorized to assent to the judgment as her agent, and the judgment was voidable in this proceeding.

It was not necessary that the husband should be joined in the action; but, being joined, prima facie he was acting as her agent. "In no case need she prosecute or defend by a guardian or next friend." Revisal, § 408.

Though there is no counterclaim set up in the answer, the plaintiff's counsel assents in this court—to avoid the necessity of another action—that judgment may be taken against her for the \$50 paid her husband by defendant in 1906, with interest thereon from date

of such payment. This entry may be made in the court below, when the certificate of this judgment on appeal is filed.

No error.

BROWN, J., not sitting.

(177 N. C. 551)

STATE v. BUSH. (No. 1.)

(Supreme Court of North Carolina. Feb. 19, 1919.)

1. CRIMINAL LAW ⇨1172(7) — APPEAL — INSTRUCTION FAVORABLE TO APPELLANT.

In prosecution for having possession of 16 gallons of whisky for purposes of sale, instruction that the jury should return verdict of guilty, if it found beyond reasonable doubt that defendant had charge of the liquor and had it in his possession for the purpose of sale, was not error of which defendant could complain, being favorable to defendant, in view of Laws 1913, c. 44, § 2, making possession of more than one gallon of whisky evidence of intent to sell.

2. CRIMINAL LAW ⇨1172(7) — TRIAL — INSTRUCTIONS—CONSIDERATION OF EVIDENCE.

Instruction charging the jury to consider and discuss the evidence, and convict defendant if guilt has been shown beyond a reasonable doubt, held not error of which defendant could complain.

3. CRIMINAL LAW ⇨1159(1)—REVIEW—CONSIDERATION OF EVIDENCE.

Where jury has convicted defendant of committing an act which is usually done by evasion or indirect means, the courts should be slow in finding that there was no evidence in the case.

4. CRIMINAL LAW ⇨330—BURDEN OF PROOF—DEFENSE.

Defendant is not called upon to prove himself innocent.

5. INTOXICATING LIQUORS ⇨236(7) — SUFFICIENCY OF EVIDENCE—POSSESSION WITH INTENT TO SELL.

In prosecution for having 16 gallons of whisky in possession for purposes of sale, evidence held to prove guilt beyond a reasonable doubt, in view of Laws 1913, c. 44, § 2, and in view of Revisal Supp. 1913, § 2080b(2), making possession of more than one gallon evidence of intent to sell.

6. CRIMINAL LAW ⇨407(1)—EVIDENCE—ADMISSIONS.

That a man charged with a crime makes no denial is in itself competent evidence.

7. INTOXICATING LIQUORS ⇨236(7) — KEEPING FOR SALE—CONSTRUCTIVE POSSESSION.

In prosecution for having liquor in possession for purposes of sale, constructive possession of more than one gallon of whisky was sufficient to justify finding that the liquor was for purposes of sale, Laws 1913, c. 44, § 2; Revisal

Supp. 1913, § 2080b(2), making possession prima facie evidence of intent to sell.

8. INTOXICATING LIQUORS ⇨242—CRIMINAL PROSECUTION—SENTENCE.

A sentence to 4 months in jail of defendant, convicted of having 16 gallons of whisky in his possession for purposes of sale, was not excessive.

9. CRIMINAL LAW ⇨1217—SENTENCE—WORK ON PUBLIC ROADS.

In sentencing defendant, convicted of having 16 gallons of whisky in his possession for purposes of sale, to 4 months in jail, the court was authorized to give permission to work defendant on the public roads.

Appeal from Superior Court, Pasquotank County; Bond, Judge.

Charles Bush was convicted of having whisky in his possession for the purpose of sale, and he appeals. No error.

The defendant was indicted and convicted in the recorder's court for having in his possession 16 gallons of whisky for the purposes of sale. On appeal to the superior court he was again convicted and appealed.

Aydlett, Simpson & Sawyer, of Elizabeth City, for appellant.

James S. Manning, Atty. Gen., Frank Nash, Asst. Atty. Gen., and J. C. B. Ehringhaus, of Elizabeth City, for the State.

CLARK, C. J. The chief point pressed on the argument here was the refusal of the court to charge that "if the jury believed all the evidence to return a verdict of not guilty." The evidence against the defendant in the record, and as fairly summed up by the trial judge, is that the defendant about 10 a. m. came to the witness Will Morris, the owner, and in charge of the stable, which was locked and not in use, and asked permission to have a trunk put in there. Morris says that he gave the defendant the key to the stable, and soon after that he saw a trunk in the stable, and that defendant did not return the key to him. Chief of Police Thomas testified that he went to the stables and found the trunk, and that it had 48 quarts of liquor in it. He had a search warrant, but he could not find the defendant, who left town that night about midnight, and was brought back from New Bern by an officer, to whom papers had been sent for his arrest.

Morris, the owner of the stable, further says that the chief of police, Thomas, got the trunk which he saw in the stables, that Bush never came back for the trunk and never returned the key, that Bush in talking to him may have said that he would have two trunks to put in there. He says that he saw the trunk sitting in there between 10 and 2 o'clock, and there was no other trunk there

that day; that the door was open, and that the defendant was in the habit of carrying trunks about, with different sets of harness with him, which he used for race horse purposes.

The witness Gray, a colored drayman, says that he hauled a trunk that day; that he put it in Mr. Morris' stables; that the trunk was brought to him on a truck; that the truck came from the direction of where the cars were, though he did not see it brought out of the car; that in fact he hauled two trunks at that time, which was about 10 o'clock, and put them in Morris' stables; that he never saw the man before who got him to haul the trunk out there, but it was not the defendant; that he does not know whether the trunks came out of the car or not; that the man who got him to haul the trunks was not the defendant, and that the man asked him if he knew where Morris' stables were.

The chief of police further testified that he went to the car, and found the horse in there and 12 cases of liquor, and that about dusk he saw this trunk (which was in court) in Morris' stables, and that it had 48 quarts of liquor in it; that he arrested a man whose name was Al Bush, who he noticed was dodging him, and used the searchlight on him. He found him in another stable.

It appears that Al Bush was convicted, and does not appeal, and presumably the evidence as to him is not in this record. The case stands, therefore, upon the above evidence, uncontradicted (for the defendant did not go on the stand or put on any evidence), that the defendant Charles Bush got the key from Morris, the owner of the stables, expressing the wish to put a trunk therein. A trunk was there about midday, and was searched about dusk by the chief of police, who found 48 quarts of liquor in it. There is no explanation by or for the defendant, to whom he gave the key, nor to contradict the presumption that this was his trunk, nor any explanation why, when the search warrant was issued for the trunk, he was not present, and why he left later that night for New Bern, and was brought back by an officer under a capias issued for him in this case.

It is true that the colored drayman says that he hauled two trunks to Morris' stables that day for a man that he did not know, whom he had never seen before, and would not recognize at the trial. Whether this "unknown" stranger acted in collusion with the defendant, or was the agent of the defendant, is a matter of inference, and there was no direct evidence as to this.

There was evidence that two horses were shipped into Elizabeth City that morning, and that the car in which they came, and from which it seems that the trunk or trunks was taken, when searched, contained 12 cases

of whisky hidden under the straw, and that the defendant and his father were down at that point that morning, before the trunk was hauled to Morris' stables.

[1] The illicit sale of whisky, or the possession of it for the purposes of sale, is, like the crime of larceny, generally done furtively, and direct evidence is not easily had. It is usually an inference to be drawn by the jury from a combination of circumstances. The court told the jury:

"If you find that this evidence shows beyond a reasonable doubt that this man had charge of that liquor, and had it in his possession for the purpose of selling it to other people, and you find that these two facts are shown beyond a reasonable doubt, it would be your duty to return a verdict of guilty."

This was too favorable to the defendant, for, if the defendant was in actual or constructive possession by having control, the statute makes it evidence of the intent to sell, if there is more than one gallon. Laws 1913, c. 44, § 2.

[2] The court further charged the jury:

"The trial of a man is a serious matter, and service upon a jury is one of the most serious responsibilities that a citizen can render. You should review the evidence, talk it over with each other, and then ask yourselves the question: 'Has it been shown beyond a reasonable doubt in this case that the defendant is guilty?' If you say it has, return a verdict of guilty. If you say it has not, then return a verdict of not guilty."

The defendant excepted to these two instructions, but we find no error therein of which he can complain.

[3] When 12 impartial jurors, sworn to render a true verdict according to the evidence, have found that there was sufficient evidence to convince them beyond a reasonable doubt that the defendant has committed an act which is usually done by evasion and indirect means, the courts should be, and are, slow to find that there was no evidence in the case.

[4, 5] This offense is one that is committed from one of the lowest of motives, that of making profit by a violation of the laws of the state, and while the defendant is not called upon to prove himself innocent, we think there was sufficient evidence to create a belief beyond a reasonable doubt of the defendant's guilt, especially when there was no evidence to explain why a trunk, placed in Morris' stables by the use of a key which he obtained from Morris for that purpose, contained the liquor in question, and his simultaneous disappearance from town when the trunk was searched.

[6] When a man is charged with crime, and makes no denial, that of itself is competent evidence to go to the jury. Here the defendant was so charged by the search war-

rant. He did not come forward and deny that the trunk was his, or that the liquor was there without his knowledge, but, on the contrary, left town that night. We do not feel justified in holding that the verdict of the jury, of the 12 good men and true, was based upon no evidence whatever.

[7] The possession of more than one gallon of whisky justified the jury in finding that the defendant had it for purposes of sale. Laws 1913, c. 44, § 2; Gregory's Supp. § 2080b(2). And constructive possession is sufficient. State v. Lee, 164 N. C. 533, 80 S. E. 405.

[8, 9] The defendant also excepted because he was sentenced to four months in jail, but this was not excessive (State v. Denton, 164 N. C. 530, 80 S. E. 401), and the permission given by the court to work the defendant on the public roads was authorized (State v. Hicks, 101 N. C. 747, 7 S. E. 707; State v. Farrington, 141 N. C. 844, 53 S. E. 954).

No error.

BROWN, J., not sitting.

(177 N. C. 128)

RICE v. METROPOLITAN LIFE INS. CO.
(No. 15.)

(Supreme Court of North Carolina. Feb. 19, 1919.)

1. INSURANCE ~~§~~138(1) — FRAUD — RELIANCE ON REPRESENTATIONS.

Even if insured accepted a policy under false representations that she could have a return of premiums at the expiration of a certain time, yet, since the policy plainly provided otherwise, and the agent urged insured to read the policy, which she did, and had others read it to her, it must be held that she did not rely on the representations.

2. INSURANCE ~~§~~141(4)—FRAUD—WAIVER.

Where insured was induced to take a policy upon representations that she could have the premiums returned at a given time, and, after learning that the policy was not as represented, she paid several premiums, she waived the alleged fraud.

Appeal from Superior Court, Beaufort County; Devin, Judge.

Action by Lina Rice against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Two causes of action are stated in the complaint. The first alleges that the defendant issued to the plaintiff a policy of insurance on the 3d day of October, 1904, and that the plaintiff was induced to accept the policy and pay the premiums thereon by false and fraudulent representations of the agent of the defendant that, if she would pay the

weekly premiums for a period of 12 years or more, she could then get back all the premiums paid, and the second alleges the right of the plaintiff to have a paid-up policy of insurance issued to her.

The defendant denied that any false representations were made by its agent, but agreed to issue a paid-up policy as demanded in the second cause of action.

The action was tried before a jury on the first cause of action, and the jury returned the following verdict:

"(1) Did defendant's agent at the time of delivering the policy of insurance, and as a part of the transaction of its execution, falsely and fraudulently represent to the plaintiff that, if she would take the policy and pay the premiums 12 years, she would under the terms of the policy be entitled to receive her premiums if she so elected? A. Yes.

"(2) If so, was the plaintiff reasonably deceived thereby, and caused to rely on said statement and unable to understand from the policy that the representation was false? A. Yes.

"(3) Did defendant's agent wrongly and incorrectly read the policy to the plaintiff, and, if so, was she deceived thereby and caused to take out the policy? A. Yes.

"(4) Did the plaintiff more than three years prior to the commencement of the action discover, or would she in the exercise of reasonable care have discovered, that any statement alleged to have been made by the agent that she could get her premiums back at the end of 12 years was untrue and contrary to the provisions of the policy? A. No.

"(5) What damage, if any, is plaintiff entitled to recover? A. \$312."

Judgment was entered in favor of the plaintiff, and the defendant appealed, presenting in several exceptions the contention that the plaintiff was not entitled to recover upon her own evidence.

Small, McLean, Bragaw & Rodman, of Washington, N. C., for appellant.

Ward & Grimes, of Washington, N. C., for appellee.

ALLEN, J. [1, 2] The policy issued by the defendant to the plaintiff is singularly free from ambiguous and uncertain language, and it contains express provision that it may be surrendered within two weeks of its date and the premiums paid recovered, if not satisfactory, thus affording opportunity to become familiar with its terms.

The plaintiff testified that the agent who sold the policy read it to her, and she does not say it was read incorrectly. She also says she did not think the agent understood the policy himself, and that he told her to get others to read it for her. He "didn't do anything to keep me from reading it, and he suggested to me to get other people to read it to me." The plaintiff can read and write. She read the policy, and others read it to her. Seven months after the policy was issued she

told the agent she did not believe it was "any good." In 1908, four years after the date of the policy, she demanded of the defendant the return of the premiums paid, claiming that the agent of the defendant represented to her that she could get her money back at any time, and this demand was refused, and in 1912, desiring to change the beneficiary, she had Mr. Cave, whom she said she had found correct in all his dealings, to read the policy to her. She continued to pay the premiums until 1916.

These facts are disclosed by the evidence of the plaintiff, and they preclude a recovery upon the ground of false representations, because an investigation of the contents of the policy was not only not prevented, but was invited, and the means of information were equally open to both parties.

"The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained." *Slaughter's Adm'r v. Gerson*, 80 U. S. (13 Wall.) 383, 20 L. Ed. 627.

The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

"The true rule is stated to be that the seller is liable to an action of deceit, if he misrepres-

sent the quality of the thing sold, in some particulars in which the buyer has not equal means of knowledge with himself, or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. 2 Kent's Com. 487. The misrepresentation must be of a kind, the falsehood of which was not readily open to the other party. Per Taylor, C. J. *Fagan v. Newsom*, 1 Dev. 22." *Saunders v. Hatterman*, 24 N. C. 85, 37 Am. Dec. 404.

These authorities are reviewed in *County v. Construction Co.*, 152 N. C. 29, 67 S. E. 40, and the principles stated as follows:

"The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributed to indifference or credulity; nor will industrious activity in other directions, to the neglect of such means, be of any avail. *Andrus v. Smelting & Refining Co.*, 130 U. S. 648 [9 Sup. Ct. 645, 32 L. Ed. 1054].

"If the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. *Farrar v. Churchill*, 135 U. S. 616 [10 Sup. Ct. 771, 34 L. Ed. 246].

"Our cases are in perfect accord with those decisions and the great weight of authority upon the important question now before us. We said in *Eagin v. Newsom*, 121 N. C. 22: 'It is a very reasonable principle that the purchaser should not be entitled to an action of deceit if he may readily inform himself as to the truth of the facts which are misrepresented.' See, also, *Cash Register Co. v. Townsend*, 137 N. C. 658 [50 S. E. 306, 70 L. R. A. 349]; *Lytle v. Bird*, 48 N. C. 225; *Saunders v. Hatterman*, 24 N. C. 32 [37 Am. Dec. 404]."

At the last term it was held in *Arndt v. Insurance Co.*, 97 S. E. 631, that one who could read and write and had kept a policy without reading it and had paid the premiums for nine years could not recover the premiums paid upon the ground that he had been induced to accept the policy by the fraudulent representations of the agent of the defendant, and the facts in this case are stronger against the plaintiff, because here she read the policy herself, had others upon whom she relied to read it for her, shows that she did not rely upon the representations within seven months after the policy was issued, knew in four years that the company had repudiated the alleged representations by refusing to return her money, and thereafter continued to pay the premiums for a period of twelve years.

We are therefore of opinion that the plaintiff cannot recover upon the first cause of action, and that she is entitled to have the de-

fendant issue to her a paid-up policy, which it has agreed to do.

The facts in the case of *Hughes v. Insurance Co.*, 156 N. C. 592, 72 S. E. 1101, are entirely different from those in this case. In the *Hughes Case* the plaintiff could not read or write. The policy was read and explained by the agent, no one else read it to him, and the agent did not suggest that the insured should make further investigation himself or get others to do so for him.

Reversed.

BROWN, J., not sitting.

(112 S. C. 151)

SPRADLEY v. GEORGIA HOME INS. CO.
(No. 10159.)

(Supreme Court of South Carolina. Feb. 10, 1919.)

1. INSURANCE ~~668~~(15)—WAIVER OF CONDITION IN FIRE POLICY—EVIDENCE.

What insured told agent of company with reference to ownership of land upon which house stood held insufficient to authorize submission to jury of question whether company waived provision of fire policy, that it should be void if building insured was on ground not owned by insured in fee.

2. INSURANCE ~~282~~(1)—FIRE INSURANCE—MISLEADING STATEMENTS OF INSURED.

Where fire policy, providing that it should be void if insured building was on ground not owned by insured in fee, was obtained by misleading statements as to ownership of land, there could be no recovery.

3. INSURANCE ~~179~~—FIRE INSURANCE—DIVISIBLE POLICY.

Policy providing that insurer undertakes to insure at a certain rate on the hundred, and that insurance is intended to be \$700 on frame building and \$300 on piano, is divisible, and the fact that insured was not sole and unconditional owner of personal property as required by policy, will not defeat recovery for destruction of building by fire.

Appeal from Common Pleas Circuit Court of Aiken County; Ernest Moore, Judge.

Action by M. W. Spradley against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

The following are the reasons of the lower court for holding the policy divisible:

The defendant contends that the policy stipulates that the entire policy shall be void if the title to the property covered thereby is not in the party insured. It seems to me that where the policy reads as it does here, that the insurer is undertaking to insure at a certain rate stated in the policy, as \$1.50 on the hundred,

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

¹ This citation should be *Fagan v. Newsom*, 12 N. C. 22.

and where the policy states that the insurance is intended to be \$700 on the frame building, and \$300 on the piano, that those are separate items of insurance, and that the fact that the policy provides with reference to personal property that the party must be the sole and unconditional owner of the personal property, when he cannot recover upon that, that does not make that an entire contract so as to defeat any right of recovery on account of the \$700 insurance on the building. In other words, I think the policy is susceptible of division on its face, and there is nothing to show, and on the contrary the inference is, that they were insuring those as to separate items of insurance, and the rate being stated, the fair conclusion from the terms of the policy is that that rate applied to \$700 on the building, at \$1.50 per hundred, and insurance on the piano at the same rate. Consequently I overrule the motion for a nonsuit or direction of a verdict upon that ground.

Hendersons, of Aiken, for appellant.

Croft & Croft, of Aiken, for respondent.

WATTS, J. This action is on an insurance policy. The policy covered a home and a piano. The home was situated on the property of another than the insured, and the piano was the property of another. The undisputed testimony establishes these facts. The building was erected under a verbal lease for three years. It does not appear that there was any stipulation therein permitting the insured to remove the building. The case was tried before Judge Moore and a jury at the April term of court, 1918, for Aiken county. During the trial the issue of waiver as to the house arose. After all of the evidence was in the defendant made a motion for a directed verdict in its behalf. His honor directed a verdict as to the claim for loss of piano, but refused as to claim for loss of house, but submitted to the jury on this issue the question of waiver. The jury rendered a verdict in favor of plaintiff for \$700 and interest. After entry of judgment, defendant appealed, and by four exceptions alleges error in two particulars on the part of Presiding Judge Moore:

[1] First, that he erred in holding that there was sufficient evidence to submit to the jury the question of defendant's knowledge of the ownership of the land, and that he should have directed a verdict for defendant on the whole case.

There is no doubt that the plaintiff breached the condition of his policy as to the ownership of the land upon which the building was situated. There is nothing in the evidence to show a waiver of this condition of policy. Among the conditions that would render the policy void unless provided for by agreement in writing added to the policy is "if the interest of the insured be other than" unconditional and sole ownership, or if the

subject of insurance be a building on ground not owned by insured in fee simple, etc.

[2] The insurance company has the right to know what insurable interest the insured had in the property for its own protection, whether in fee-simple life estate for a year, or a term of years. Experience teaches us that the owner of a house is more circumspect and careful in looking after it than a tenant or one who leases. There is no question but that moral hazard is much better when the insured is the owner in fee of house insured. The risk is not so great. The agent of the insurance was misled when the insured said that it was part of the Ben Turner land, near the place he called "home." This was simply a designation of its location, and carried with it no notice of ownership. It was the duty of the insured to tell agent whether he owned or leased the land. And he did not tell the agent enough, as to the ownership of the land, for the question of waiver to be submitted to a jury. Under misleading statements, a policy is procured, and a short time afterwards the property is burned and the plaintiff is awarded the full amount of the policy, as if he were the owner in fee.

[3] These exceptions must be sustained. His honor should have directed a verdict for defendant as asked for. The exceptions raising the question that his honor was in error in holding that the policy was divisible are overruled, for the reason stated by his honor in his ruling on this question in the circuit court.

Judgment reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 394)

RAGIN v. NORTHWESTERN R. CO. OF
SOUTH CAROLINA et al. (No. 10139.)

(Supreme Court of South Carolina. Jan. 28, 1919.)

1. PLEADING \S 8(3)—CONCLUSIONS OF LAW
—JOINT CONVERSION.

An allegation, without stating facts or circumstances, is not sufficient to show a joint conversion of goods by a carrier and the consignor.

2. ACTION \S 50(4)—JOINDER OF CAUSES OF ACTION—CONSIGNEE AND CARRIER.

A consignee is not liable with the carrier for loss of his goods in transportation, nor does the carrier become liable with the consignee for the latter's failure to account to the consignor for the goods upon receipt.

Appeal from Common Pleas Circuit Court of Clarendon County; John S. Wilson, Judge.

Action by C. H. Ragin against the Northwestern Railroad Company of South Carolina and Henry W. Frost & Co. From orders of trial court overruling demurrer to the complaint and ordering its amendment so as to show a joint obligation of defendants, and dismissing complaint on failure to so amend, plaintiff and Henry W. Frost & Co. both appeal. Affirmed as to plaintiff, and reversed as to defendant Frost & Co.

Purdy & O'Bryan, of Manning, and Frank R. Frost, of Charleston, for appellants.

J. J. Cantey, of Summerton, for respondent.

WATTS, J. The appeal involved in this case is from orders of his honor, Judge Wilson. Both plaintiff and defendant Henry W. Frost & Co. appeal from said orders of his honor. The issues in this case are the "aftermath" of the case between same parties in the case reported in 108 S. C. 171, 93 S. E. 860. After that opinion was filed the plaintiff asked and was granted a nonsuit in the magistrate's court, and commenced the present action in the court of common pleas. Henry W. Frost & Co. appealed from the orders of Judge Wilson dated June 25, 1918, respectively, and C. H. Ragin appealed also from the order of date July 28, 1918.

The first, second, and fourth of Henry W. Frost & Co.'s exceptions raise the question whether the plaintiff has complied with Judge Wilson's order, and alleged a joint obligation between the defendants. If he has not done so, then he does not state a cause of action against Frost & Co. Under the facts of the former decision in this case, there is not a particle of doubt that there never was a joint possession of the bale of cotton, the subject-matter of the suit, or a joint tort between the railroad and Frost & Co. If the railroad received the cotton as a common carrier consigned to Frost & Co., and delivered it to Frost, then its liability ceased, for the railroad had then done as it had contracted to do. If Frost received the cotton and failed to account, then Frost & Co. would be liable. The undisputed evidence in the former case shows that the railroad delivered the cotton to Frost & Co., and that Frost & Co., according to the allegation of the complaint, accounted in part.

[1] There is no sufficient allegation that there was a joint conversion. A mere suggestion, an allegation to that effect, without stating facts or circumstances to allege the facts, is not sufficient. When the plaintiff elected to allege, as he did in the former suit which was passed upon by this court, that the railroad received the cotton consigned to Frost & Co., then, under a proper showing, he could have held the railroad responsible if the railroad had failed to carry and deliv-

er to Frost. When, however, the railroad delivered to Frost the cotton, then its liability ceased; and if Frost & Co. received the cotton, and failed to account for the same, and plaintiff feels aggrieved, then he can sue Frost & Co. This court decided in the former case that there was no joint tort, and that the cause of action against Frost & Co. could not be tried in Clarendon county.

[2] There is no principle of law whereby a consignee becomes liable with the carrier for loss in transportation, or that the carrier becomes liable with the consignee for his failure to account. In the former case the court says, "Clearly, both are not liable." The facts conclusively show that the carrier is not liable. This leaves the matter open between plaintiff and Frost & Co., and Frost & Co. cannot be sued in Clarendon county. Under all of the exceptions the real question in the case is whether the complaint alleges a joint obligation between the defendants. There is none.

Plaintiff's exception overruled; Frost & Co.'s exceptions sustained.

Judgment reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(111 S. C. 463)

McCLURE v. HOME INS. CO. OF NEW YORK. (No. 10161.)

(Supreme Court of South Carolina. Feb. 12, 1919.)

1. APPEAL AND ERROR ¶231(3) — OBJECTION BELOW—ADMISSION OF EVIDENCE.

In an action on a hail policy, admission of evidence that agent who solicited insurance stated that he would adjust loss if it occurred could not be complained of in absence of specific objection.

2. APPEAL AND ERROR ¶1050(1) — ADMISSION OF INCOMPETENT TESTIMONY—HARMLESS ERROR.

Permitting plaintiff, suing on hail policy, to testify that agent who solicited application stated that he himself would adjust loss, held not prejudicial.

3. APPEAL AND ERROR ¶706(2)—GROUNDS OF MOTION FOR NEW TRIAL—PRESERVATION.

Grounds of motion for new trial not stated in the record are not properly before the court on appeal.

4. TRIAL ¶334 — VERDICT — UNCERTAINTY.

Verdict for a certain amount, with interest, etc., was not void for uncertainty, where it required only a mathematical computation to ascertain the full amount which the jury intended to award, since "that is certain which can be made certain."

Appeal from Common Pleas Circuit Court of Anderson County; James E. Peurifoy, Judge.

Action by W. J. McClure against the Home Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Bonham, Watkins & Allen, of Anderson, for appellant.

Watkins & Prince, of Anderson, for respondent.

HYDRICK, J. This was an action on a policy dated April 28, 1917, insuring plaintiff against damages caused by hail during that year to his crop of 300 acres of cotton to an amount not exceeding \$25 per acre. On April 20th the crop on part of the land was damaged by hail to the extent of \$190.73. That loss was adjusted and paid. On May 22d another hailstorm struck plaintiff's farm, and completely destroyed the crop on 200 acres, and damaged that on 100 acres to the extent of 40 per cent., as estimated and agreed upon by plaintiff and the agent of defendant who solicited plaintiff's application for the policy. According to this estimate, plaintiff's loss was \$6,000—\$5,000 on the 200 acres totally destroyed, and \$1,000 on the 100 acres partially destroyed—and, according to plaintiff's testimony, the agent promised to send him a check within a few days for the amount of the loss so agreed upon. But, instead of sending the check, the company sent two other agents to appraise and adjust the loss. These agents offered plaintiff, first, \$1,000, then \$1,200, and finally \$1,792—offers which plaintiff declined to consider, and brought suit on the policy. The jury found a verdict in his favor for \$5,809.73, with interest from July 23, 1917, at 7 per cent. per annum. From judgment on the verdict, defendant appealed.

[1, 2] The first assignment of error is in allowing plaintiff to testify that the agent who solicited his application for the policy assured him that, in case of loss, he (the soliciting agent) would himself adjust it. Appellant contends that this testimony was in conflict with the written stipulations of the application and policy, and that it was prejudicial, as appeared from the attitude of plaintiff to the other agents of defendant who were sent to adjust the loss.

The objection and contention are untenable for several reasons: When the objection was interposed no specific ground of objec-

tion was stated. The court asked plaintiff's attorney what was the purpose of the testimony. His reply was: "To show the understanding as to how the loss should be adjusted—who should adjust the loss." The court: "This policy shows how it should be adjusted. Go ahead." It does not appear that the loss was adjusted, or attempted to be adjusted, in any way contrary to the provisions of the policy. In fact it was not adjusted at all; and the action was not brought upon an adjustment of the loss, but upon the policy; and it does not appear that there is any provision of the policy that an action may not be brought upon it until after adjustment of the loss, or an effort to adjust it. The record contains no provision of the application or policy with regard to the matter of adjusting the loss, and there was no issue thereabout. It appears that the attitude of plaintiff to the adjusters sent out by the company was brought about rather by the insignificance of their offers, as compared with his actual loss, as claimed by him and found by the jury, than by any reliance upon the alleged agreement with the soliciting agent. Therefore, if the ground of objection had been stated, we fail to see wherein appellant was prejudiced by the testimony, though incompetent and irrelevant.

[3] The next contention is that the court erred in refusing a new trial. The ground or grounds of the motion for a new trial are not stated in the record, and therefore are not properly before us. But, assuming that they appear in the exceptions which assign error in sustaining the verdict, on the grounds that the evidence was insufficient to support it, and that the jury did not follow the instructions of the court (which were admittedly correct) as to the measure of damages, we find abundant evidence to support the verdict, and none that the jury did not follow the instructions given them in estimating plaintiff's damages.

[4] The last assignment of error is that the verdict is void for uncertainty because it was not for a certain amount, but for a certain amount with interest, etc. That is certain which can be made certain. It required only a mathematical calculation to ascertain with certainty the full amount which the jury intended to award. *Bank v. Bowie*, 1 McM. (26 S. C. Law) 430.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(83 W. Va. 380)

LONG v. POCAHONTAS CONSOL. COLLIERIES CO.

(Supreme Court of Appeals of West Virginia.
Feb. 11, 1919.)*(Syllabus by the Court.)***1. PLEADING \S 237(5)—VARIANCE—AMENDMENT AFTER VERDICT.**

Where on a trial objections are timely made to the introduction of evidence upon the ground of variance, or the question of such variance is otherwise seasonably presented, the pleader should not be permitted to amend his declaration or other pleading after verdict.

2. PLEADING \S 430(2)—VARIANCE—WAIVER.

Where the declaration or other pleading states a good cause of action, but broader than the contract or other liability proven, objection to the evidence or motion to exclude based on variance, not specifically stated to be on that ground, should after verdict be treated as waived and be disregarded.

3. PLEADING \S 430(1)—VARIANCE—FORM OF OBJECTION.

Objection to evidence or motion to exclude based on variance should be specifically stated in the objection or motion and not concealed under a general objection or motion, and after verdict the objection should be treated as coming too late and as waived.

4. PLEADING \S 237(4), 432—VARIANCE—CURE BY VERDICT—AMENDMENT.

If the evidence adduced on the trial by plaintiff or defendant shows a good cause of action or defense, a defect in the pleading should be regarded as cured by the evidence when after verdict either of the parties seek an advantage based on variance, or the pleader should be permitted to amend his pleading to correspond with the proof, and if no substantial rights of the parties will be injuriously affected thereby, the verdict or judgment should not be disturbed.

5. MASTER AND SERVANT \S 101, 102(1) 235 (1), 289(23)—TOOLS AND APPLIANCES—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

A master is bound to use reasonable care to provide his servant with reasonably safe machinery and implements with which to discharge his duties, and unless the defect occurs in the use thereof by the servant and is slight and easily remedied by the servant, the master will be liable to the servant for injuries sustained by him on account of such defect, unless it be clearly shown that under all the circumstances the defect was open and apparent and that the servant should by the reasonable use of his faculties have discovered the defect in time to avoid the injuries, generally a question of fact for the jury.

*(Additional Syllabus by Editorial Staff.)***6. INTEREST \S 21—ON VERDICT IN TORT ACTION.**

In actions ex delicto, interest is allowable from the date of the verdict of the jury.

Williams, J., dissenting.

Error to Circuit Court. Mercer County.

Action by J. A. Long against the Pocahontas Consolidated Collieries Company.

Verdict for plaintiff, and from a judgment setting aside the verdict, and awarding defendant a new trial, plaintiff brings error. Reversed, verdict reinstated, and judgment for plaintiff.

Minter & Minter, of Pocahontas, Va., and Sanders, Crockett & Kee, of Bluefield, for plaintiff in error.

S. C. Graham, of Tazewell, and A. W. Reynolds, of Princeton, Va., for defendant in error.

MILLER, P. This writ of error was awarded plaintiff to the judgment of the circuit court setting aside the verdict of the jury in his favor for ten thousand dollars and awarding defendant a new trial.

The record does not clearly disclose the ground or grounds upon which defendant was awarded a new trial. Of the grounds assigned the following only are now urged or relied on in support of the judgment: (1) The refusal of the court to give instructions 1A, 4 and 5 as propounded by defendant; (2) that the verdict was contrary to the law and the evidence. And as probably covered by these grounds the point is here urged that there was a fatal variance between the averments of the declaration and the proof, justifying the judgment.

The record shows that after the verdict and motion for a new trial and before judgment plaintiff asked but was denied leave to amend his declaration in certain particulars, so as to cure any defect or error therein and make it conform to the case proven by the evidence. The suit was for damages for personal injuries sustained by plaintiff while employed in defendant's coal mine in the state of Virginia, due to the alleged negligence of defendant. The specification of negligence in the first count was that defendant permitted large quantities of slate, refuse, coal and other materials to be hauled along the haulways and tracks over which plaintiff was required to haul the coal, and because of the defective car on which he was riding in the discharge of his duties, he was thrown off and fell upon the said refuse, coal, slate and other accumulations in the mine and because of such obstructions he was unable to get out of the way of the car, and thereby received his injuries. The negligence averred in the second count is that defendant provided and permitted to be loaded with coal the car on which plaintiff was riding in discharge of his duties defectively equipped with a chain and latch, which chain was too long to hold the end gate of the car when locked and in course of transportation securely in place as required to prevent injury to employees, and by reason whereof said gate or swinging door under the pressure of the load was caused to swing out over the bumpers of the car, pushing plaintiff and causing his feet to slip off the car and throwing him under the wheels, and doing him the

injuries of which he complains. The third count avers a defect in the brakes of said car, so that when plaintiff riding thereon as alleged reached a point where the grade was heavy he was unable by reason thereof to check the speed of the car upon reaching an abrupt curve in the track, whereby he was jerked and thrown off the car and injured as alleged.

Each of these counts erroneously avers that it was the duty of the plaintiff to dig down the coal in the mine and load it on to the mining cars of defendant. Among the other duties of his employment as alleged was to haul the coal from the place where it was loaded into said cars to what is termed "the Loaded Branch," being a point in the said mines where he was instructed by the defendant to place all loaded cars under his control.

On the trial the evidence of plaintiff and defendant was that plaintiff's employment was to haul the coal, set props and lay track, and that it was no part of his contract to dig, mine and load coal as erroneously alleged and as the evidence on both sides proved, and so plaintiff proposed after verdict and before judgment to so amend each count of his declaration by striking out the redundant words, but the court denied him his motion and sustained defendant's motion to set aside the verdict and award it a new trial.

[1] The first question for consideration in logical and orderly sequence, it seems to us, is, was the judgment below properly predicated on the supposed variance between the *allegata* and *probata*? It is not denied that the redundant averments were material, for if plaintiff's contract included digging and mining the coal and loading it into the cars, his rights would be measured by different rules than those applicable to a mere hauler of coal; but the declaration is broad enough in its averments to cover the contract as proved. The case seems to have been tried and submitted to the jury on the two issues: (1) Whether the car in question was defective in the particulars alleged in the second count; (2) was plaintiff guilty of negligence which was the proximate cause of his injuries? It does not appear from the record that plaintiff undertook to sustain his case under the first and second counts.

At no time during the progress of the trial did the defendant object to the plaintiff's evidence or any part of it on the ground of variance. Plaintiff proved by his own evidence the contract just as it was subsequently proved by witnesses for the defendant, and it is quite evident that the question of variance was an after thought of defendant, probably suggested for the first time on the motion for a new trial, for according to the record variance was not made a special ground for a new trial, nor was it made the ground of a motion to strike out the evidence or the subject of an instruction to the jury.

Nor was the question presented in any other way unless by the peremptory instruction, denied, to find for defendant, or by the motion to set aside the verdict because contrary to law and the evidence. It is contended on behalf of defendant that the motion to amend came too late and that the variance was fatal.

The general rule, according to the common law and our statutes, section 12, ch. 125, and section 8, ch. 131, of the Code (secs. 4766, 4912), undoubtedly is that when upon the trial objections are timely made to evidence upon the ground of variance, or the variance is otherwise presented upon time, the pleader should not be permitted to amend after verdict. *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 680, 57 S. E. 258.

[2] But when as in this case the declaration states a good cause of action, but states the contract of employment broader and as imposing duties not covered by the contract proven, the defect of pleading after verdict should be regarded as waived or cured by the statute of jeofails. Section 3, ch. 134 of the Code (sec. 4977). The objection on the ground of variance after verdict comes too late and should be disregarded.

[3, 4] The proper way to take advantage of a variance between *allegata* and *probata* is not after verdict, working a surprise and injustice on the opposite party, but to object to the evidence when first offered or by a motion to strike out, so that the pleader if he desires may exercise his rights of timely amendment, given by the statute. And we think that sound and orderly rules of practice require that such objection and motion to exclude predicated on variance should specifically state the ground and should not be regarded as covered by some general objections or a motion entered to catch the court or the opposite party in reversible error not specifically pointed out on the trial. Our decisions, we think, fully support this proposition. *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197; *Dresser v. Transportation Co.*, 8 W. Va. 553; *Harris v. Lewis*, 5 W. Va. 575; *Davisson v. Ford*, 23 W. Va. 617; *Bluefield v. McClaugherty*, 64 W. Va. 536, 63 S. E. 363; *State v. Hood*, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964. And in Virginia the rule is definitely stated that if no objection is made to the admissibility of evidence on account of the failure to support the issue and no motion is made to exclude it on account of the supposed variance, the objection is deemed to be waived. And this rule is reaffirmed with even more exactness in *Taliaferro v. Shepherd*, 107 Va. 56, 57 S. E. 585.

Moreover, oceans of judicial decisions are cited by numerous text writers and annotators for the proposition that when no vested rights will be disturbed, nor the cause of action or defense substantially destroyed, or the theory of the case altered, amendments

should be permitted at any time before or after trial if substantial justice will thereby be promoted. 21 R. C. L. 577; Burks' Pleading and Practice, § 312; Ellinghouse v. Ajax Livestock Co., 51 Mont. 275, 152 Pac. 481, L. R. A. 1916D, 838, and elaborate note beginning on page 841. And as particularly applicable in appellate courts the writer of the note at page 848 of L. R. A. 1916D, citing a long line of decisions from many states, some perhaps controlled by statute, says:

"Under these circumstances [those noted], it is held generally that the judgment will not be reversed because of defects or omissions in the pleadings which are supplied by the proof or the pleadings of the adverse party, or because of a variance between the pleadings and the proof, if the sufficiency of the pleadings was not properly challenged in the lower court, or the evidence was introduced without objection, or the defect or variance appears clearly not to have affected the substantial rights of the parties; but the pleadings may be amended in the appellate court to support the judgment, if necessary, or the amendment will be deemed made. The rule has become elementary, it has been said, that 'if a good cause of action has been established upon a trial and all controversies in reference to the matter are fully tried without objection, and such cause is within the jurisdiction of the court and might have been, but was not, fully pleaded, or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may * * * on appeal be deemed amended in accordance with the judgment.'"

In Massachusetts, in Lemay v. Springfield Street Ry. Co., 210 Mass. 63, 96 N. E. 79, 37 L. R. A. (N. S.) 43, where the facts were quite similar to those presented here, it was held that "as the declaration stood at the trial the instructions requested by the defendant should have been given, but, as upon a proper declaration the defendant would have been liable if the accident was caused by a defect in the car which by proper inspection might have been discovered and remedied, and as the case appeared to have been submitted to the jury fairly on this question, an amendment of the declaration so as to present this issue would cure the error without resorting to a new trial which justice did not require"; and it was ordered that if the plaintiff's declaration should be amended so as to properly present the issue, the defendant's exceptions should be overruled, otherwise they should be sustained.

We are of opinion therefore, upon reason and authority, that as no objection to the evidence for a variance was at any time interposed, nor any motion made to exclude on this or any other ground, the plaintiff was erroneously denied the right to amend his declaration as proposed, even after verdict, and if not that, the court, a good cause of action being established by the proof, should have disregarded the defect in the pleadings and entered judgment on the verdict in favor of plaintiff, without the necessity of a new trial.

[5] The next inquiry is, was plaintiff entitled to a verdict and judgment on the facts proven under the second count averring a defective car? One theory of the defendant was that although the car may have been defective in the particular alleged, the defect was not the proximate cause of plaintiff's injuries, but was the result of his own negligence in attempting, while the car was in motion, to reach out and get his dinner bucket setting on a "gob pile" in the haulway, whereby he lost his balance and fell under the car. The other theory was that the defective condition of the car was so plain and obvious, owing to the wooden block stuck in between the chain and end gate, that plaintiff was bound to use his senses and take notice thereof, and not having done so, he violated rules of the defendant made for his safety, and assumed the risk incident to riding on the car so dangerously equipped and loaded.

The evidence on these two theories of defendant, however, was decidedly conflicting. Plaintiff and another employee riding on the same car swear that the car was defective and that plaintiff was injured substantially as alleged in the declaration. Both swear that plaintiff succeeded in getting his bucket and landing safely back in his position on the bumper of the car. - And the evidence of some of the defendant's witnesses tends to show that the car had run quite a distance from the place where plaintiff had gotten his bucket to the place where he had been pushed off and fallen under the car. Defendant undertook to contradict Hodge, the other witness for plaintiff, by a previous statement in writing claimed to have been made by him, but we do not think it clearly does so. Besides, on cross-examination he swore he did not make a different statement, and both he and the scrivener who took down the statement agree in saying that after it was written down it was not read to or verified by the witness. Two or three witnesses for defendant say that when called to assist in getting plaintiff from under the car, or the next day when they examined it, the car was in good shape, that the end gate was fastened and that no coal had run out on the ground. Their evidence on these questions however did not agree with previous statements made by them in writing at the request of counsel for plaintiff, the signatures to which they would not distinctly admit or deny, though on cross-examination they did admit that they had made statements in writing about the time specified. These witnesses were all employees of defendant. On rebuttal witnesses for plaintiff present at the time, swear that the statements were made, reduced to writing and read over to the witnesses and signed by them. No witness swears that the chain to hold the end gate was not too long. One witness for defendant at least admits that the slack was taken up with a block of wood as claimed by

plaintiff. So that we do not think the circuit court was justified in disturbing the verdict on the ground that it was contrary to the evidence tending to show a defective car and that plaintiff's injuries were the result thereof, but was the result of his supposed negligence in attempting to secure his bucket while the car was in motion. If the chain was too long to properly and securely hold the load, and the slack of the chain had to be taken up by the block of wood as stated, which was liable to fall out, we think the master was liable for consequential injuries to plaintiff.

Counsel for defendant say, however, that the defect, if proven, was trivial and easily remedied by plaintiff if he had observed due care and the rules of the defendant formulated for his safety, and they would bring the case within the rules and principles of *Martin v. Carter Coal & Coke Co.*, 75 W. Va. 653, 84 S. E. 574, and *Priddy v. Coal Co.*, 64 W. Va. 242, 61 S. E. 163. In the first case a draw bar or draw head had been bent in the use of the car by plaintiff, which was easily remedied by him. We held in that case, citing numerous decisions, that for injuries thus sustained by a servant's own negligence the master is not liable. But the rule is different where a defective instrument or appliance is supplied by the master and is not rendered defective in the use thereof by the servant, as in the *Martin* case. In such cases the master is not relieved from his common-law or statutory duty to use due care to furnish his servant with reasonably safe machinery and appliances and to keep them in repair. We do not see that the rules of the company relied on were in any way violated by plaintiff.

But was plaintiff guilty of contributory negligence precluding recovery? Of course if the servant knowing of the defect in a machine or other instrument continues to use it, as a general rule, he assumes the risk, and the master is not liable for the injuries thus incurred. In this case plaintiff swears that though he had his carbide lamp in his cap he did not see the defective condition of the car, and under the facts and circumstances of a dark mine we are unable to say he could and should have seen the defect. The evidence does not clearly show that it was so obvious that plaintiff by the reasonable exercise of his senses should have discovered it and remedied it before riding the car. We think under all the circumstances shown in evidence the facts involved were for the jury and not for the court. In *Priddy v. Coal Company* the defect in the platform was open and apparent; plaintiff had passed over it several times on the day of his injuries; the platform was being repaired, and we decided that he was bound to use his eyes and look out for his own safety, and not having done so his negligence was the proximate cause of his injuries.

Lastly, was any error committed to the prejudice of defendant in the instructions? Three were given for defendant and three refused. Instructions 1, 2 and 3, given, fully covered defendant's theories, or a violation of the rules, contributory negligence of plaintiff in getting his bucket off the gob pile, and the law respecting the burden of proof. Of those offered and refused, number 1A would have told the jury that the evidence was insufficient to entitle the plaintiff to a verdict, clearly a wrong conclusion as we have already indicated in our review of the evidence. Instruction number 4 was too broad on defendant's theory that the defect in the car indicated by the block of wood between the end gate and the chain was so open and obvious that plaintiff should be chargeable with negligence in hooking on to it. It did not properly submit to the jury whether under the circumstances of the mine plaintiff was guilty of negligence in not observing the defect in time to avoid the dangerous condition of the load. Instruction number 5, on the theory that the loader of the car was a fellow servant of the plaintiff, was clearly bad. If the car was defective, the responsibility was that of the master, and the doctrine of fellow servancy has no application.

[6] Our conclusion is to reverse the judgment, reinstate the verdict, and without the intervention of a new trial to pronounce judgment in favor of plaintiff and against defendant for the sum of ten thousand dollars according to the verdict of the jury, with interest from the 23d day of May, 1918, the date of the verdict, being such judgment as we think the circuit court should have pronounced, with costs incurred by him in the circuit court and in this court in this behalf expended.

WILLIAMS, J. (dissenting in part). I do not concur in so much of the opinion as holds that plaintiff is entitled to interest from the date of the verdict.

This is a tort action, and there is no provision in the statute for allowing interest in such cases prior to the date of the judgment. Sections 14 and 16 of chapter 131 (secs. 4923, 4925) Code of West Virginia, relate only to actions *ex contractu*, hence the amendment of those sections in 1882, so as to allow interest from the date of the verdict, did not change the rule as to interest in actions *ex delicto*. The cases of *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 628, 36 Am. Rep. 825, and *Fowler v. B. & O. R. R. Co.*, 18 W. Va. 579, are binding authority notwithstanding the subsequent amendment of the statute. *Talbott v. W. Va. & P. Ry. Co.*, 42 W. Va. 560, 28 S. E. 311, and *Easter v. Virginian Ry. Co.*, 76 W. Va. 383, 86 S. E. 37. *Campbell v. City of Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159, conflicts with the foregoing, but the opinion does not mention the *Talbott* Case, which was decided after the statute was amended.

(83 W. Va. 321)

WALLACE v. ECLIPSE POCAHONTAS COAL CO. et al. (No. 3588.)(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919.)*(Syllabus by the Court.)***1. CORPORATIONS ⇨448(1, 2) — PROMOTERS — CONTRACT—VALIDITY.**

The promoters of a corporation to be formed are as a general rule to be regarded the agents of the corporation, and a contract made by them on behalf of themselves and the corporation when accepted by the corporation after organization is binding upon the promoters and the corporation accepting the benefits of the contract.

2. CORPORATIONS ⇨428(4)—PROMOTERS—CONTRACT—NOTICE.

Notice to the promoters and incorporators of a corporation of the provisions of a contract made for and on behalf of the corporation is notice to the corporation accepting the benefits of the contract.

3. CORPORATIONS ⇨448(2) — SPECIFIC PERFORMANCE ⇨70—SUBSCRIPTION TO STOCK—CONTRACT WITH PROMOTERS.

One who sells and transfers to a corporation a lease for coal pursuant to a contract made with the promoters thereof and accepted by the corporation when organized in consideration of stock in the corporation to be issued to him fully paid up sufficient to represent one-fifth interest in the value of the property when fully equipped for mining and producing coal, is entitled under his contract properly construed to stand in the position of a subscriber to so much of the stock as his contract calls for and may in equity enforce specific performance thereof against promoting stockholders and corporation.

4. CORPORATIONS ⇨77—TRANSFER OF LEASE—CONSIDERATION—"ONE-FIFTH INTEREST IN THE PROPERTY FULLY EQUIPPED."

The provision "a one-fifth interest in the property fully equipped" contained in a contract made with promoters of a corporation for the sale and transfer to the corporation of a lease for coal, expressive of the consideration which the seller is to receive in the stock of the corporation, means in the light of the facts and circumstances surrounding the parties in this case a sufficient amount of stock to equal one-fifth of the value of the property equipped with tipples, tracks, haulways, cars, and all necessary machinery and motive power to successfully carry on one operation on the property.

Appeal from Circuit Court, Mercer County.

Suit for specific performance of contract by J. S. Wallace against the Eclipse Pocahontas Coal Company and others. Decree for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Sanders, Crockett & Kee and Russell S. Ritz, all of Bluefield, for appellant.

McClagherty, Scott & Richardson, of Bluefield, for appellees.

MILLER, P. This is a suit for specific performance of a contract. The contract alleged and as the court below found, and we find established by the evidence, was made in December, 1916, supplemented by one of January 18, 1917, between plaintiff and the defendants Perkins and Griffith, the latter acting for themselves and their associates O'Keeffe and Weller, all promoters of the defendant corporation, organized afterwards for the purpose of taking over and operating a tract of about 600 acres of coal in McDowell county, an option for a lease on which was then owned or controlled by the plaintiff. That the plaintiff did have such option when the contract was concluded is established by the evidence beyond question or cavil, although defendants have undertaken to discredit his right and title thereto.

The substance of the contract was that in consideration that plaintiff would transfer, assign or cause said lease to be assigned or transferred, first to Griffith, trustee, for himself and associates, and by him to the corporation when formed, the said Perkins, Griffith, O'Keeffe and Weller would advance and supply the necessary money to pay the purchase price for said lease, namely, \$2,500.00, and to fully equip said property for operation for coal under the said lease, and when so equipped and ready for operation, plaintiff was to have a one-fifth interest in the property fully paid up, and that to effectually and fully carry out the contract the defendant corporation was formed and organized with the definite and positive agreement between plaintiff and the other promoters, acting for themselves on behalf of the corporation, that plaintiff was to have and receive in stock enough to represent a one-fifth interest fully paid up in the corporation. And it is also alleged that of the \$25,000.00 capital stock authorized, the estimate amount necessary to cover the cost of the lease and the equipment contemplated by the contract, plaintiff was entitled to receive at least fifty shares of the stock of the defendant corporation, while but five shares had ever been issued to him. The bill further alleges full and complete performance of the contract by plaintiff on his part and failure and refusal of the defendant company and of its promoters, officers and agents to execute the contract on their part. The answers deny the contract as alleged and put in issue the material facts, and the answer of Weller and O'Keeffe denies authority of Griffith and Perkins to bind them and want of notice of the alleged rights of Wallace. One Holly Stover, claiming to own some seventy shares of the stock of the corporation, not made a party to the suit, also appeared by petition denying authority of the promot-

ers to make the alleged contract with plaintiff and want of notice thereof and its binding effect on him and the corporation, if made.

The bill, we think, presents good grounds for equitable relief, and the demurrer was properly overruled. This conclusion will be fully justified, we think, by what is to be presented on the merits of the case.

The decree appealed from, which found as a fact that the contract as alleged had been proven, adjudged as the only practicable relief that could be grounded on the present status of the corporation and its stockholders that the plaintiff recover of the defendants W. F. Perkins, H. C. Weller, T. J. Griffith and James O'Keeffe, respectively, the sum of one thousand and seventy-five dollars (\$1,075.00) each, aggregating the sum of \$4,300.00, which the court found to be the value of forty-three shares of stock of which he had been deprived, being one-fifth of the shares issued less the five shares delivered to him and two shares contributed by him to another stockholder according to an agreement which has no material bearing on the issues here presented.

The evidence shows that the first meeting of the stockholders of the corporation after obtaining the charter was held on February 20, 1917, pursuant to waiver of notice in writing signed by Griffith, Wallace, Perkins and by Frank Lively and J. W. Kirchenschlager. The minutes of this meeting show that only the twenty-five shares subscribed were at first represented in person or by proxy as follows: Frank Lively by H. C. Weller, his proxy; J. W. Kirchenschlager by L. C. Ayers, his proxy; T. J. Griffith by W. F. Perkins, his proxy; J. S. Wallace by W. F. Perkins, his proxy; and W. F. Perkins in person. Perkins was made chairman of the meeting, and Weller secretary. After acceptance of the charter and the adoption of the by-laws the minutes recite that since the subscription to the twenty-five shares shown by the charter held by said Lively, Kirchenschlager, Wallace, Griffith and Perkins, the said Lively, Mrs. W. F. Perkins, L. C. Ayers and Holly Stover have each subscribed for five additional shares. And thereupon the three present, namely, Weller, Ayers and Perkins, as the very next business proposed, proceeded to consider a preamble and resolution, by whom presented does not appear, the manifest purpose of which was to resolute plaintiff as far as possible out of his interest in the property and stock of the corporation basing the proposition on facts differing materially from those alleged and proven in this cause, and as far as material to this decision are as follows:

"And whereas, it is represented to the meeting that the said J. S. Wallace claims to have had at one time an option upon the property covered by the Deed of Lease from said McDowell Pocahontas Coal Company from the said T. J.

Griffith, the Assignee of said leasehold estate but which option, if such was ever in existence, had expired and terminated before the purchase thereof by the parties contributing the said Twenty-Five Hundred Dollars (\$2,500.00) in cash, and that said Wallace claims that he had an oral understanding or agreement with one or more of the parties so contributing said sum of money that he would be allowed or would be entitled to participate to the extent of one fifth undivided interest in said sum of Twenty-Five Hundred Dollars (\$2,500.00) and that one-fifth of the stock subscribed for and to be issued on account of the payment of the said sum should be issued in his name;

"And whereas, it is the desire of the stockholders of this corporation that the said Wallace be dealt with in an entirely liberal manner and that he be accorded such consideration as he claims to be entitled to, but without waiving any legal rights said stockholders in this corporation may have:

"Now, therefore, be it resolved, that the Board of Directors to be elected at this meeting of stockholders be and it is hereby authorized and directed through the proper officers of this corporation to issue stock in this corporation as follows: To Frank Lively, five shares; to J. S. Wallace, five shares; to J. W. Kirchenschlager, five shares; to T. J. Griffith, five shares; to W. F. Perkins, five shares; the same having been paid for by the said Frank Lively, J. W. Kirchenschlager, T. J. Griffith and W. F. Perkins, each contributing the sum of six hundred and twenty-five dollars (\$625.00) and the said five shares hereby directed to be issued to the said J. S. Wallace having been paid for by the other parties herein named by contributing the sum of One Hundred and twenty-five dollars (\$125.00) on account thereof, and that said five shares of stock so issued to the said Wallace shall be received by him in full and complete satisfaction of any and all claims whatsoever he may have upon any stock of this corporation. And,

"Be it further resolved, that it is not the intention of this Resolution of stockholders to in any wise preclude the four stockholders herein mentioned from the exercise of any legal right whatsoever that they may have against the said Wallace on account of the five shares of stock herein directed to be issued in his name and paid for in the manner herein set forth."

During the consideration of this preamble and resolution the minutes recite that W. F. Perkins, the chairman, retired from the chair manifestly because of his fiduciary relation to the company, and particularly to plaintiff as his proxy, and Holly Stover, who, the minutes recite, on account of his subscription to five shares of the stock and the deposit of his check in payment therefor, had been permitted to participate in the meeting, was called to the chair. Thus it appears that Stover, though appearing here as an innocent holder of stock, and practically all the other subscribers of stock had notice of plaintiff's claims and of the proceeding in his absence to undo him by the action of the stockholders, his representative Perkins deserting his post when action was called for. This whole pro-

ceeding is manifestly fraudulent, and in the light of the other evidence in the case we have no hesitancy in so characterizing it and putting upon it our seal of condemnation.

On the receipt of the five shares so generously tendered him by these confidential agents of the company and of himself, the plaintiff at once demanded of the secretary an exhibit of the books and minutes, which was denied him, and it was not until after this suit was brought that he was permitted to see the evidence of the wrongs perpetrated upon him.

[1] Upon these showings of right and of wrong and injury, what is the measure of plaintiff's right to relief? He contends on this appeal that he was erroneously limited to money decrees against Griffith, Perkins, Weller and O'Keeffe for sums aggregating the par value of forty-three of the 250 shares issued, instead of a decree against the corporation, either (1) impressing upon the entire property and plant of the corporation as a trust therein his one-fifth undivided interest according to his contract, or (2) a decree requiring the defendant corporation and the other parties to the contract to issue and deliver to him forty-three additional shares to represent a full one-fifth interest in the property fully equipped as contemplated by his contract, or (3) if not entitled to either of these forms of relief, to a decree against the corporation and the other promoters of the corporation not for the par value but the actual value of the shares to which his contract literally performed would entitle him.

It is quite clear to us that Perkins, Griffith, Weller and O'Keeffe are liable jointly and severally for the stock to which plaintiff is entitled, and if it is possible for them to do so, to respond in stock; but is the corporation not also liable upon a contract made for and upon its behalf and fully executed upon the part of the plaintiff? It is quite clear to us upon reason as well as authority that in this case the corporation as well as the promoters is liable to plaintiff. We recently said *arguendo* in *McCullough v. Clark*, 81 W. Va. 743, 95 S. E. 787, 789, upon the very highest authority, that as a general rule promoters of a corporation not yet organized, especially when their contracts are made for and on behalf of the corporation, are regarded as the agents of the corporation, and such contracts become binding upon them as well as upon the corporation after organization and acceptance thereof by it. Citing *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 203, 20 Sup. Ct. 311, 44 L. Ed. 423; *Alger on Promoters and the Promotion of Corporations*, § 206 et seq.; 7 R. C. L. § 60, p. 81 et seq.

[2] But it is argued that the corporation and the other subscribing stockholders had

no notice of the contract as made. Did it not accept and take advantage of the contract? Is it possible for the corporation to plead ignorance of the terms and conditions of a contract made by its promoters on its behalf, acquire the right and title to valuable property upon terms of payment in cash or credit or for its value in the stock of the corporation, and corporation and promoters thereby escape the burden of its performance? Our answer is, No. In the case at bar not only did the corporation have notice of plaintiff's right through its incorporators and agents, but all the stockholders of the corporation participating in the first meeting of stockholders, including Stover, had notice that plaintiff had at least some interest or claim, and Perkins and Griffith knew the extent of it, and if not, on inquiry of him all would easily have discovered the full extent thereof. The case of *Mulverhill v. Vicksburg Ry. Power & Mfg. Co.*, 88 Miss. 689, 40 South. 647, is direct authority on the law of notice to a corporation through its promoters and agents. See, also, *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; 3 *Cook on Corporations*, § 727; *Newman v. Newman*, 60 W. Va. 371, 55 S. E. 377, 7 L. R. A. (N. S.) 370; *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300; *Barksdale v. Finney*, 14 Grat. (Va.) 333.

[3, 4] As a prerequisite to a final adjudication of plaintiff's rights it becomes necessary to determine two questions: First, what is the status or relation of the plaintiff to the corporation under his contract; and, second, what was reasonably contemplated in the provision of the contract for "a one-fifth interest in the property fully equipped"? On the first inquiry we think there can be no doubt that plaintiff's position was that of a subscriber to the capital stock of the corporation. His contract was to sell and convey or cause to be conveyed to the corporation the leasehold and to accept in payment fully paid up stock to the value of the property when fully equipped for mining and producing coal. Being entitled to this amount of stock easily ascertainable when the equipment was completed, he became entitled to the stock, and being so entitled, has not a court of equity jurisdiction by its mandatory process to compel specific performance of the contract? We think it has. Such was the holding in *Mulverhill v. Vicksburg Ry. Power & Mfg. Co.*, *supra*. And we have decided that one who has paid his subscription to the capital stock of a corporation may by bill in equity compel the issuance of proper certificates therefor. *Applegate v. Wellsburg Banking, etc., Co.*, 68 W. Va. 477, 69 S. E. 901; *Snyder v. Charleston, etc., Bridge Co.*, 65 W. Va. 1, 68 S. E. 616, 131 Am. St. Rep. 947. We have also held that when

shares of stock have some peculiar value to a purchaser and cannot be purchased on the market, or their value is not ascertainable with any degree of certainty, the purchaser may require specific performance of his contract. *Hogg v. McGuffin*, 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491. And we recently decided that mandamus would lie at the suit of a purchaser to compel a corporation and its officers to transfer on its books shares to which it had been adjudicated he was entitled. *Citizens' National Bank v. Consolidated Glass Co.*, 97 S. E. 689. So we think there can be no doubt of the jurisdiction of a court of equity in the case here presented.

The second question is, What was comprehended in the provision of the contract "a one-fifth interest in the property fully equipped"? The subject of the contract was a lease of coal, which required operation and production to keep it alive. The parties must have contemplated at least one operation and all the necessary equipment such as tipples, track, haulway, cars, and all necessary machinery and motive power to successfully carry on the operation. Counsel for plaintiff contended that he is entitled under his contract to have issued to him from time to time one share for every five shares of stock issued, so that his interest will always represent a one-fifth interest in the property. We do not think this could have been reasonably within the minds of the contracting parties when entering into the contract. We recently decided that a contract to make a will in consideration of certain services to be rendered, giving to plaintiff from \$4,000.00 to \$6,000.00 was sufficiently definite and certain to be enforceable for the least amount provided in the contract. *Jefferson v. Simpson*, 98 S. E. 212. And we think we would be traveling far afield to hold with counsel that the parties here contemplated any such far reaching consequences. Besides, with the one operation thoroughly equipped the parties would naturally, though not necessarily, have contemplated after the first operation was equipped that further developments would be carried on the credit of the company or out of the income or profits of the first operation. But whether so or not the contract must be given a reasonable construction, and we think to do so we must limit the rights of plaintiff to one operation.

The contract being so construed, what ought the decree below to have been? Of course the court would not have been warranted in impressing plaintiff's rights and interests as a trust upon the entire property and plant of the corporation. Clearly his contract was to take in payment stock in the corporation which he helped to organize and to which he caused the lease to be con-

veyed. His bill was not framed in any other view, and the contract pleaded entitles him to no other relief or its equivalent. We are clearly of opinion however, that the court was in error in limiting him to a money decree severally against the promoting shareholders. While they are no doubt liable jointly as well as severally, so is the corporation liable, as already indicated, either for the number of shares to which plaintiff may be entitled under the contract as now construed, if ascertainable or obtainable, if not, a money decree should be given against the corporation and Griffith, Perkins, Weller and O'Keeffe jointly for the value of the one-fifth of the property equipped for one operation as already stated.

Our conclusion is to reverse the decree and remand the cause with directions to the circuit court to ascertain the value of the plant and property of the defendant corporation fully equipped for one operation as indicated, and if the capital stock then authorized and unissued or issued and outstanding and held by the said Griffith, Perkins, Weller and O'Keeffe is sufficient to represent in value such one-fifth interest in said property such number of shares shall be decreed to be issued or transferred on the books of the corporation to plaintiff by the defendant corporation and said promoting stockholders, and if not, then the plaintiff shall be decreed against the corporation and said stockholders jointly a money decree for the value of plaintiff's interest in the property equipped as aforesaid and as ascertained by the court, with interest thereon from the time when plaintiff should have received said shares or the value thereof.

(88 W. Va. 312)

CARTER v. CARTER et al. (No. 3666.)

(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS — 356 —
SALE OF LAND—ADJUDICATION OF PRIORITY
OF LIENS.

Where a purchaser of lands takes a deed therefor, and immediately executes a trust deed thereon to secure the unpaid purchase money and dies, and, on default of payment, the trustee advertises the property for sale, but before the day of sale the administrator of the purchaser files a general creditors' bill, making the vendor and his trustee parties, it is error for the court, or the judge in vacation, to authorize the trustee to make sale of the property and bring the funds into court, before the amount of the debts and priorities of liens have been adjudicated.

Appeal from Circuit Court, Mercer County.

Creditors' suit by Garland R. Carter, administrator of E. E. Carter, against Mary F.

Carter and others. Decree for defendants Garrett, and plaintiff appeals. Reversed and remanded for further proceedings.

Sanders, Crockett & Kee, of Bluefield, for appellant.

Wm. E. Ross and Jas. S. Kahle, both of Bluefield, for appellees.

WILLIAMS, J. This is a creditors' suit by Garland R. Carter, administrator of E. E. Carter, deceased, against his heirs and creditors, for the purpose of ascertaining his debts and their priorities and selling the lands of his estate, on the ground that the personal assets are not sufficient to pay the same.

At the time said E. E. Carter died he owed a debt of \$26,000 to Cleo S. Garrett and Robert M. Garrett, her husband, as well as numerous other debts to other persons. This debt to the Garretts was for the balance of purchase money on certain lots in Bluefield, which said Carter had purchased from them in his lifetime and partly paid for, and was secured by a deed of trust executed on said lots by his widow and heirs at law in fulfillment of his contract of purchase, the interest of his infant heirs therein being conveyed by a commissioner appointed by the court for the purpose pursuant to a decree made in a suit brought for the specific performance of the contract. An absolute deed was contemporaneously executed by the Garretts to the Carter heirs for the same lots. Twenty thousand dollars of said debt was represented by four notes, of \$5,000 each, becoming due and payable in one, two, three, and four years, respectively, from the 14th of March, 1917, and \$6,000 thereof, not evidenced by any note, represented the balance of \$7,000 to be paid in lieu of a lot which said Carter had agreed to convey to the Garretts, as part of the consideration for the lots sold to him, \$1,000 of which they paid. After the death of Carter this conveyance was found to be impracticable, because of the numerous liens on said lot and the consequent inability of the Carter heirs to make a good and unincumbered title thereto. Said \$6,000 was made payable in monthly installments of \$500 each, with interest; the first installment being payable on the 1st of November, 1917. The trust deed stipulated that default in payment of any one of the \$5,000 notes should operate to cause all of them to become due and payable, for the purpose of authorizing the trustee to sell, and also that default in the payment of five of the \$500 monthly installments should cause the whole of the said \$6,000 to become due and payable, and upon default in either respect, the trustee was authorized, on request of Cleo S. Garrett or her assignee of the debt, to sell the property at public auction for cash, sufficient to pay the costs of sale and all the notes and installments then matured, and the balance on such terms as to meet and discharge the remaining notes and installments as they

became due, first having advertised notice of such sale in some newspaper of general circulation published in Mercer county.

Default having been made in the payment of one of the notes and six of the monthly installments, William E. Ross, the trustee in said trust deed, advertised that on the 18th day of May, 1918, he would offer the property for sale at public auction. On the 16th of May, two days before the sale day, plaintiff presented to the judge of the circuit court, in term time, his bill praying, among other things, that the trustee be enjoined from selling. A temporary injunction was awarded inhibiting the sale, and the cause was remanded to rules to be there matured. At a later day of the same term, to wit, on the 22d of May, the trustee and the Garretts, having given notice thereof, appeared before the judge, tendered and asked leave to file their joint answer, and moved for a dissolution of the injunction. Plaintiff appeared and objected to their answer being filed at that time, on the ground that the cause was pending at rules, not matured for hearing, and was not on the docket. He also objected to the entry of an order at that time, adjudicating any of the principles of the cause. The judge overruled his objections to the filing of the answer and permitted it to be filed, and states in his order that it is not considered as an answer to the bill at that time, but only as an affidavit in support of the motion to dissolve the injunction. He thereupon entered an order rectifying the fact that the trust deed was given to secure the purchase money due the Garretts on the lots advertised for sale, sustained defendants' motion, and dissolved the injunction, and directed the trustee to proceed to sell the property according to the terms stated in the notice of sale, requiring him, before proceeding, to execute before the clerk of the court a good and sufficient bond in the penalty of \$25,500, conditioned for his faithful performance of the trust, and directed him to bring the fund into court to be thereafter disbursed according to its order.

The question presented by this appeal is: Was it error to dissolve the injunction and permit the trustee to sell the property out of court, after a general creditors' suit had been brought making the trustee and the cestui que trust parties and before the cause was matured for a hearing?

The bill alleges that E. E. Carter, at the time of his death, owed a large number of debts besides the trust debt to the Garretts, and that some of those debts were evidenced by judgments and others by notes and open accounts. This court and the Court of Appeals of Virginia have held in numerous cases that it is premature and erroneous to decree a sale of land to satisfy a lien, without first ascertaining all the liens thereon and fixing their amounts and priorities. 8 Ency. Dig. Va. & W. Va. Cases, 674. Although the cases there cited are mostly judgment creditors' suits, the rule is the same in the case of

a general creditors' suit brought for the purpose of selling real estate and paying the debts of a decedent. The reason for the rule is that the creditors, even though they be junior creditors, have a right to have their liens adjudicated and their priorities determined, in order that they may be the better prepared to protect their interests at the bidding. The creditors in such case are usually bidders at the sale, and a creditor, ignorant of the relation his lien bears to other liens on the same property, might be deterred from bidding. The debtor himself is also vitally interested in having the property bring the best price obtainable, and therefore a right to have any uncertainty respecting the liens determined before a sale is made. *Payne v. Webb*, 23 W. Va. 558.

The fact that defendants' lien is for the purchase money of the lots to be sold does not affect the application of the rule; the same reason for the rule applies.

Although the judge was presiding in court when he awarded the injunction, and also when he permitted defendants to file their answer, and sustained their motion to dissolve the injunction and authorized the trustee to make the sale, nevertheless his rulings in this respect had no more force than if made in vacation. The cause was not then in condition for an adjudication upon any question touching the merits. The general creditors' suit having been brought making the trustee and cestui que trust parties, before the day of sale, the trustee, of course, could not disregard the suit and proceed with the sale, he had to wait the orders of the court. The judge, at that time, could only act upon the injunction, either to modify or dissolve it or to refuse to dissolve it; he could not adjudicate any question relating to the merits of the case. This case is very similar to *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723, and is governed by the principles therein announced, and also in *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285, and *Payne v. Webb*, supra.

We reverse the decree and remand the cause for further proceedings.

(83 W. Va. 292.)

ABNEY-BARNES CO. et al. v. DAVY-POCAHONTAS COAL CO. et al. (No. 3556.)

(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919.)

(Syllabus by the Court.)

1. CREDITORS' SUIT \Leftrightarrow 17—MORTGAGES—SALE OF PROPERTY — REDUCTION OF INCUMBRANCES.

In a suit to enforce payment of judgment, mortgage, and trust liens by a sale of the incumbered property, a productive coal mining property, a substantial fund derived from it

through a receivership should be applied to reduce the incumbrance before decreeing a sale of the land.

2. MORTGAGES \Leftrightarrow 464—TRUST DEED—PRODUCTION OF NOTES AND BONDS—SALE.

Ordinarily notes and bonds secured by trust or mortgage deeds should be produced, and the holders thereof identified, or the absence of both explained or accounted for, upon a reference to a commissioner, before decreeing a sale of the incumbered property.

3. MORTGAGES \Leftrightarrow 464—SALE OF PROPERTY—DECREE—DESCRIPTION.

But where the plaintiffs' bill and the answers of the trustees sufficiently describe the notes and bonds, and give the total amount thereof, and the debtor does not deny their existence or question their validity, the description will be accepted as true, and, for the purposes of the decree of sale, the bonds and notes treated as valid and subsisting liens upon the property, without proof of their amount or the identity of the holders thereof before the entry of such decree.

4. MORTGAGES \Leftrightarrow 464—TRUST DEED LIENS—SALE—PRODUCTION.

It suffices to protect the debtor to require the holders of such notes and bonds to produce them for the adjudication of all questions connected therewith before the entry of the decree directing the distribution of the proceeds of sale.

5. CREDITORS' SUIT \Leftrightarrow 13—DISCHARGE OF LIENS FROM RENTS AND PROFITS — REFERENCE.

Before decreeing a sale of property incumbered by liens, a court in a foreclosure suit ordinarily should ascertain by a reference to a commissioner, or by an express adjudication based upon the pleadings or upon facts disclosed and not controverted, whether the rents, issues, and profits of the property will be sufficient to discharge the liens within five years.

6. CREDITORS' SUIT \Leftrightarrow 44 — DISCHARGE OF LIENS BY RENTS AND PROFITS — BURDEN OF PROOF.

When such ascertainment is necessary, the burden of establishing the insufficiency of such returns rests upon the creditor.

7. EQUITY \Leftrightarrow 194—DISCHARGE OF LIENS BY RENTS AND PROFITS.

But if the bill alleges, and the respondents in their answers do not deny, that the rents, issues, and profits likely to accrue from the property will not within that period be sufficient to satisfy and discharge the liens, no such preliminary investigation need be made.

8. MORTGAGES \Leftrightarrow 502—FORECLOSURE—SALE—RENTAL VALUE OF LAND—ASCERTAINMENT.

In a suit to foreclose definitely described mortgage and deed of trust liens, where the instruments provide for a sale for cash on default of payment, such a sale ordinarily may be decreed without an ascertainment of the rental value of the land.

9. BANKRUPTCY ⚡391(1)—SUIT TO FORECLOSE—STAY PENDING BANKRUPTCY PROCEEDING.

Such a suit begun in a state court generally will not be stayed upon the petition of the debtor filed therein based upon the pendency of a proceeding in bankruptcy against him instituted in a federal court six months thereafter.

10. COURTS ⚡475(1)—CONCURRENT JURISDICTION—JURISDICTION FIRST ACQUIRED—EFFECT.

The general rule concedes to the court which first regularly acquires jurisdiction of the subject-matter and the parties the superior right to proceed unmolested to the final determination of the controversy involved therein.

11. CREDITORS' SUIT ⚡51—FORECLOSURE AND SALE—REDEMPTION.

A decree to sell land to satisfy liens thereon should accord to the debtor a reasonable time to redeem, and failure to do so is cause for reversal.

12. MORTGAGES ⚡502—REDEMPTION—REASONABLE TIME.

What is a reasonable time for such purpose is to be determined from the circumstances of each case.

13. MORTGAGES ⚡502—FORECLOSURE AND SALE—REDEMPTION—ADVERTISEMENT.

The period given by a decree of sale for advertising notice thereof is not the equivalent of a day to redeem.

14. MORTGAGES ⚡502—FORECLOSURE—REDEMPTION.

The giving of a day to redeem is not required in a foreclosure suit where the instrument to be foreclosed is a deed of trust, and it prescribes the terms and conditions of the sale upon default.

15. MORTGAGES ⚡502—FORECLOSURE AND SALE—REDEMPTION.

But in such foreclosure suit, where the deed of trust provides only for a public sale, if the court first authorizes a private sale to be conducted by the receivers, and directs a public sale to be had only in case a private sale cannot be effected in the time allowed, a reasonable time and opportunity to redeem the land should be accorded the debtor.

16. MORTGAGES ⚡502—DEED OF TRUST—SALE—ADVERTISEMENT.

Likewise, where the deed of trust prescribes advertisement of the time, place, and conditions of the foreclosure sale for eight consecutive weeks, it is error for the decree to provide for only four weeks' advertisement.

17. MORTGAGES ⚡337—ENFORCEMENT OF LIEN—PRIORITY—SALE.

A mortgagee does not lose any substantive rights by being compelled to enforce his trust lien in a pending judgment creditors' suit, and, where the lien of the former has priority, the time and terms of the sale will ordinarily be determined by the provisions of the trust deed, not by rules applicable to the enforcement of judgment creditors' liens.

(Additional Syllabus by Editorial Staff.)

18. MORTGAGES ⚡337—ENFORCEMENT OF JUDGMENT LIEN—MORTGAGE LIEN—DETERMINATION IN SAME PROCEEDING.

After institution of judgment creditors' suit to foreclose liens under Code 1913, c. 139, § 7 (sec. 5099), a trust deed creditor who has been made party to the suit cannot bring an independent suit to foreclose his mortgage, but such mortgage, like any other lien, must be enforced in that suit.

Appeal from Circuit Court, McDowell County.

Representative suit by Abney-Barnes Company and others to enforce certain judgment liens against Davy-Pocahontas Coal Company, W. L. Taylor, and another, and the Mercantile Trust & Deposit Company of Baltimore and the Equitable Trust Company, consolidated with suit by A. G. Russell, Jr., against W. L. Taylor. Case referred to a commissioner to report an account, and exceptions to report by Davy-Pocahontas Coal Company and W. L. Taylor, and answers by the Mercantile Trust & Deposit Company and the Equitable Trust Company seeking the foreclosure of deeds of trust and the discharge of receivers, with another reference and exceptions to report by Davy-Pocahontas Coal Company and W. L. Taylor, and decree directing receivers' sale of property of Davy-Pocahontas Coal Company unless it should pay the amount of indebtedness, and the Davy-Pocahontas Coal Company and W. L. Taylor appeal. Reversed and remanded.

Strother, Taylor & Taylor, of Welch, for appellants.

Anderson, Strother, Hughes & Curd, of Welch, for appellee Abney-Barnes Co.

Haman, Cook, Chesnut & Markell and France, McLanahan & Rozler, all of Baltimore, Md., Brown, Jackson & Knight, of Charleston, and Graham Sale and J. Randolph Tucker, both of Welch, for other appellees.

LYNOH, J. Abney-Barnes Company, a corporation, and others, who sue on behalf of themselves and all other lien creditors of Davy-Pocahontas Coal Company, obtained the decree from which Davy-Pocahontas Coal Company and W. L. Taylor have appealed. The decree ascertained the corporate property of the defendant coal company, and the amount and priority of the liens chargeable thereto, and directed it to be sold to satisfy and discharge the liens reported by the commissioner to whom the cause was twice referred. The property consists of about 4,000 acres of valuable coal land in McDowell county, with two well-equipped and active coal mining operations.

The object of the suit instituted in the circuit court of McDowell county, July 10, 1915, is to enforce certain judgment liens against the defendants, Davy-Pocahontas Coal Company, W. L. Taylor, and James A. Strother, in favor of plaintiffs, Abney-Barnes Company and others. The bill also names as defendants the trustees in two mortgages or deeds of trust, promptly recorded, in which the Davy-Pocahontas Coal Company is grantor, and which convey its real and personal property, the first being to the Mercantile Trust & Deposit Company of Baltimore, dated July 1, 1910, to secure a bond issue of \$300,000, all of which, except bonds aggregating \$3,000, paid off and retired, is outstanding, the other to the Munsey Trust Company (now Equitable Trust Company), dated June 1, 1913, to secure a note issue of \$125,000, of which \$80,000 issued and sold is outstanding, the remainder, issued but not sold, being pledged as collateral security for debts of the corporation. On October 9, 1915, this case was consolidated with the case of A. G. Russell, Jr., against the defendant W. L. Taylor, and the consolidated cases referred to G. L. Counts, commissioner, to report an account showing (1) the description and quantity of all the real estate owned by the judgment debtors therein; (2) the liens upon said real estate, by whom held, their respective amounts, and priority; (3) whether the rents, issues, and profits of said real estate will in five years yield a revenue sufficient to pay off and discharge the liens and the costs of the suit. On November 4, 1915, W. L. Taylor filed his answer and cross-bill asking for the appointment of receivers for the property, in conformity with which the court appointed two, who accepted the position and have since had charge of the property.

While the suit was pending the Mercantile Trust & Deposit Company, one of the trustees, instituted a suit in the federal court for the Southern district of West Virginia against the Davy-Pocahontas Coal Company to obtain the foreclosure of the mortgage in which it was trustee. This relief was refused, but the court ordered the case retained on its docket while this suit remained undetermined. Later other creditors filed a petition in involuntary bankruptcy in the same court against defendant coal company, which petition also is still pending.

On September 12, 1916, Commissioner Counts filed his report, to which certain exceptions were filed by Davy-Pocahontas Coal Company and W. L. Taylor, those of the latter, however, being later withdrawn. At the June, 1917, term of the circuit court the Mercantile Trust & Deposit Company and the Equitable Trust Company filed their answers in the cause, set up their deeds of trust, alleged certain defaults thereunder

by the Davy-Pocahontas Coal Company, and asked that the foreclosure rights under the deeds of trust be protected, and to that end prayed that the receivers be discharged and the trustees permitted to proceed to foreclose, or that the court compel the receivers to sell the property covered by the deeds of trust, to which answers general replications were filed by W. L. Taylor.

On June 29, 1917, on motion of the trustees, the court again referred the cause to Commissioner Counts to state specifically certain facts respecting the liens of the trustees, which report he filed October 22, 1917, and to which W. L. Taylor, Davy-Pocahontas Coal Company, and others excepted. On October 29th the Davy-Pocahontas Coal Company and W. L. Taylor tendered and asked leave to file their petitions setting up the pendency of the bankruptcy proceeding in the federal court, and asked the state court to stay the prosecution of this suit to await the result of the bankruptcy, the filing of which petition, being objected to, was refused.

On November 5, 1917, the circuit court pronounced the decree here complained of on appeal, directing the receivers to sell the property of the Davy-Pocahontas Coal Company at private sale on or before December 15, 1917, provided they are able to obtain therefor an offer of \$500,000, and if such sale should not be effected by that date they were directed to advertise the property for sale and to sell the same at public auction on or before February 1, 1918, the notice, time, terms, and place thereof to be given by publication in the McDowell Recorder for four successive weeks. The Davy-Pocahontas Coal Company, W. L. Taylor, and others objected to a sale of the property at that time, and moved the court to require the receivers out of the funds in their hands, totaling about \$95,000, to pay off the taxes on the property, and the interest then due on the bonds and interest coupons secured by the deeds of trust, which objection and motion were overruled; but the court further decreed that if before the time fixed for said sale the Davy-Pocahontas Coal Company, or any one for it, should pay off the amount of the indebtedness of said coal company as set out in the decree, the receivers should not proceed to sell the property.

Of the ten assignments of error, only those deemed material, relevant, and necessary to a just decision will be considered in passing upon the merits of the cause, so far as they are now involved.

[2-4] The failure of the holders of the notes or bonds secured by the deeds executed to the Mercantile Trust & Deposit Company and the Equitable Trust Company, respectively, to produce, prove, and file them while the cause was before the commis-

sloner, and his reporting and the decree fixing them as liens against the property of the grantor, notwithstanding such failure, is the first error assigned by appellants. The bill alleges the due execution of the trust deeds, notes, and bonds, and the aggregate amount of both, the dates of their issuance, and the property on which they are liens, namely, all real and personal property of the Davy-Pocahontas Coal Company, and exhibits copies of both instruments.

The two trust companies file separate answers to the bill, setting forth, briefly, the due execution and objects of the trusts, the dates thereof, the amount of the notes and bonds secured and negotiated. The answer of the former alleges that, of the \$300,000 of bonds secured by the deed in which it is named trustee, \$3,000 have been retired as paid and discharged, that the residue remain outstanding and subsisting valid liens against the trust subject, and that the interest coupons due and payable thereon January 1 and July 1, 1915, and 1916, and January 1, 1917, were not paid at the time the answer was filed; and further says that the number of the holders of the bonds authorized by the deed so to do have demanded that it, as the trustee, proceed to foreclose the lien by a sale of the trust property. The answer of the latter details the same facts as to the notes secured by the trust executed to it, and alleges the default of the grantor in the payment of interest as of the dates mentioned in the answer of the Mercantile Trust & Deposit Company.

Notwithstanding the facts alleged in the bill and in the answers of the respondent trustees as to the bonds and notes and the deeds of trust, the Davy-Pocahontas Coal Company does not answer or deny the allegations; it did not appear for any purpose, and the bill was taken as confessed as to it. Nor does the appellant Taylor, though president, creditor, and owner of a large block of the capital stock of the Davy-Pocahontas Coal Company, in his answer or in the petition hereinafter referred to, or in any other manner than by exceptions to the reports of Commissioner Counts, directly or indirectly question the allegations of the bill with respect to the integrity or validity of the bond issues; and only by a general replication does he deny the allegations of the answers filed by his codefendants, the trustees.

None of the bonds or notes whose payment the trusts secured were produced before the commissioner, nor was the failure to produce them explained, and they were reported by him and decreed by the court as liens in favor of the Mercantile Trust & Deposit Company and Equitable Trust Company; whether properly so or not is a question for solution in the light of the circum-

stances and of the provisions of the trust deeds. These provisions, it may be said, without reciting them in detail, confer upon the trustees ample power and authority to act as the representatives and agents of the purchasers and holders of the obligations secured, so far as necessary to protect their rights and interests, however affected, whether by litigation or in any other manner. *Billmyer Lumber Co. v. Coal Co.*, 66 W. Va. 696, 66 S. E. 1073, 28 L. R. A. (N. S.) 1101. The power to represent and protect the rights of such holders could not be more complete or effectual. The trusts vested broad and ample authority to act for them and on their behalf in all matters pertaining to them and to the enforcement of their rights arising thereunder.

It is true that as a general rule the notes or bonds secured must be produced, or a sufficient reason given for their nonproduction. *Armstrong, C. D. & Co. v. Painter*, 75 W. Va. 394, 399, 83 S. E. 1027; 3 *Jones on Mortgages* (7th Ed.) § 1469a, and cases cited. But where a bill or answer to foreclose mortgage liens against real estate gives a detailed description of the liens, and the mortgagor does not deny the facts alleged and the liens to be as set forth, it will be taken as true, and the bonds treated as valid and outstanding obligations of the debtor; nor in such cases is it necessary to show in whose hands they are or to require their production before the entry of the decree of foreclosure. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 193, 20 Sup. Ct. 311, 44 L. Ed. 423; *Anderson v. Culver*, 127 N. Y. 377, 28 N. E. 32; 3 *Jones on Mortgages* (7th Ed.) § 1469a.

The general replication of W. L. Taylor to the answers of the trustees is the only denial of any of the allegations relating to the bonds and notes, and that cannot avail as a denial by the Davy-Pocahontas Coal Company, the mortgagor, who made no denial of either the bill or answers. And, further, it is the general rule in cases involving deeds of trust securing large numbers of outstanding and widely scattered bonds or notes, and providing for a trustee to represent the holders thereof, that—

"It is not necessary that each claimant of a bond or of unpaid interest should, at this stage of a foreclosure case, identify himself as the owner of bonds or unpaid coupons. It is not necessary that the bonds with coupons should be produced before a nisi foreclosure decree. It is only necessary that it shall, at this stage of the cause, appear that there has been a default, and the amount of that default. This showing has been made. Should a decree of sale be made absolute, the holders of bonds can then be required to produce their bonds and coupons before a master, and all questions connected with the amount due each, and of ownership, can then be determined. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M.*

R. Co., 139 U. S. 150, 151 [11 Sup. Ct. 512, 85 L. Ed. 116]. Such a decree is not to be regarded as final as to the debts entitled to share in the distribution, for any other creditor may challenge the debt when the claims are produced in the master's office for ascertainment and classification. The decree for a foreclosure only establishes that there has been a default in the payment of the three last installments of interest. It does not establish that that interest is due to any particular person." *Central Trust Co. v. Cincinnati, H. & D. Ry. Co.* (O. C.) 169 Fed. 466, 469; *Toler v. East Tenn., etc., Ry. Co.* (O. C.) 67 Fed. 168, 180.

Thus it is only on the final decree of distribution that it is necessary for the various holders of the bonds and notes to present and prove them before the receiver or master, as the case may be. The court should not direct the distribution of the proceeds of the sale until it shall be ascertained that the bonds and notes outstanding represent proper and valid liabilities against the debtor, and such as he has authorized to be created.

[6-7] There arises the next question whether before decreeing a sale of the trust property it was the duty of the court to ascertain by reference to a commissioner, or by an express finding of its own based upon the pleadings and the facts disclosed, whether the rents and profits will be sufficient to pay and discharge the lien indebtedness within five years. Such preliminary investigation and report generally are necessary. Section 7, c. 139 (sec. 5099) Code; *Westinghouse Co. v. Ingram*, 79 W. Va. 220, 223, 224, 90 S. E. 837; *Dunfee v. Childs*, 45 W. Va. 155, 164, 30 S. E. 102. And when necessary, the burden of proof rests upon the creditor seeking the sale. *Newlon v. Wade*, 43 W. Va. 283, 286, 27 S. E. 244. But if the bill alleges and the respondents do not deny that the rents and profits to accrue from the property will not in five years discharge the liens, an inquiry need not be had. Section 36, c. 125 (sec. 4790) Code; *Newlon v. Wade*, cited; *Muse v. Friedenwald*, 77 Va. 57; *Ewart v. Saunders*, 25 Grat. (Va.) 203; *Horton v. Bond*, 28 Grat. (Va.) 815; *Barr v. White*, 30 Grat. (Va.) 531. Despite the failure to deny the allegations of the bill as to their insufficiency, the court directed the commissioner to ascertain that fact; but this the commissioner failed to do in either his first or second report, nor did the *Davy-Pocahontas Coal Company* or *W. L. Taylor* except to the reports on that ground, though the latter did except to the first report because of that failure, but immediately withdrew his exception.

While the primary object of the bill in this case is to secure a decree to sell the property of the coal company, and appropriate the fund derived therefrom to the payment and discharge of the lien of a judgment recovered by the plaintiff *Abney-Barnes*

Company, the ultimate object is to enforce the prior trust or mortgage liens created by the judgment debtor, and the plaintiff, to effectuate the attainment of the object he seeks, specifically alleged the probable insufficiency of the rents and profits to discharge all liens within five years. This broad declaration of the pleading is not denied. The statement in the answer of *W. L. Taylor* that he neither admits nor denies these allegations is not such a denial as section 36, c. 125 (sec. 4790) Code, contemplates. To avail, the denial must be specific and positive. *Grant v. Cumberland Valley Cement Co.*, 58 W. Va. 162, 172, 52 S. E. 36; *Shurtleff v. Right*, 66 W. Va. 582, 66 S. E. 719, 135 Am. St. Rep. 1041; *Ihrig v. Ihrig*, 78 W. Va. 360, 88 S. E. 1010. The mere statement in an answer that the respondent neither admits nor denies a material fact alleged in the bill does not amount to a denial of the existence of that fact.

[8, 17, 18] And, further, in a suit to enforce liens created by trust deeds given to secure payment of an indebtedness, which provides for a sale for cash in case of default, it is ordinarily not error to decree a sale of the land without ascertaining its rental value. *Lewis, Hubbard & Co. v. Toney*, 76 W. Va. 80, 85 S. E. 30; *Stafford v. Jones*, 73 W. Va. 299, 303, 304, 80 S. E. 825; *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627. After the institution of a judgment creditors' suit to enforce liens under section 7, c. 139 (sec. 5099) Code, a trust deed creditor who has been made a party to the suit cannot bring an independent suit to foreclose his mortgage, but such mortgage, like any other lien, must be enforced in that proceeding. *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723. But the trustee or mortgagee can obtain in such suit the enforcement of his mortgage according to its terms if his trust deed is prior to the judgment liens, and, if not, its proper order or priority will be determined. A mortgagee does not lose any substantive rights by being compelled to enforce his trust lien in a pending suit, and the time and terms of the sale will be determined by the provisions of the trust deed, not by the rules applicable to the enforcement of judgment creditors' liens. *Watterson v. Miller*, 42 W. Va. 108, 24 S. E. 578; *Stafford v. Jones*, 65 W. Va. 567, 64 S. E. 723; *Stafford v. Jones*, 73 W. Va. 299, 80 S. E. 825; *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731.

[9, 18] The creditors' suit in the circuit court of McDowell county, it is contended, should have been stayed by the judge of that court until the termination of the bankruptcy proceedings against the *Davy-Pocahontas Coal Company* instituted January 13, 1916, in the federal court for the Southern district of West Virginia. It must be observed,

however, that this proceeding was begun more than six months after the institution of the creditors' suit in the state court, and, under the decisions of the United States Supreme Court and other federal courts, the rule recognized is that the court which first obtains rightful jurisdiction over the subject-matter in a proceeding in rem to enforce prior liens will not be interfered with by any other court, including a court of bankruptcy. *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *In re Pilcher & Son* (D. C.) 228 Fed. 189, 142; *In re Schmidt* (D. C.) 224 Fed. 814; *Blair v. Bralley*, 221 Fed. 1, 136 C. C. A. 524; *Collier on Bankruptcy* (11th Ed.) pp. 293, 294, notes 57 and 59; 1 Fed. Stat. Ann. (2d Ed.) pp. 635-6. This holding does nothing more than reaffirm and approve the general, if not the universal, rule that concedes to the court which first regularly and lawfully acquires jurisdiction of the subject-matter and of the parties interested the right to proceed undisturbed to the final determination of the controversy involved. *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365. It is unnecessary to determine what the result would have been with respect to the granting of a stay, if the bankruptcy proceeding had been instituted within four months after the beginning of the actions which resulted in the judgment liens sued on in the creditors' suit, or what it would have been had the proceeding in McDowell county been one in personam instead of in rem.

[1] The sixth, seventh, and eighth assignments relate to and comprehend the same general subject, namely, the refusal to allow the motion of the defendants, now appellants, to apply the \$95,000 under the control of the court to the payment of the overdue and unpaid interest coupons attached to the bonds and notes, and thereby remove the default relied on by the defendant trustees acting for and on behalf of the holders and owners of the bonds and notes. This fund was accumulated through the administration and management of the coal mining operations on the trust estate or property by receivers appointed by the court upon the petition and motion of the appellant Taylor.

The third and final report of the receivers, the only report appearing in the record, shows \$95,000 as the net receipts for the first six months of the year 1917 from all sources after deducting disbursements, which include taxes on the property, administration expenses, insurance, repairs, and compensation to the receivers. Except for the intervention of some unusual or extraordinary cause or circumstance, a property from which is produced during six months the net sum realized may not improperly to be

assumed to be valuable and profitable, a property likely to produce under the same or an improved management a return upon the investment such as will speedily absolve it from incumbrances, and, when so disincumbered, yield a profit to its owners. But whether the returns be sufficient to pay the indebtedness against the property within five years or not, a proposition affirmed by appellants and denied by appellees, is not controlling or decisive upon the question discussed.

An owner who is about to be deprived of his property to satisfy liens, however created, has the clear right to know within a reasonable degree of certainty its status as to the charges for which it is to be sold. The fund in the treasury of the court and under its control arose out of the trust property and is a part of it, and as such is subject to the payment of the liens binding it. Though predicated upon facts somewhat different, the principle enunciated in *Strayer v. Long*, 83 Va. 715, pt. 2, syl., 3 S. E. 372, is not inapplicable, though appellees deny its applicability; that is, that all sums in the hands of receivers realized from property of the debtor should, before subjecting it to sale, be applied as credits on his indebtedness, that he may know to what extent it remains a charge against his land. Such a requirement conforms to principles governing courts of equity. To hold this fund in reserve for purposes merely conjectural, and that may not occur, is not consonant with justice and equity. The statement of the proposition shows its harshness. The receivers continue to manage the property; the court refuses to discharge them upon appellees' motion; the fund in their hands when the decree was entered the receivers doubtless have since increased at the same rate, perhaps more than quadrupled it, and to that extent exhausted the property, while interest has proportionately augmented the indebtedness without the equivalent compensatory reduction of the trust liens. Because of the receivership, the debtor does not have access to the property. He cannot control it; cannot deal with it, sell or incumber it, to relieve it from incumbrances; and the court and the receivers are converting it into liquid assets without applying the returns to his relief. His request for their appointment does not meet the situation or prejudice his rights.

Moreover, the application of the fund so produced from the property to the payment of the overdue interest coupons would have partially, perhaps totally, absolved it from that default. Such, it is true, was within the sound discretion of the court; but as the interest was in effect the primary liability of the debtor, and as such, together with the principal, the first charge upon the land, it seems inequitable, under the cir-

circumstances, to hold the fund subject to some preconceived situation demanding its expenditure.

This application reasonably falls within the rule requiring certainty in the ascertainment of liens for which the incumbered land is liable before decreeing it to be sold for their satisfaction. *Payne v. Webb*, 23 W. Va. 558; *Carter v. Carter*, 98 S. E. 296, contemporaneously decided. Such course is to be commended because of the probability of discouraging bidding by creditors, as they probably would bid if the amounts of the liens were fixed definitely by the decree. The same principle or necessity is recognized and the rule enforced in *Golden v. O'Connell*, 69 W. Va. 374, 71 S. E. 384, where some of the lienors agreed to a sale of part of the tract subject to their lien to be divided into lots and sold, the proceeds to be applied to discharge the liens; and the court held it necessary to make such an application before decreeing the sale of the other part of the land.

[11-14] The failure to give a day to redeem before sale is the next assignment to be noted. As a general rule, according to many decisions of this court, a decree to sell land for debt without giving the debtor reasonable time for payment before sale is cause for reversal. *King v. Burdett*, 44 W. Va. 561, 29 S. E. 1010; 8 Enc. Dig. Va. & W. Va. Rep. 693. The giving of time for advertising the sale is not the equivalent of a specific day to redeem. *Rose v. Brown*, 11 W. Va. 122. Though somewhat archaic, the rule is too well established in this state to be disturbed or ignored in some circumstances. However, it is held not to apply to decrees directing a trustee to sell land conveyed to him to secure the payment of the grantor's debts, where the deed fixes the terms and conditions of the sale. *Watterson v. Miller*, 42 W. Va. 108, 24 S. E. 578. See, also, *Stafford v. Jones*, 73 W. Va. 299, 303, 304, 80 S. E. 825. In the former case Judge Brannon says:

"That is a technical rule which requires a court to give a day to redeem before sale in addition to the time required for notice of sale. It ought not to be applied to sales under trust deeds, as a trust deed is essentially a contract, * * * and the court has no right to give indulgence when the parties have provided against it."

So in this case, if the court had decreed a sale at public auction upon the notice and in the manner required by the trust deed, it would not have been necessary to fix a day to redeem, as the decree would merely have enforced the provisions of the contract.

[15, 16] But the court went further, and authorized a private sale to be conducted by the receivers, and directed a public sale to be had upon four weeks' published notice only in case a private sale could not be effect-

ed in the time allowed. Since the court authorized a sale by private negotiation to be conducted through the receivers, which under the terms of the decree could have been made immediately upon its entry, a reasonable time and opportunity to redeem the land ought to have been accorded the debtor before such sale could be consummated and his rights irretrievably jeopardized.

Finally, appellants complain of the advertisement directed by the court in the decree of sale, in that the direction failed to follow the requirement of the trust deeds, which, we think, should have been done as part of the contract of the parties. For this reason, and because of the failure to apply the funds in the hands of the receivers to the partial relief of the debtors and exoneration of their property from incumbrance, and the lack of a definite ascertainment of the exact amount due on the total indebtedness binding the property, we are of opinion to reverse the decree, award costs to appellants, and remand the cause for further proceedings.

(177 N. C. 132)

ASHE v. PETTIFORD et al. (No. 14.)

(Supreme Court of North Carolina. Feb. 19, 1919.)

1. EVIDENCE ⇨288, 291—PEDIGREE—DECLARATIONS.

Pedigree or genealogy may be shown by reputation in the family of the parties concerned, or by declarations of deceased members of such families, but cannot be shown by general reputation in the community.

2. EVIDENCE ⇨293 — PEDIGREE — DECLARATIONS.

To warrant admission of declarations relative to pedigree or genealogy, the traditions must be derived from persons so connected with the family that it is natural and likely from their domestic habits and connections that they are speaking the truth.

3. EVIDENCE ⇨293 — PEDIGREE — DECLARATIONS.

Declarations relating to pedigree or genealogy are restricted to declarations of deceased persons who were related by blood or marriage to the person and therefore interested in the succession in question.

4. EVIDENCE ⇨295 — PEDIGREE — DECLARATIONS.

Declarations relating to pedigree to be admissible must have been made before the beginning of the controversy in which the question of pedigree arises.

5. EVIDENCE ⇨288—RELATIONSHIP—PUBLIC OPINION.

Public opinion in the community is inadmissible to show pedigree or genealogy or the relation of one person to another.

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action by Joseph Ashe against Nancy Pettiford and others. Verdict and judgment for defendants, and plaintiff appeals. New trial.

The action was brought to recover possession of a tract of land on Welch's creek, containing 60 acres. Plaintiff claimed the land by collateral descent from Martha A. Pettiford, who, he alleged, was his sister, which allegation the defendants denied, so that the sole question was whether the relation of brother and sister existed between the plaintiff and Martha A. Pettiford. In order to show that Martha was not the sister of the plaintiff, the defendants asked Henry Pettiford, one of their witnesses, "What relation, by general reputation in the community, was there between Joe Ashe and Martha A. Pettiford?" The plaintiff entered an objection to the question, which was overruled by the court, and plaintiff excepted and now assigns the ruling as error. The witness answered that they were no kin, nor did they have the same father or mother, Martha's father being a man by the name of Yates, and her mother was Mary Yates, while Joe Ashe's mother was named Sylvania. The testimony of the witnesses in this connection tended to prove that Joe Ashe, the plaintiff, and Martha A. Pettiford, were not brother and sister or so related as to make the plaintiff the heir of Martha and as such entitled by descent to the land, which belonged to her.

There was other testimony of the reputation in the Pettiford family, as to the relation between Joe Ashe and Martha Pettiford, and as to other matters bearing upon the question; but we need not consider it.

There was verdict and judgment for defendant, and plaintiff appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., and P. H. Bell and Z. V. Norman, both of Plymouth, for appellant.

L. W. Gaylord, of Greenville, and Ward & Grimes, of Washington, N. C., for appellees.

WALKER, J. (after stating the facts as above). [1] We are of the opinion that error was committed in overruling the objection to testimony of the witness Henry Pettiford, as to the general reputation of the pedigree or genealogy of Joe and Martha, as this must be shown by reputation in the family of the parties concerned, or by declarations of deceased members of such family, and not by general reputation in the community. The error was substantial and prejudicial.

[2] It was held in *Kaywood v. Barnett*, 20 N. C. 91, that, in order to warrant the admission of declarations relating to pedigree, it is essential: First, that the parties who

made the declarations be proved to be dead; secondly, that the declarants were likely to know the facts. The tradition must therefore be derived from persons so connected with the family that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken, citing 2 Starkie on Ev. 604, 605. A question exactly like the one now being considered, was asked in *Erwin v. Bailey*, 123 N. C. 628, 634, 31 S. E. 844, 846. To make the analogy between the two perfectly clear, we quote literally from the opinion of the court in that case:

"The defendants proposed to prove that there was a general reputation that plaintiff was not the child of Caesar. This evidence was objected to and ruled out, and defendants excepted. We do not think there was any error in the court's sustaining plaintiff's objection, and in overruling the exceptions of defendants to this evidence. The case of *Woodward v. Blue*, 107 N. C. 407 [12 S. E. 453, 10 L. R. A. 682, 22 Am. St. Rep. 897], comes nearer sustaining defendant's exceptions than any case called to our attention. And that case does not do so, as we think."

This kind of proof is a well-known exception to the general rule excluding hearsay, and it rests in part on the supposed necessity of receiving such evidence to avoid a failure of justice, and in part on the ground that individuals are generally supposed to know and to be interested in those facts of family history about which they converse, and that they are generally under little temptation to state untruths in respect to such matters which might be readily exposed. 2 Jones on Evidence (Ed. of 1913 by Horwitz) § 312, pp. 704 and 705. Lord Chancellor Eldon once said, in part, that declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles, and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. In other words, the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest in the declarations of the person from whom the descent is made out, and their consequent interest in knowing the connections of the family.

[3] The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question. From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being

dead, may be given in evidence to prove pedigree; and so is tradition in the family, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. It is not every statement or tradition in the family that can be admitted in evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. 2 Jones on Evidence, pp. 705, 706; Whitelock v. Baker, 13 Vesey, 514; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; and 16 Cyc. 1225 to 1235, where the subject is fully discussed with a great many authorities in the notes presenting and illustrating manifold features of the question.

It was stated by Justice Woods, in *Fulkerson v. Holmes*, supra, that—

"The fact to be established is one of pedigree. The proof to show pedigree forms a well-settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. Taylor on Evidence, § 635. Traditional evidence is therefore admissible. *Jackson v. Cooley*, 8 Johns. [N. Y.] 128; *Jackson v. Browner*, 18 Johns. [N. Y.] 37; *Jackson v. King*, 5 Cowen [N. Y.] 237 [15 Am. Dec. 468]; *Davis v. Wood*, 1 Wheat. 6 [4 L. Ed. 22]. The rule is that declarations of deceased persons who were de jure related by blood or marriage to the family in question may be given in evidence in matters of pedigree. *Jewell v. Jewell*, 1 How. 219 [11 L. Ed. 108]; *Blackburn v. Crawford*, 3 Wall. 175 [18 L. Ed. 186]; *Johnson v. Lawson*, 2 Bing. 86; *Vowels v. Young*, 13 Ves. 147; *Monkton v. Atty. Gen.*, 2 Russ. & Myl. 159; *White v. Strother*, 11 Ala. 720. A qualification of the rule is that, before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. *Monkton v. Attorney General*, 2 Russ. & Myl. 156; *Attorney General v. Kohler*, 9 H. L. Cas. 680; *Rex v. All-Saints*, 7 B. & C. 789. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy."

McKelvey on Evidence (2d Ed.) p. 271, says that—

"Where the question of pedigree is one of some years back, it is generally the case that there is no living witness who has personal

knowledge of the facts, and it therefore becomes necessary, if any proof at all is to be had, to resort to what may be said to be the reputation in the family concerning the facts; that is, what has been handed down from father to son, or to other form of hearsay evidence in the family. The rule is very strict as to the degree of relationship which must exist in order to render the declaration admissible. Formerly it was thought that it should be confined to those connected by blood only with the family to which the pedigree related, but subsequently it became established that declarations of a husband or wife should be admitted"—citing *Shrewsbury Peerage Case*, 7 H. L. Cases, t, at 26, and *Jewell's Lessee v. Jewell*, 1 How. 219, 231, 11 L. Ed. 108.

But it has been held that there are qualifications as to the competency of a husband's declarations. *Harland v. Eastman*, 107 Ill. 535. See, also, *Conn., etc., Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. Ed. 294; *Eastman v. Martin*, 19 N. H. 152; *Carnes v. Crandall*, 10 Iowa, 377.

[4] A further condition of the admissibility of declarations of this nature is that they must have been made before the beginning of the controversy in which the question of pedigree arises. A common form of expressing this condition is that the declarations must have been made antelitem motam. This does not mean, however, that it is sufficient if they have been made before the commencement of the actual suit. As a matter of fact, they must have been made before the existence of the controversy which has given rise to the suit, in order to be admissible. This is a rule of fairness, and is a necessary precaution against unreliable and prejudiced statements made as the result of sympathy or passion, or other feeling, or with a view to their subsequent use in litigation. *McKelvey on Evidence* (2d Ed.) pp. 280, 281; *Stein v. Bowman*, 13 Pet. 209, 220, 10 L. Ed. 129; *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205, 209; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *Barnum v. Barnum*, 42 Md. 251, 304.

It was held in *Stein v. Bowman*, supra, that the testimony of a witness "that he had been in Hanover, Germany, 'last summer,' and there heard, from many old persons of whom he inquired, that the plaintiff was the brother of Nicholas Stone, deceased," was excluded on the ground that the declarations were not of "members of the family, who may be supposed to have known the relationships which existed in its different branches." 2 *McKelvey on Ev.* (2d Ed.) p. 273, note 37; *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277.

[5] We have thus stated, in a casual way, the reasons underlying this exception, as it is called by some authorities, to the general rule concerning hearsay. It appears from this statement that public opinion in the community to show pedigree or genealogy, or

the relation of one person to another, is not admissible. It would violate the fundamental theory upon which the exception is based. Judge Elliott, after stating that only one state has ever approved such evidence, assigns the reasons why it should not be admitted in this language:

"The exception to the general rule of evidence, the admissibility of declarations, is confined, first to the declarations of persons deceased, for the reason that if living they should be called as witnesses; second, it is generally confined to the declarations of relatives, because they are likely to be acquainted with the pedigree of each other; and, if the exception was extended to strangers, before the testimony could be admitted it would be necessary to prove the degree of intimacy, the opportunities for knowledge, the source of the information, etc., which would render the exception uncertain and difficult to apply. But in Tennessee it was held that the declarations are not to be confined to members of the family, and even public repute in the community is admissible." Elliott on Ev. § 2197, p. 688.

The cases in the single state mentioned do not all refer to general reputation in the community, but only one of them, and this is not supported by the only authority cited for the statement, which was based on special facts, and the testimony offered was more than mere general repute. Even this decision was met by a very strong dissent from Judge Spencer, one of the ablest and most distinguished judges in the state where it was rendered, and is contrary to all the authorities.

But, however this may be, we have shown by cases already cited that this court has distinctly rejected it as opposed to the principles which justify the exception itself. It would be unsafe, and too wide a departure from the ordinary rule as to hearsay, to establish pedigree by any such standard of proof. We have designated hearsay as to pedigree an exception to the general rule as to such evidence, but Mr. Greenleaf does not so treat it, but calls it original evidence. It does not follow, he says, because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary it happens in many cases that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and, in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy. In such cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. 1 Greenleaf on Ev. § 100. The learned author then undertakes to enumerate a number of instances in which what may, in com-

mon parlance, be termed hearsay, is original and competent evidence. Among these he includes "evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath."

1 Greenleaf Ev. 101. "To this head," he adds, "may be referred much of the evidence sometimes termed hearsay, which is admitted in cases of pedigree. * * * And general repute in the family, proved by the testimony of a member of it, has been considered as falling within the rule." Other pertinent statements as to proof of pedigree may be found in the same volume at pages 101, 104.

There are other exceptions to the testimony which raise very serious questions, but we do not deem it necessary to discuss them, as, perhaps, they may be avoided hereafter, or presented in such a different form as to materially change even the substance of them. Besides there is scarcely any evidence that the declarations or reputation originated ante litem motam, and there is grave doubt whether the declarations came from those qualified to speak. We have discussed the rule as to pedigree more fully than we would otherwise have done, for the reason that it does not seem to have received very much consideration before, and because of the great and important interests dependent upon or which may be affected by it.

There must be another trial because of the error indicated.

New trial.

BROWN, J., not sitting.

(177 N. C. 150)

LAMB v. LAMB. (No. 9.)

(Supreme Court of North Carolina. Feb. 26, 1919.)

1. WATERS AND WATER COURSES §154(2) — EASEMENTS—DRAINAGE.

Where landowner established artificial system of drainage for benefit of entire property and subsequently separated land into two tracts which passed to different parties, upper owner had easement, giving him right of drainage over lower tract by means of the lead ditches built by their predecessor.

2. EASEMENTS §53—COST OF MAINTENANCE AND REPAIRS.

Generally, in absence of contract stipulation or prescriptive right to the contrary, owner of easement is liable for costs of maintenance and repairs, where easement exists and is used and enjoyed for the benefit of dominant estate alone.

3. EASEMENTS §53—RIGHTS OF OWNER OF DOMINANT ESTATE—ENTRY UPON SERVIENT ESTATE.

Generally, in the absence of contract stipulation or prescriptive right to the contrary,

owner of easement existing for the benefit of and used and enjoyed by the dominant estate alone has the right of entry upon servient estate for the purpose of maintaining easement in good repair.

4. EASEMENTS §64—BENEFIT OF OWNER OF DOMINANT ESTATE—FAILURE TO MAINTAIN AND REPAIR.

Generally, in absence of contract stipulation or a prescriptive right to the contrary, owner of easement existing and used for the benefit of the dominant estate alone may be held liable for injuries resulting from his willful or negligent failure to keep easement in good repair.

5. EASEMENTS §53 — DUTY OF OWNER OF DOMINANT ESTATE—MAINTENANCE OF EASEMENT.

Owner of dominant estate is not required to maintain or repair the easement for the benefit of the servient owner.

6. EASEMENTS §30(1) — ABANDONMENT BY DOMINANT OWNER.

Owner of dominant estate may ordinarily abandon easement without infraction of any rights of servient owner.

7. WATERS AND WATER COURSES §154(2) — EASEMENT — MAINTENANCE OF LEAD DITCHES.

Where drainage system has been established over land of upper and lower owners by prior owner of both tracts, and where both upper and lower owners are benefited by the ditches, the upper owner, though having easement giving him a right to drainage over land of lower owner, is not required to maintain and keep in repair the ditches extending over lower land, but at most can be required to pay his pro rata part of expense.

Appeal from Superior Court, Camden County; Bond, Judge.

Action by Joseph Lamb against W. J. Lamb. Judgment for defendant, and plaintiff excepts and appeals. No error.

The action was instituted by plaintiff, the lower proprietor, against the defendant, adjoining and upper proprietor, to recover damages for flow of water wrongfully diverted upon plaintiff's land and for damages caused by failure on part of defendant to clear off and properly maintain on plaintiff's land certain lead ditches running through both tracts, whereby it was claimed that plaintiff's land was soaked and injured.

On specific issue submitted, there was verdict of the jury negating the charge of wrongful diversion, and, his honor having ruled that, on the facts in evidence, no recovery could be had on the second aspect of the case, there was judgment on the verdict for defendant and plaintiff excepted and appealed.

Aydlett, Simpson & Sawyer, of Elizabeth City, for appellant.

Ehringhaus & Small, of Elizabeth City, for appellee.

HOKE, J. (after stating the facts as above). [1] The facts in evidence tended to show that the plaintiff and defendant were adjoining proprietors of two tracts of land, the plaintiff owning the lower tract along certain lead ditches hereinafter referred to; that they had obtained these tracts of land from their respective fathers, and they in turn held them under a devise from the grandfather, Abner Lamb; that Abner Lamb owned the land as one tract, and during his possession had constructed a system of drains and ditches through the same, and at his death he divided the land into two tracts, described in the complaint, the lower of which has become the property of plaintiff and the upper the property of defendant, and at the time of his death and the different transfers these ditches and drains were openly maintained and used for the benefit of the land and its proper tillage; that the lead ditches ran from defendant's land through plaintiff's and on through lands of lower proprietors into a swamp, the ultimate and natural outflow, "and there were tap or side ditches of defendant, running across his lands from lead to lead and draining into the leads and then on through plaintiff's land as stated, and that, on plaintiff's land, the latter, by his side or tap ditches, drained into these leads." There was also allegation, with supporting evidence on the part of plaintiff, tending to show that, some time prior to the institution of the suit, defendant had failed and refused to clear off and keep open the portion of these lead ditches which were on plaintiff's land, and by reason of such failure the same had proved inadequate to the proper drainage of plaintiff's property, causing damage thereto. It was shown, further, "that defendant had offered, in connection with plaintiff and others using the three big drains or lead ditches, to pay his pro rata part of cutting out the ditch from end to end along with plaintiff and others using the same." Upon these, the facts chiefly relevant to the question presented, and under authoritative decisions here and elsewhere, an easement was created, constituting the upper tract the dominant tenement and conferring on the owner the right of drainage over the lower by means of these lead ditches referred to, it appearing that Abner Lamb, the grandfather, when owner of the land as one tract, had established thereon an artificial system of drainage continuous and permanent in its nature and openly used and enjoyed for the benefit of the entire property at the time the same was separated in two tracts and passed by devise to his sons, from whom the present parties acquired their titles, respectively. *Hair v. Downing*, 98 N. C. 172, 2 S. E. 520; *Shaw v. Etheridge*, 48 N. C. 301; *Mitchell v. Seipel*,

53 Md. 251, 36 Am. Rep. 404; *Scott v. Moore*, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749; *Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165; *Fayter v. North*, 30 Utah, 156, 83 Pac. 742, 6 L. R. A. (N. S.) 410; *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; 3 *Farnham on Waters and Water Rights*, p. 2440 et seq. In this last, the South Carolina case, the general principle applicable is well stated as follows:

"Apart from all consideration of time, there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have * * * been used by the owner during the unity, though they have had no legal existence as easements, as well as of all those necessary easements without which the enjoyment of the several portions could not be fully had."

[2-6] We do not understand that the appellant desires to question the correctness of the principle as stated, but it is urged, in his behalf, that when the defendant's property has been constituted the dominant tenement, giving its owner an easement of drainage, as claimed, such owner has thereby become responsible for the costs and charges required for the upkeep of the ditches on the lands of plaintiff, and is liable for damages caused by a breach of duty in this respect. It is undoubtedly the general rule that, in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone; that he has a right of entry upon the servient estate for the purpose indicated, and may be held liable for injuries arising from his willful or negligent breach of duty in these matters. The position finds support in *Hair v. Downing*, one of the North Carolina cases heretofore cited, and is very generally approved in the decisions and text-writers on the subject. *Bellevue v. Daly*, 14 Idaho, 545, 94 Pac. 1036, 15 L. R. A. (N. S.) 992, 125 Am. St. Rep. 179, 14 Ann. Cas. 1136; *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 52 S. E. 343, 2 L. R. A. (N. S.) 832, 113 Am. St. Rep. 1066; *Dudgeon v. Bronson*, 159 Ind. 562; 9 R. C. L. pp. 794, 795; 14 Cyc. p. 1209; *Jones on Easements*, § 821. But in such case the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may ordinarily abandon it altogether without infraction of any rights of the servient owner. 9 R. C. L. p. 795, citing *Pomfret v. Ricroft*, 1 Saund. 321, 10 Eng. Rul. Cases, p. 16, and *Mason v. Shrewsbury*, etc., Ry. Co., L. R., 6 Q. B. p. 578, 10 Eng. Rul. Cas. p. 22, and note, a general principle recognized and applied in this state in *Canal Co. v. Burnham*, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527.

[7] But where, as in this case, a system

of drainage has been constructed for the benefit of the two properties and is used and enjoyed by the owners of both, the general rule is or should be, as held by the court below, that each is required to maintain the portion of the system on his own land, unless the conditions and circumstances presented should make such an obligation so unequal and burdensome on one at the expense of the other that a different method of adjustment would be required. While we have found very little authority bearing on the direct question, the rule suggested will usually make for the right of the matter, and seems to be approved in *Winslow v. Furhman*, 25 Ohio St. 639. On the record, the evidence offered in support of plaintiff's claim is not set out in detail, but from the general statement we conclude that his demand is made to rest, and he so intends it, on the proposition that the defendant is liable to bear the entire burden of keeping these lead ditches open, and he is charged with the full expense of maintenance and repairs, not only for the proper use and enjoyment of his own easement, but for the benefit also of the servient estate.

We are confirmed in this estimate of plaintiff's case by the statement appearing in the record that "defendant had offered, in connection with plaintiff and others using the three big drains or lead ditches, to pay his pro rata part of cutting out the ditch from end to end," etc., and this, in any event, is all that plaintiff could justly require.

We find no error in the ruling of his honor, and the judgment for defendant must be affirmed.

No error.

BROWN, J., not sitting.

(177 N. C. 555)

STATE v. LEWIS. (No. 90.)

(Supreme Court of North Carolina. Feb. 26, 1919.)

1. JURY ⇐70(3, 12)—SECURING SPECIAL VENIRE—NUNC PRO TUNC ORDER AND RETURN.

When court had ordered sheriff to summon venire of 40 men, and clerk failed to enter order, but sheriff notified jurors who were named in oral order to appear so far as they could be found, the court in the exercise of its discretion could amend the proceedings and allow the clerk to issue the writ, and the sheriff to make proper return nunc pro tunc.

2. CRIMINAL LAW ⇐1152(2)—MATTERS OF DISCRETION—SPECIAL VENIRE—REVIEW.

Since court had power to amend its record by inserting order for special venire and the issuing of the writ to the sheriff, and the entering of the sheriff's return upon the process nunc pro tunc, the court on appeal will not review the exercise of such power.

3. JURY \Leftrightarrow 82(2)—IRREGULARITY IN PROCURING.

Irregularity in procuring a jury could not, in the absence of fraud or corruption, affect the rights of accused.

4. WITNESSES \Leftrightarrow 406—CONTRADICTORY TESTIMONY—ALIBI—ADMISSIBILITY.

To contradict testimony that accused had been sick for two weeks, including day upon which rape was committed, evidence that within said two weeks he had been seen two or three miles from home, had chased another woman, and had returned three nights afterwards and peeped into the window of her home, was competent.

5. RAPE \Leftrightarrow 51(1)—EVIDENCE—SUFFICIENCY.

In prosecution for rape, evidence held sufficient to support verdict of guilty.

Appeal from Superior Court, Wayne County; Daniels, Judge.

Jim Lewis was convicted of rape, and appeals. No error.

The prisoner was charged with rape, committed on the person of Mrs. Sarah King, on January 17, 1918. The prosecutrix testified that she was alone in the field picking cotton, about 5 o'clock in the afternoon, when the defendant approached her from the negro cemetery and asked her what she received for picking cotton, and, then, if the butcher wagon had passed by. He walked along the cotton row behind her, and, when she reached the end of the row, he seized her and threw her down to the ground, and had connection with her, by force and against her will. She cried out, and he choked her. When he left, after being there a half hour, he went towards the branch. She met Mr. Jones on her way to her home and told him about it, and he went back with her to the place. She described minutely how the prisoner was dressed at the time, and stated that he had a gap in his teeth. She identified the prisoner as the man who assaulted her in the field, and expressed herself as being positive and sure that he is the man. She was corroborated by Mr. Jones, who testified that he went to the field with Mrs. King and saw the place where, as she alleged, the act was committed, and it appeared as though there had been a struggle there. He further stated that there were bruises on Mrs. King's throat, and she was crying when he met her in the road. He accompanied her to her home and reported the facts to Mr. Fulghum, the constable, who also went to the place where Mrs. King was assaulted, and testified that there were indications of a struggle on the ground; that he went to the prisoner's home and found him in bed, and he said that he was sick, and was sick and in bed on January 17, 1918, and had been sick ever since.

The defendant's witnesses testified that the prisoner was sick and in bed on January 17, 1918, and for a week before and for a week after that day.

The state, in rebuttal, offered evidence tending to show that the prisoner had been seen by them, not in Goldsboro, where he was found by the constable, when he said that he was sick, and was then in bed, but in the country some two or three miles from Goldsboro, within the week before and the week after January 17, 1918, and that he had chased Mrs. Loftin, and tried to grab her, and returned three nights afterwards and peeped in the window of her house. This evidence was admitted over the prisoner's objection, but was confined by the court strictly to its effect as contradicting the prisoner's declarations, and the testimony of his witnesses as to his whereabouts at the time mentioned, though there was evidence that he ran when he saw one of the witnesses a few days after the alleged assault. None of this evidence was permitted to be used as substantive, but only as tending to contradict the defendant's witnesses and his own statements.

A special venire of 40 jurors was ordered by the court, but the writ was not drawn out in writing and delivered to the sheriff at the time. When the case was again called for trial, only 22 of this panel answered to their names, and 5 of these were excused, leaving 17 for service. This number was exhausted, and another order made for 20 special jurors, and there was a third order made for 10 jurors, and the sheriff summoned the members of a jury, which had just rendered their verdict in another case, and were dismissed until a later day in the term. A jury was finally selected, without the prisoner having exhausted his peremptory challenges, he having made use of only nine of them. When it was discovered that no formal writ had been issued for the 40 jurors, the court, on motion, ordered the writ to issue nunc pro tunc, and the sheriff to make his return thereon, which was done, he stating that he could only find 22 of the 40 summoned after proper search for them. These proceedings of the court were all duly and severally objected to by the prisoner, and his objections were overruled, and they are now assigned as error. He was convicted, sentenced to death, and appealed.

W. F. Taylor and J. Faison Thomson, both of Goldsboro, for appellant.

James S. Manning, Atty. Gen., and Frank Naab, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1,2] We have no doubt as to the power of the court to amend its record, by inserting the order for the summoning of the special venire, and the issuing of the writ to the sheriff, and the entering of his return upon the process nunc pro tunc. The order for these amendments, and the correction of what was overlooked by the officers, that is, the clerk and the sheriff, related back to the

time when the order or writ should have been issued by the clerk, and the return made thereon by the sheriff. When the court has the power, we do not review its exercise, as it is within the discretion of the court to decide whether it will exercise it or not. There are a vast number of authorities for this position, and there is nothing better settled by our cases than this rule. *Phillipse v. Higdon*, 44 N. C. 381; *Clark v. Hellen*, 23 N. C. 421 (approved in *Henderson v. Graham*, 84 N. C. 496); *Seawell v. Bank*, 14 N. C. 279, 22 Am. Dec. 722; *Cheatham v. Crews*, 81 N. C. 343; *State v. Cauble*, 70 N. C. 62; *Bullard v. Johnson*, 65 N. C. 436; *Williams v. Weaver*, 101 N. C. 1, 7 S. E. 565; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573; *Grady v. Railroad Co.*, 116 N. C. 952, 21 S. E. 304. There are many other cases more or less analogous to this one.

In *State v. Cauble*, *supra*, this court held that the superior court had the power to amend the warrant by striking out the name of the prosecutor, as plaintiff, it then having the form of a civil action, and inserting the name of the state, Justice Bynum saying:

"The power of the court to make any amendment in furtherance of justice is ample. C. C. P. § 132. The change did not affect the defense or take the defendant at a disadvantage, and he therefore has no cause of complaint."

It was held in *Clark v. Hellen*, *supra*, and Chief Justice Smith stated in *Henderson v. Graham*, *supra*, approving *Clark v. Hellen*:

"Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. *Phillips v. Holland*, 78 N. C. 31. The power has been exercised in numerous cases in this state, and precedents established for the present application. Thus it is held that a seal may be affixed to a writ issued to another county, after its return, and the process, void without seal, thus rendered effectual. *Clark v. Hellen*, 23 N. C. 421. And this may be done to a *feri facias* under which the defendant's land has been sold, for the purpose of perfecting the purchaser's title. * * * The extent to which the power of amendment has been carried will appear in the numerous cases which have come before this court and to which it is needless to refer in detail. Some of them are cited in *Cheatham v. Crews*, 81 N. C. 343"—citing *Purcell v. McFarland*, 23 N. C. 34, 35 Am. Dec. 734; *Seawell v. Bank*, 14 N. C. 279, 22 Am. Dec. 722.

The power of the court to require the officers to do what it had ordered to be done is fully discussed in the very recent case of *Mann v. Mann*, 176 N. C. 363, 97 S. E. 175.

[3] We therefore conclude that the court, in the exercise of its discretion, could amend the proceedings and allow the clerk to issue the writ, and the sheriff to make a proper return *nunc pro tunc*. *State v. Whitt*, 113 N. C. 716, 18 S. E. 715; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573; *Grady v. Railroad*, 116 N. C. 952, 21 S. E. 304. An officer may be allowed to amend his return of process, so as to make it speak the truth, even though the amendment defeats the plaintiff's recovery of a penalty for a false return. *Steelman v. Greenwood*, 113 N. C. 355, 18 S. E. 503; *Swain v. Burden*, 124 N. C. 16, 32 S. E. 319; *Swain v. Phelps*, 125 N. C. 43, 34 S. E. 110. The judge's finding of facts shows that the omission here was purely clerical, and could in no way affect any substantial right, so to cure it was plainly within his discretion. There seems to have been no other irregularity alleged in the further proceeding to secure a jury, and, if there was, it could not, in the absence of fraud or corruption, affect the rights of defendant. *State v. Speaks*, 94 N. C. 865; *State v. Hensley*, 94 N. C. 1021; *State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *State v. Brogden*, 111 N. C. 656, 16 S. E. 170; *State v. Whitt*, *supra*; *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

In this record, it appears that the court had ordered the sheriff to summon the venire of 40 men, and it was the plain duty of the clerk to enter this order in the minutes, and of the sheriff to obey it. If the clerk failed to do so, by inadvertence, the court could, at any time, require him to supply the omission, and to issue the writ, so that the sheriff could make his return. The jurors, who were named in the verbal order, were actually notified to appear at the court, so far as they could be found, and it amounted to nothing more than committing to writing that which was ordered to be done. How it could prejudice the prisoner in any way, or in the least degree, we fail to see. This assignment of error, therefore, is unavailing.

[4] The evidence admitted by the court was manifestly competent for the single purpose of contradicting the prisoner's statement and the testimony of his witnesses that he was sick for two weeks, including January 17, 1918, as one of the days, and it was thus restricted by the judge. This assignment also must be disallowed.

The other exceptions are merely formal.

[5] There was sufficient evidence, in law, to support the verdict.

It must therefore be certified that there is no error in the case or record.

No error.

BROWN, J., not sitting.

(177 N. C. 137)

ALEXANDER et al. v. RICHMOND CEDAR WORKS. (No. 10.)

(Supreme Court of North Carolina. Feb. 19, 1919.)

1. TENANCY IN COMMON §14—COLOR OF TITLE—DEED TO ENTIRE ESTATE—TENANTS IN COMMON.

A deed of the interest of a tenant in common, executed under a judicial proceeding which purports to sell and convey the whole estate, constitutes color of title, and 7 years' adverse possession thereafter by the grantee bars the cotenants who were not parties to the proceedings where the deed was given.

2. ADVERSE POSSESSION §54—SUFFICIENCY OF POSSESSION—TIME OF POSSESSION.

In order to ripen into title, adverse possession need not have been during the period next preceding the suit; and, if the title ripened by adverse possession at any time prior thereto, it is sufficient, unless, subsequent to its vesting, it has been divested.

3. ADVERSE POSSESSION §57—SUFFICIENCY OF POSSESSION—CONTINUED POSSESSION.

Adverse possession need not be unceasing, but the evidence should be such as to warrant the inference that occupation had extended over the required period.

4. ADVERSE POSSESSION §44—SUFFICIENCY OF POSSESSION—NATURE OF USE OF LAND.

To ripen title by adverse possession, possession is making that use of land of which it is susceptible in its present condition so as to give the public notice of a claim of ownership and to constantly expose the party to suit by the true owner; occasional trespasses not being sufficient.

5. ADVERSE POSSESSION §16(1) — CUTTING AND REMOVING TIMBER—TRESPASS SIGNS.

Cutting and hauling away trees and lumber from swamp land, together with posting notices warning off trespassers, was a sufficient use of the land to support title by adverse possession, when continued for 7 years.

6. ADVERSE POSSESSION §85(2)—EVIDENCE—ABSENCE OF PROTEST.

In a suit to establish title to land by adverse possession, continued for 7 years under color of title derived from a deed of the interest of a tenant in common executed in partition and conveying the entire tract, that his cotenants or those claiming under them made no demand or protest for 7 years was competent evidence on the question of adverse possession and the cotenants' knowledge thereof.

7. TRIAL §29(2)—CONDUCT OF COURT—"EXPRESSION OF OPINION."

A remark of the court in asking the views of counsel made to them alone, though in the presence and hearing of the jury as to the legal phase of the testimony in an adverse possession suit, is not an expression of opinion on the facts, within the statute.

8. APPEAL AND ERROR §216(2) — RESERVATION OF OBJECTIONS—INSTRUCTIONS.

Where an instruction covers the case and is otherwise correct, that it is not sufficiently full cannot be complained of, where no request for a more explicit instruction was made.

9. APPEAL AND ERROR §230—RESERVATION OF OBJECTIONS—CONTENTION OF PARTIES.

An objection that the judge did not correctly state the contentions of the parties, when not made at the proper time, is unavailing.

Appeal from Superior Court, Tyrrell County; Bond, Judge.

Suit by J. E. Alexander and others against the Richmond Cedar Works. Judgment on the verdict for defendant, and plaintiffs appeal. No error.

Plaintiffs alleged, and offered evidence tending to show, that this land lay within the boundaries of the grant to Josiah Collins, and that a chain of title connected said Collins with Solomon Hassell, that Solomon Hassell conveyed this land to Jesse Alexander in 1813, and that Jesse Alexander died leaving five children: (1) Abner Alexander, who died intestate without issue; (2) Joseph Alexander, ancestor in blood of some of the plaintiffs; (3) Martha Sprull, ancestor in blood of the remaining plaintiffs; (4) Geo. Alexander, who conveyed his right in the land in controversy to Thos. Alexander; (5) Thomas Alexander, who conveyed his right and the right acquired from his brother, George, to one William Cahoon, whose title, plaintiffs alleged, had been acquired by defendant.

Plaintiffs further alleged that their interests together equaled one half, and that the defendant owned the other half; that the land could not be actually divided, and that a sale for partition was necessary.

Defendant admitted that it had acquired the title of William Cahoon, but pleaded sole seizin, and averred that it had acquired a good title for the entire tract by adverse possession.

Upon the trial it developed that there lay within the outer boundaries of the tract of land described in the complaint, several other tracts of land, referred to upon the trial and in the first issue and in the judgment rendered as: (1) A. C. Sawyer to F. C. Patrick; (2) Allen Cahoon Nos. 1 and 2; (3) Armstrong tract No. 1; (4) Kemp No. 1; (5) Kemp No. 2; (6) Armstrong No. 2 swamp; (7) Armstrong (3, 4, and 5). These tracts are the ones named in red ink on the blueprints, and the correctness of their location in relation to the boundaries of the tract of land described in the petition was conceded by plaintiffs.

In order to show title in itself for these

several tracts, the defendant offered grants prior to the Josiah Collins grant aforesaid, and deeds to itself foreign to the title under which the plaintiffs claimed, and evidence of possession of each of said tracts by it and its ancestors in title.

Plaintiffs finally, at the conclusion of the testimony, in open court, disclaimed title to any of the tracts referred to in the first issue, and admitted that they could not and did not claim title to any of said tracts, and thereupon this phase was eliminated from the case. The court, with the consent of plaintiffs, framed two issues, the first of which involved the tracts of land above described, which the court answered in accordance with plaintiffs' admission that they had no title thereto, the second of which issues involved the title to the remainder of the land described in the petition outside of the boundaries of the above tracts.

For the purpose of showing sole title in itself for the lands referred to in the second issue (that is, that portion of the land described in the petition outside of the tracts referred to in the first issue), the defendant offered: (1) Deed from Geo. H. Alexander to Thos. H. Alexander. (2) Deed from Thos. Alexander to William Cahoon, in 1833, which purported to convey in fee, with warranty, the entire tract of land described in the petition. (3) Deed from Wm. Cahoon to Jas. S. Cahoon, in 1839, which purported to convey in fee, with warranty, a tract of land which included within its boundaries the tract described in the petition. (4) Petition filed by Jordan L. Jones, administrator of Jas. S. Cahoon, in 1849, in court of pleas and quarter sessions, asking for a sale of his intestate's lands to make assets, with evidence of the clerk of the court that a diligent search of his office did not show any other papers in his office relative to said proceeding. (5) Certain entries on the appearance docket for January term, 1849, of court of pleas and quarter sessions of Tyrrell county. (6) An account of the lands of Jordan L. Jones sold by his administrator. (7) Deed from Jordan L. Jones, Adm'r, to Chas. McCleese, which purported to convey in fee the entire tract of land described in the petition. This deed recites that it was made pursuant to a sale by virtue of a petition filed by grantor at January term, 1849. (8) Partition proceeding of Martha Sawyer et al. v. C. E. Tamem et al. The pleadings alleged that the parties to this proceeding were the owners in fee simple of the entire tract of land in controversy, and the court ordered the sale of the said tract, and appointed M. Majette, commissioner. The sale was made and duly confirmed, and Majette, commissioner, was ordered to make deed to C. R. Johnson, the purchaser. (9) Evidence tending to show that the parties to said proceeding were all the heirs at law of Chas. McCleese. (10)

Deed from M. Majette, commissioner, to C. R. Johnson (general manager of the Richmond Cedar Works in North Carolina), in 1893, made pursuant to the last-mentioned special proceeding, and purporting to convey in fee several tracts of land, the second of which included the land now in controversy. (11) Deed from C. R. Johnson and wife to Richmond Cedar Works, in 1905, which purported to convey in fee several tracts of land, the third of which included the land now in controversy. This deed recites that this tract and one other were bought and held by said Johnson for the Richmond Cedar Works. (12) Evidence of adverse possession set out in the record.

The principal contentions of appellants at the trial in the lower court were: (1) That they and defendant, and its ancestors in title, were tenants in common, and that therefore 7 years' adverse possession was not sufficient to bar their rights; and (2) that if 7 years' possession was sufficient, there was no evidence of such possession fit to be considered by the jury.

Defendant, appellee, contends: First, that it is now settled that adverse possession by defendant, or those under whom it claimed, for 7 years is a complete and perfect defense to plaintiffs' action. Assuming, as it further says, for the sake of argument, that some 80 years ago, when Jesse Alexander died, his children became tenants in common of the land in controversy, and that the effect of the conveyance from George H. Alexander to Thomas H. Alexander was only to convey an undivided one-fourth interest in the locus in quo, and that the effect of the conveyance from Thomas Alexander to William Cahoon and from Wm. Cahoon to Jas. S. Cahoon, although they purported to convey the entire interest, was only to convey a one-half interest to James S. Cahoon and to create him a tenant in common with the other heirs of Jesse Alexander, yet when the court, upon the petition of the administrators of Jas. S. Cahoon, ordered the sale of the entire land, and it was sold to Charles McCleese and deed was made to him, and when the court later, in the partition proceeding brought by the heirs at law of Charles McCleese, purported to order the sale of the entire tract, and, upon the sale being reported to it, entered an order of confirmation, and directed deed to be made to the purchaser, who paid the purchase money, either or both of these judicial proceedings and the deeds made under either or both of them were equivalent to an actual ouster of any other tenants in common, constituted color of title to the whole tract, and 7 years' adverse possession thereafter was sufficient to bar the entry of any of the plaintiffs, even admitting them to have been tenants in common.

There were exceptions to the charge of the

court which will be noticed hereafter. The verdict was as follows:

"(1) What interest, if any, do the plaintiffs, J. E. Alexander and others, own in that portion of the lands described in the complaint or petition in this cause covered by the various tracts platted on map used in this trial, marked: First, A. C. Sawyer to F. C. Patrick; second, marked Allen Cahoon, Nos. 1 and 2; third, marked Armstrong tract No. 1; fourth, tract marked Kemp No. 1; fifth, tract marked Kemp No. 2; sixth, marked Armstrong No. 2 swamp; seventh, tract marked Armstrong Nos. 3, 4, and 5? Answer: None (by consent of plaintiffs).

"(2) What interest, if any, do the plaintiffs, J. E. Alexander and others, own in that portion of land described in complaint or petition in this cause outside of tracts platted on map used in this trial, and referred to in issue 4 by numbers first, second, third, fourth, fifth, sixth, and seventh? Answer: None."

Judgment upon the verdict, and plaintiffs appealed.

W. L. Whitley, of Plymouth, and Aydtlett, Simpson & Sawyer, of Elizabeth City, for appellants.

J. Crawford Biggs, of Raleigh, and Thompson & Wilson, of Elizabeth City, for appellee.

WALKER, J. (after stating the facts as above). [1] We held in *Roper Lumber Co. v. Richmond Cedar Works*, 165 N. C. 83, 80 S. E. 982, that there is color of title, not where a deed is executed by one tenant in common, which purports to convey the entire interest, the grantor having less than an entirety, but where a deed is executed under a judicial proceeding which purports to sell and convey an entirety, and where some of the tenants in common had been made parties to the proceeding under which the court ordered the sale. Discussing this point, we said:

"This court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they [the tenants] are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case, 20 years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby." *Cloud v. Webb*, 14 N. C. 317; *Hicks v. Bullock*, 96 N. C. 164, 1 S. E. 629; *Breden v. McLaurin*, 96 N. C. 307, 4 S. E. 136; *Bullin v. Hancock*, 138 N. C. 198, 50 S. E. 621; *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682, and cases cited.

"We are not inadvertent to the fact that this state stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc. 1078, and notes); but it has too long been the settled doctrine of this court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be

carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to the technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the court. * * * Where less than the whole number of tenants join in a proceeding to sell the common estate for partition, and the same is sold, a deed made under order of the court to the purchaser is color of title, and 7 years' adverse possession thereafter by him under the deed will bar the cotenants who were not parties." *Amis v. Stephens*, 111 N. C. 172, 16 S. E. 487; *McCulloh v. Daniel*, 102 N. C. 529, 9 S. E. 413; *Johnson v. Parker*, 79 N. C. 475.

"It will be found in the case first cited that there were tenants who were not made parties to the proceeding at law, and yet they were held to be barred by the adverse possession of 7 years; and this was because the court attached importance to the fact that the deed had been made under a decree in a judicial proceeding which closely resembled one made by a stranger to the title held by the cotenants. Only a part of the estate held in common was sold for partition, but the parties to the proceeding claimed the entirety in that part, or purparty, as it is technically called."

In that case the court said:

"In deciding this question, though, the proceeding at law is to be regarded as having the force and effect that a deed of one not connected with the tenancy would have. It purports to sever the relation of all the cotenants, whether it does so in law or not, at the time, as against those tenants not made parties to it."

And further:

"The jury have found that plaintiff has had sufficient adverse possession of the land in dispute for 7 years under color to bar the defendant's right, if they ever had any; and, as the state has parted with the original title, judgment was properly entered in favor of the plaintiff, upon the verdict."

This decision leaves nothing to be said in favor of appellants' contention upon this point.

[2, 3] The second position taken by the plaintiffs is that there was no evidence of adverse possession fit to be considered by the jury. This involves the inquiry as to what is adverse possession necessary to ripen title. The possession need not have been during the period next preceding the commencement of the suit; but, if the title ripened by adverse possession at any time prior thereto, it will be sufficient for a recovery, unless subsequent to its vesting it had, in some way, been divested. *Christenbury v. King*, 85 N. C. 229. The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the re-

quired period. *Berry v. McPherson*, 153 N. C. 6, 68 S. E. 892.

[4] Judge Bond charged the jury that possession is the making that use of land of which it is susceptible in its present condition; for example, cutting timber from timber land, kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own, and that it is done in such a way as to constantly expose the party to a suit by the true owner, is sufficient, if done for the time required by law to ripen the color into a good title. Occasional trespasses will not do. The acts must be such as at all times to subject the party doing the acts to an action at the instance of the true owner. Seven years' possession under color of title, before suit is begun under known and visible lines and boundaries adversely, notoriously, continuously, and exclusively, will ripen title in the parties having such possession. Plaintiffs certainly could not complain of this instruction, as it is sustained by all the authorities.

In determining the question of adverse possession, Mr. Wood says that the jury may take into consideration the nature and situation of the land, the using of it in the ordinary way by the grantees to whom it was conveyed, and the placing of the deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it, and prevent trespasses upon it, payment of taxes continuously under claim of title, and other such facts and circumstances may be considered by them in connection with other acts denoting a claim to it, and the exercise of dominion and ownership over it. *Wood on Limitations*, § 268, p. 569. What is sufficient to constitute this actual possession depends upon the character of the land and also the circumstances of the case. It involves, as a general rule, the doing of acts of ownership on the land sufficiently pronounced and continuous in character to charge the owner with notice that an adverse claim to the land is asserted. The question whether, in any particular case, there was an actual and adverse possession of the land is usually one of fact for the jury under the instructions of the court. *Tiffany, Real Property*, p. 1007. A standard author has said:

"Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits of which it is susceptible. This dominion may consist in and be shown by a great number and almost endless combination of acts, and where the statute of limitations has not designated certain things as requisites, the law has prescribed no particular manner in which possession shall be maintained and made manifest. Nor, on the other hand, has the law attempted to lay down any precise rules by which the sufficiency of a given set of facts to constitute

possession may be determined. It is ordinarily sufficient, if the acts of ownership are of such nature as the claimant would exercise over his own property and would not exercise over another's."

Whether there has been sufficient adverse possession to ripen title is a mixed question of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of land, and the purpose for which it is adapted and for which it has been used. All these circumstances must be taken into consideration by the jury, whose peculiar province it is to pass upon the question. The only rule of general applicability is that the acts relied upon to establish such possession must always be as distinct as the character of the land reasonably admits of, and be exercised with sufficient continuity to acquaint the true owner with the fact that a claim of ownership, in denial of his title, is being asserted. 1 Cyc. pp. 983, 984; 2 C. J. pp. 54, 55.

As the question still appears to be misunderstood, and is frequently the subject of contention, it may be well to state the principles settled by this court in former cases. Says *Ruffin, J.*:

"I think the rule is that, exercising that dominion over the thing, and taking that use and profit which it is capable of yielding in its present state, is a possession. It is all that can be done, until the subject itself shall be changed. It is like the case stated in the books of cutting rushes from the marsh. This is sufficient, though it might appear that dikes and banks would make the marsh arable." *Simpson v. Blount*, 14 N. C. 36.

And Judge Gaston:

Entering upon, ditching, and making roads in a cypress swamp, and working timber into shingles, was sufficient possession, if continued for the requisite time, to ripen a defective title into a perfect one. *Tredwell v. Reddick*, 22 N. C. 56.

And again, by *Ruffin, C. J.*, in *Bynum v. Carter*, 26 N. C. 310:

"The occupation of the pine land by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one, claiming merely under a superior paper title"

—and in this opinion the Chief Justice calls attention to the fact that making turpentine from the trees is notice to the true owner, because it is necessarily visible, and the trees are boxed and the sides of the trees are scraped with a round hack, making the work easily visible to the eye. It was therefore held that occupation of pine land by annually making turpentine on it is such an actual possession which will, in time, mature the title against a constructive possession by one claiming merely under a superior paper title.

The leading idea is that there shall be notice to the world, so that any one claiming adversely may have an opportunity to assert his title. *Moore v. Thompson*, 69 N. C. 121.

The court held in *Brittain v. Daniels*, 94 N. C. p. 786, that the erection of a spring house and the use of a spring was sufficient adverse possession of a 50-acre tract of land on which the spring was located. See, also, *Staton v. Mullis*, 92 N. C. 624, 631. It has further been said that the test of the sufficiency of the possession to fully mature title depends upon the question of whether a right of action had existed for the statutory period, when the suit was instituted, in favor of the parties against whom the benefit of the lapse of time is claimed. *Everett v. Newton*, 118 N. C. 923, 23 S. E. 961. In *Coxe v. Carpenter*, 157 N. C. 557, 73 S. E. 113, the evidence tended to show that the land was only fit for use as timber land, and that Col. Coxe did not clear any of the land, but he and his tenants every year cut timber from the land to manufacture into lumber, and also for firewood and house-bote—roads were used and new ones laid out for the purpose of using the land in its then state and condition. In the opinion the court said:

"There is no doubt but that the possession, if adverse, was open, visible, notorious, and continuous, and no owner of land could have failed to take notice of it as an assertion against his title from the very beginning. There was also evidence that the plaintiffs and those under whom they claimed 'had possession of the land' for more than 7 years. * * * We are of the opinion that there was sufficient proof of facts showing adverse possession, and the case was properly submitted to the jury for their consideration."

The court quotes from a former case to the effect that possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff (and his father) were exercising the dominion of owners and were not pillaging as trespassers. *Berry v. McPherson*, 153 N. C. 4, 68 S. E. 892.

We held in *Locklear v. Savage*, 159 N. C. 238, 74 S. E. 348:

"What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner"—citing *Loflin v. Cobb*, 46 N. C. 406, 62 Am. Dec. 173; *Montgomery v. Wynns*, 20 N.

C. 667; *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *Burton v. Carruth*, 18 N. C. 2; *Glechrist v. McLaughlin*, 29 N. C. 310; *Bynum v. Carter*, 26 N. C. 310; *Simpson v. Blount*, 14 N. C. 34; *Tredwell v. Reddick*, 23 N. C. 56.

That decision has been cited and approved in the following cases: *Green v. Dunn*, 162 N. C. 343, 78 S. E. 211; *Locklear v. Paul*, 163 N. C. 338, 79 S. E. 617; *Christman v. Hilliard*, 167 N. C. 7, 82 S. E. 949; *Reynolds v. Palmer*, 167 N. C. 455, 83 S. E. 755; *Horton v. Jones*, 167 N. C. 667, 83 S. E. 751; *Lumber Co. v. McGowan*, 168 N. C. 87, 83 S. E. 8; *McCaskill v. Lumber Co.*, 169 N. C. 25, 85 S. E. 39; *Stallings v. Hurdle*, 171 N. C. 5, 86 S. E. 80; *Cross v. Railroad*, 172 N. C. 122, 125, 90 S. E. 14; *Holmes v. Carr*, 172 N. C. 215, 90 S. E. 152; *Kluttz v. Kluttz*, 172 N. C. 623, 90 S. E. 769; *Richmond Cedar Works v. Pinnix* (D. C.) 208 Fed. 785 (opinion by Connor, J.); and more recently in *Waldo v. Wilson*, 174 N. C. 626, 94 S. E. 442, where Justice Brown thus applies the rule:

"There is evidence of an actual occupancy, possessio pedis, of a very small part of 6317 which defendant undertakes to explain, but that is a question for the jury. The adverse and unexplained possession of so small a part may not give title to the whole tract, but, coupled with all the other evidence in the record, we think, under our decisions, that, taken as a whole, the evidence is sufficient to go to the jury that they may, under a correct charge, draw their own conclusions from it"—citing *Locklear v. Savage*, 159 N. C. 238, 74 S. E. 347; *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184; *Hamilton v. Icard*, 114 N. C. 538, 19 S. E. 607; *Bryan v. Spivey*, 109 N. C. 67, 13 S. E. 766; *Osborne v. Johnston*, 65 N. C. 26; *Lenoir v. South*, 32 N. C. 241; *Christman v. Hilliard*, 167 N. C. 7, 82 S. E. 949.

The plaintiffs contend, though, that there was not sufficient evidence of adverse possession by the defendant. It would be vain and useless, and would serve no good purpose, to review the testimony upon this question in detail. We have examined it carefully, and have concluded that there is ample evidence to establish all the elements required to show such an adverse possession as will bar the true owners' right of entry and transfer the proprietorship to the dispossessor. The statute of limitations, while it is always destroying titles, is also constantly building them up. It has been well said that where an adverse relation is fixed, and continues for the required period, time covers the transaction as with a mantle of repose. *Clarke v. Boorman's Ex'rs*, 18 Wall. 493, 21 L. Ed. 904; 25 Cyc. 1168, and note 61. It is truly a statute for the quieting of titles, and warns those who sleep upon their rights that, if their silence is too long continued, they may lose them, for the law favors the active and vigilant. As plaintiffs say that there was no evidence of adverse possession, such as there

is must be taken and considered most strongly against them, rejecting all in their favor. We cannot apply this rule without concluding, at once, that this contention must fail.

[5] The locus in quo is swamp land, and could only be used for the purpose of cutting and removing the trees for lumber, they being mostly juniper, which was standing in or near rivers and creeks, such as Alligator river, Northwest fork, and Juniper creek. These trees were cut and hauled away, and generally unloaded at Ballast bank. The premises were, therefore, used and controlled just as would be done by the true owner, and the work was so long continued and so notoriously done as to give fair notice to any claimant of the land, and there is evidence to show that there was actual notice. It was also posted in places to warn trespassers away. There are other facts and circumstances which more or less tend to show possession of the land in the character of owner, and the doing of such things openly and persistently as indicated a clear assertion of title to it. The jury have found upon such testimony that the defendants had acquired the title by color and sufficient adverse possession, following the instructions of the court, which we deem to be free from any error; and, unless there is some sound and valid objection not yet considered, we find no ground for a reversal.

The proceeding, entitled Jordan L. Jones, Adm'r of James S. Cahoon, v. Sarah Ann and Elizabeth Cahoon, his heirs, while not complete, is sufficient to show a record, consisting of the petition, order of sale of the lands to pay debts of the deceased, and confirmation of the sale to Charles McCleese, account of sale, etc., service of process on the guardian of the two defendants, who were infants, and deed to purchaser; and, while some of the essentials must be inferred from the actual existence of others as shown in the roll, all are sufficiently substantiated by the documents themselves and entries on the minutes of the court. There is really more reliable evidence in this case of the pendency of the proceedings in the court of pleas and quarter sessions of Tyrrell county, at January term, 1847, and of their regularity throughout, from the original process to the final decree, than there was in *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30, as to the validity of the proceedings there in question, for in other material respects there were more deficiencies there, but the court in that case admitted the mere fragment of the minutes, which was offered by defendants, as evidence of the entire record. Furthermore, the evidence in this case shows that there was a partition proceeding between the heirs at law of Charles McCleese, entitled Martha Sawyer et al. v. C. W. Tatem et al., in which the court decreed a sale of the same lands, and they were sold to C. R. Johnson, the sale confirm-

ed and deed executed by commissioner, Mr. Majette, to C. R. Johnson, who conveyed the lands to the defendant. It would seem that all this record is fully sufficient to bring this case within the operation of the principle settled in *Roper Lumber Co. v. Richmond Cedar Works*, 165 N. C. 83, 80 S. E. 982, where we held that a purchaser at a judicial sale of land, which was held in common, made for partition or otherwise, and a deed to the purchaser by the commissioner, under the decree of the court, were sufficient to constitute color of title, and that 7 years' adverse possession thereunder would vest the title in the purchaser as against the former tenants so holding the land. We, therefore, find no error in submitting the case to the jury in this respect.

[6] The fact that none of the plaintiffs, as cotenants now claiming the land, made demand upon the defendant, or those under whom it holds, or protested against their acts of trespass during the 7 years and more, was surely competent, it being some evidence upon the question of adverse possession, as the failure to list the land for taxes would have been. *Austin v. King*, 97 N. C. 339, 2 S. E. 678. It would be strange if the owner of land should permit it to be occupied and used profitably and adversely by another, under a claim of ownership, without making any claim to it for 7 years. This is not the usual conduct in such cases. The fact that the adverse occupancy continued for so long a period of time is some evidence that the plaintiffs knew of it.

[7] The remark of the court to counsel alone, though in the presence and hearing of the jury, as to the legal phase of the testimony, when he asked for the views of counsel, was no expression of opinion, within the meaning and intent of the statute. *Observer Co. v. Remedy Corp.*, 169 N. C. 251, 85 S. E. 33. It was held in *Harris v. Greenville Traction Co.*, 101 S. C. 360, 85 S. E. 899, that a remark by the trial judge in overruling a motion for a directed verdict was not in violation of a constitutional provision as an expression of opinion upon the weight or sufficiency of the evidence to prove a fact. If the court could not call for an argument from counsel upon the law of the case, for example, upon the question of law whether there is any evidence for the jury, trials could not be easily or expeditiously conducted. In a proper case we have no doubt the learned judges would, in the exercise of their discretion, protect the parties by temporarily dismissing the jury, when it appeared that either party might be prejudiced by the discussion of the law. There was no expression of opinion upon the facts, but merely upon the law, and the learned judge did not finally adopt his first impression. There was clearly no prejudice. *State v. Jones*, 67 N. C. 285; *State v. Browning*, 78

N. C. 555; *Williams v. Lumber Co.*, 118 N. C. 928, 24 S. E. 800.

[8] If the instructions of the court to the jury were not sufficiently full and explicit, or plaintiffs desired any particular phase of the case to be stated, they should have submitted a special request for what they wanted. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; *Potato Co. v. Jeanette*, 174 N. C. 237, 93 S. E. 795. In the absence of such a request, we must hold the charge to be free from any error, as it covered the case, and was correct in principle, and it was quite responsive to plaintiffs' prayers for instructions.

[9] An objection that the judge did not correctly state the contentions of a party, when not made at the proper time, is unavailing. *McMillan v. Railroad Co.*, 172 N. C. 853, 90 S. E. 683; *State v. Foster*, 172 N. C. 960, 90 S. E. 785.

The complaint that the judge did not state the law applicable to both sides, but only on defendant's side, is not supported by the record. Other exceptions are clearly without merit.

After a critical examination of the entire record, and upon a motion to nonsuit, or for the direction of a verdict, viewing the evidence most favorably for the defendants, as we should do (*Lynch v. Dewey Bros.*, 175 N. C. 152, 95 S. E. 94), we find no reason to disturb the result.

No error.

BROWN, J., not sitting.

(177 N. C. 153)

BRADLEY et al. v. CAMP MFG. CO.
(No. 103.)

(Supreme Court of North Carolina. Feb. 26, 1919.)

1. EVIDENCE ⇨501(7)—BASIS OF OPINION—VALUE.

In an action for damages for destruction of timber on plaintiff's land by fire set out by defendant's locomotive, witness' estimate of value based on that of timber sold from his own and other land in the neighborhood, where he also stated his estimate of the value irrespective of such sales, was admissible.

2. WITNESSES ⇨240(4)—LEADING QUESTION.

Where a witness was asked, "What would that land sell for now—\$23 per acre?" it was not error to exclude the answer thereto, since, if otherwise competent, the question was leading.

3. TRIAL ⇨129—MISCONDUCT OF COUNSEL—REMARKS.

In a trial involving the amount of damage to plaintiff's land from burning of timber thereon by fire set by defendant's locomotive, counsel's remarks that the defendant had the au-

dacity to say that the damage done to land was only \$2 per acre held not such a flagrant abuse of privilege as to warrant new trial, where it is apparent that no harm was done thereby, and the statement was provoked.

4. APPEAL AND ERROR ⇨216(3)—TRIAL ⇨193(1)—INSTRUCTIONS—RECITAL OF CONTENTIONS.

A mere recital of the contentions of the parties in instruction is no expression of an opinion upon the facts or weight of the testimony; and, if the court misstated them, his attention should have been called thereto when timely correction could be made, and it is too late to do so after verdict.

5. TRIAL ⇨193(2)—AMOUNT—PLEADING—INSTRUCTIONS.

An instruction restricting plaintiff's maximum recovery to the amount stated in the complaint was not an expression of opinion that the damages should be in the amount claimed.

6. APPEAL AND ERROR ⇨1033(5)—FAVORABLE ERROR—INSTRUCTIONS.

An instruction restricting plaintiff's maximum recovery to the amount stated in the complaint is in favor of defendant.

7. TRIAL ⇨256(13)—INSTRUCTIONS—DAMAGES—REQUESTS.

Defendant, desiring a more specific instruction than one restricting plaintiff's recovery to amount stated in the complaint, should have requested it.

8. TRIAL ⇨295(8)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for damages to plaintiff's land by burning of timber by fire set by defendant's locomotive, a charge upon negligence, which must be construed as a whole, held correct.

9. RAILROADS ⇨484(4)—DAMAGE BY FIRE—EQUIPMENT OF ENGINE—QUESTION FOR JURY.

In an action for damages for burning of plaintiff's timber by fire set by defendant's engine, whether the engine was properly equipped and handled was a question for the jury.

10. RAILROADS ⇨480(5)—DAMAGE BY FIRE—EQUIPMENT OF ENGINE—BURDEN OF PROOF.

In an action for damages resulting from fire, caused by defendant's locomotive, the proper equipment and handling of the engine were peculiarly within defendant's knowledge, and the burden rested upon it to disprove negligence.

11. TRIAL ⇨281—EXCEPTIONS TO CHARGE GOOD IN PART.

An exception to a charge, embracing two separate propositions, one of which is plainly correct, is too broad.

Appeal from Superior Court, Northampton County; Kerr, Judge.

Action by M. E. Bradley and others against the Camp Manufacturing Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Plaintiff alleged that the timber, brush, rails, and fences on his land were burned by sparks which came from defendant's locomotive engine, as it passed near plaintiff's premises, and that the fire was caused by the negligence of the defendant.

Chas. Massey testified, on direct examination, as follows:

"I live in this county. I knew the Bradley land before the fire, and have seen it since. I should say the difference in value then and now was \$15 to \$20 per acre. About 200 to 215 acres were burned over. Yes; the land was studded with young trees and undergrowth. The fire killed most of the little trees, and those it did not kill it burned one side, and that stunts the growth. I arrived at the value of the land according to the timber that I had upon selling off my land and that in the neighborhood. Irrespective of the value of the timber which I had sold and which I had seen sold in the neighborhood, I put the difference in value before and after the fire at \$15 to \$20 per acre."

There was no objection to the foregoing testimony by the defendant.

Cross-examination:

"I sold my timber about one year ago, and some one or two months ago."

Counsel for defendant moves to strike out this witness' estimate of damages. Motion overruled, and defendant excepts, and this is defendant's exception No. 1.

J. A. Shaw testified:

"I live in this county. I live about 1½ miles from Bradley's land; am a farmer and a merchant, cut some cord and pulp wood, and have for 12 or 15 years. Yes, I went on the Bradley land to estimate the damage, went twice; Cleaton and Vinson were with me. Jno. Bradley showed me the lines. I examined the lines as carefully as I knew how. The damage was \$2 per acre; that included all the fence. Yes; I am familiar with the map. On the 80 acres, the timber had been cut off. It was damaged very slightly, except a small place which was burned right bad. The 8 acres were in the burned area. The 29 acres were burned over. The 7 acres were scrub oak and pine."

He was asked:

"What would that land sell for now—\$23 per acre?"

Objection; sustained; exception by defendant, and this is exception No. 2.

During the argument, counsel stated that the defendant company had the audacity to come here and say that damage done to the plaintiffs' land was only \$2 per acre. To this statement of counsel to the jury defendant excepted.

Court's charge to jury:

"Gentlemen of the jury, this action was brought by Bradley et al. against the Camp Manufacturing Company. (The plaintiff Bradley seeks to recover \$2,600 for damages sustained by reason of the fire which he alleges was set out by defendant company on or about

April 14, 1916, which said fire Bradley alleges burned over about 200 acres of his land, and which land was damaged as he alleges, at least \$12.50 per acre, and he alleges that he was further damaged by destruction of a rail fence and some other fence rails of the value of about \$100.)"

To the foregoing part of his honor's charge in parentheses the defendant excepted, and this is defendant's exception No. 4.

"(These plaintiffs, gentlemen of the jury, contend that this fire was negligently set out by the defendant, its agents or employees, and that the same was communicated to their lands, and that these lands were burned over and they were damaged as alleged.)"

To the foregoing part of the charge the defendant excepted, and this is defendant's exception No. 5.

"Now, gentlemen of the jury, the defendant company denies that it or its agents or employees negligently set out the fire which burned over the plaintiffs' lands, and further contend that the fire didn't originate on its right of way, and that it could not have started there, because the right of way was clean, was carefully kept clean, and there was no combustible material thereon, and that the engine which passed over the plaintiffs' land at the time the same was alleged to have been burned over was well equipped with appliances in general use, and that the said engine was in proper condition and operated in a careful manner, by a skillful and competent engineer, and that it is not liable in any aspect of these cases, and should not be compelled to pay the plaintiffs any amount whatsoever.

"Now gentlemen, it is my duty to state to you the contentions of both parties to this action, and I say to the counsel, if I state any of the contentions incorrectly, I'll gladly correct myself, or if I fail to state some that you would like me to do, just call my attention to them and I will be glad to do so.

"Plaintiffs contend that on the 14th day of April, 1916, the defendant's engine passed over that Bradley property; that it was some time in the afternoon; that Ned Johnson was near where the engine passed; that in a few moments after the engine passed, and in about 25 yards from Johnson, he saw a large smoke right at the track, and about where the engine had just passed; that it was a windy day in April; that this fire caught in the combustible matter, which was dry, which was upon the right of way of the company; and they contend that before he could put it out it spread over the right of way and burned over 200 acres of Bradley land. Plaintiffs contend that Bradley sold timber about 15 years ago, and that the small timber was very valuable. They contend that this fire utterly destroyed it, burned over 200 acres, burned over the new growth, and practically destroyed everything on this land. (Bradley says that he was damaged \$2,600. The court charges you he is not entitled to recover any more damages than he claims in his complaint.)"

To the foregoing part of charge in parentheses defendant excepted, and this is defendant's exception No. 6.

"These plaintiffs further contend that this right of way was full of dry combustible material; that they have offered evidence that ought to satisfy you that this right of way over which the engine run was a foul right of way; that it was easy for a fire to start, because it was dry. They not only contend that the right of way was foul, but go further and contend that the engine of the defendant company, which was passing and which put out this fire, was not equipped with a proper spark arrester; that the company had two spark arresters on it, and this fact ought to convince you that this engine wasn't safe. They contend that it wasn't safe, and that if it was safe, it wasn't manned by a competent engineer; that it was not run by a skillful engineer. They contend that the defendant company set out this fire; that it caught on the right of way; that the engine wasn't properly equipped with appliances in general and common use; that it wasn't handled by a competent engineer; that this engine which passed at the time Ned Johnson was in the potato patch was the one that put out the fire. They contend that you ought to find from the evidence that they were damaged; that Bradley is a conservative man, and he says he is damaged about \$10 per acre, and the other Bradleys about \$15. Others have testified that it was \$10 to \$15 per acre. Contend that it was in the spring, and it was hard to tell how much damage was done, unless you knew the property just before and just after the fire occurred. They contend they have brought men here who know and who ought to know what they say; that these gentlemen saw this land just before and just after the fire, and that it is the best evidence for you to obtain the amount of damages. They contend that you ought not to take what Mr. Williams said about the fire, for he is interested and would put it too low; that he has brought men here who never saw the place till 28 months after the fire; and they say you ought not to take what these men said, for they knew nothing about it until after the new undergrowth had begun. They contend that these men who ought to know say that the damage was \$10 per acre, and that Bradley was damaged at least \$2,000, and contend that you ought to give them a reasonably fair sum as damages for the rails and fences that were destroyed. (The court charges you that if you answer the first issue, 'Yes,' then the plaintiffs would be entitled to recover a reasonable fair amount as damages for any fence or rails destroyed as you find from the evidence.)"

To the foregoing part of the charge in parentheses, the defendant excepted, and this is the defendant's exception No. 7.

"Now the defendant contends entirely different. They contend that it didn't set out the fire; that it had bought and acquired roads and timber, and had acquired a right of way over or by Bradley's land or property, and that it had been careful, as compelled by law to be, and kept its right of way clean, and it says the section master of the company, whose evidence you ought to believe, has told the truth, and that he was careful in keeping the right of way in good condition; that it was burned over about every two weeks; that it was to

their interest to keep it clean, it was their duty to keep its right of way clean. They contend that they have offered witnesses who saw it every day, and they have testified that it was clean, and that it was clean when this fire broke out, that it had no combustible material on it, and that you ought to believe what these men say about it. It contends further that it has not only been careful to keep the right of way clean, but its engines were equipped with all appliances that were in common and general use, that they were kept in good order, and that the only men who knew this were the men who handled them, and it has brought these men here to testify; and it contends that the engines were equipped with the proper spark arrester, in good order, and had every appliance in good order, and they didn't negligently and carelessly let fire escape. They contend that the engines were operated by skillful engineers, and that there is no evidence to the contrary. They contend that the engine which ran by Bradley's property was operated by a competent engineer, and in a skillful manner. They say it could not have put out the fire, and, if it did, they didn't do it negligently, and that, therefore, they ought not to be liable to the plaintiffs in any amount whatsoever. Defendants say if it put out the fire it didn't damage the plaintiffs as much as they claim. They say, if you find that they set out the fire, they didn't damage the Bradley property more than \$2 per acre. They contend that they have brought men here like Mr. Vinson, who knew something of the nature of the growth and the value of the land, and he said that the damage would not be more than \$250 to Bradley. They contend that they have gotten other men who have gone over the land, and that those men have confirmed what Vinson said about the damage done to the lands, and they say that the damage done to Bradley's land wasn't more than \$2 per acre, and that you ought not to find that it has damaged Bradley \$2,600. They say they don't know about the damage to the rails and fence; that will be a question for you to find from evidence. (You are to consider that and give the plaintiffs a fair and reasonable compensation for the fence rails, as you may find.)"

To the charge in parentheses above defendant excepted, and this is defendant's exception No. 8.

It contends that Johnson said the fire was late in the evening, about night, and that this fire was not the one that burned over Bradley's land, because other witnesses say it occurred in the middle of the day. Plaintiffs say that Johnson was an old man, and that his recollection about the time of day might be wrong; and plaintiffs say that Johnson said he saw smoke immediately after the engine passed by; and plaintiffs say it was the fire that burned over their land. Defendants say they did all they could to stop the fire, and that you ought to know when it occurred. It contends that the estimate that their witnesses put upon the damage done by reason of the fire included the damage done to the rails and any other property.

Defendant's prayers for instruction:

In apt time the defendant prayed the court in writing to give the following special instructions to the jury:

"If you believe all the evidence, the defendant's right of way was burned and was free from inflammable matter and in good condition."

Not given, and defendants excepted, and this is defendant's exception No. 9.

"2. If you believe all the evidence, you will find that the engines or the defendants were well equipped with spark arresters, ash pans, and all other appliances in general use for the prevention of fire, and that the said appliances were in good condition, and said engines were operated by skillful engineers, and manned by a skillful engineer in a skillful manner, you will answer the first issue, 'No.'"

Not given, and defendant excepted, and this is defendant's exception No. 10.

"3. That if the jury find from the evidence, and by its greater weight, that the right of way of defendant's railroad was scraped, burned, and free from trash and combustible matter, and that its engines were equipped with spark arresters, ash pans, and other appliances in general use for the prevention and escape of fire and sparks from its engines, and that the same were in good condition, then the defendants would not be guilty of setting out the fire as alleged in the complaint, even though the fire was accidentally set by the defendant's engine on the right of way of the defendant, and spread therefrom to the lands of the plaintiffs, and they will answer the first issue, 'No.' (Given.)"

"4. That if the jury find from the evidence, and by its greater weight that the engines of the defendant were equipped with approved spark arresters, ash pans, and other appliances in general use for the prevention and escape of fire and sparks, and that the same were in good condition and manned by a skillful engineer, and operated in a skillful manner, and if they should find further from the evidence, by its greater weight, that the fire originated off the right of way of the defendant, then the defendant would not be guilty of negligently setting out the fire as set out in the complaint, and they will answer the first issue, 'No.' (Given.)"

"5. That if the jury find from the evidence, and its greater weight, that the fire escaped from the defendant's engine in proper condition, having a proper spark arrester, and operated in a careful way, by a skillful and competent engineer, and the fire escapes off the right of way, the defendant is not liable, for there would be no negligence, and they should answer the first issue, 'No.' (Given.)"

"6. If you believe all the evidence, you should answer issue one, 'No.'"

Not given, and defendant excepted, and this is defendant's exception No. 11.

Issues:

"1. Were the lands of the plaintiffs Bradley set fire to and burned by the negligence of the defendant, as alleged in the complaint?"

"2. What damage, if any, has been done to the lands of the plaintiffs Bradley, by reason of said fire?"

After giving a part and refusing to give a part of defendant's special instructions, as above set out, the court resumed its charge as follows:

"Now, gentlemen of the jury, the question is, Were these lands negligently set fire to? and I will give you a definition of negligence. Negligence in law cannot exist except in cases where there has been a want of ordinary care upon the part of the person charged with the act of omission or commission; it is the omission to do what a reasonable man, guided upon these considerations, which ordinarily regulate the conduct of human affairs, would do, or it is the doing something which a provident or reasonable man would not have done under the existing circumstances. (Negligence, to be actionable, must be the failure to do, by one responsible exercising ordinary care under all the circumstances, what a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee.)"

To the foregoing charge in parentheses, defendant excepted, and this is exception No. 12.

"(Now, as to the first issue, the burden is upon the plaintiffs to satisfy you by the evidence, and by its greater weight, and I mean by greater weight that that side upon whom the burden is placed by law and who must establish their contention by the greater weight of the evidence must put on sufficient evidence as to their contentions on their side of the scale to outweigh their adversaries' side; it must be borne down some—ever so slight will be sufficient—but they must satisfy you by the greater weight of evidence: First. That they are the owners of the property alleged to have been burned over, and the court charges you that it is admitted, so you need not consider that. Bradley owned the land. Second. That the fire was set out by defendant company, its agents or employes, from its locomotive engine which passed over or near plaintiffs' land, and if the plaintiffs have failed to satisfy you by the greater weight of the evidence, as I have defined it to you, that the defendant company set out the fire, then you will answer the first issue, 'No,' and if you answer the first issue 'No,' you need not consider the other issue, because the defendant in no event would be liable if it didn't set out the fire; but if the plaintiffs have satisfied you by the evidence, and by its greater weight, that defendant set out fire as alleged, the burden then shifts to the defendant to satisfy you by the evidence and by its greater weight, as I have defined it to you, that it didn't negligently set out the fire, for that its engines were not defective, but were properly equipped with good spark arresters and other appliances in good condition, and which appliances were in common and general use, and that the same were operated in a skillful manner, and by a competent engineer, and notwithstanding that you may find that the defendant set out the fire, if you find these facts from the evidence, the burden being upon the defendant company to establish these facts, then the defendant company would not be liable; the defendant may not be liable for every fire it sets out, and you should answer the first issue, 'No.')"

To the foregoing part of charge in parentheses, defendant excepted, and this is defendant's exception No. 13.

"(If the plaintiffs have satisfied you by the evidence, and by its greater weight, that the fire which burned over their lands on the date alleged was set out by defendant company, and the defendant company has failed to satisfy you by the evidence, and by its greater weight, that it wasn't negligent in that its engine was properly equipped and in good condition and operated by a competent and skillful engineer, then you should answer the first issue, 'Yes.')

To the foregoing part of charge in parentheses, defendant excepted, and this is exception No. 14.

"(If you find from the evidence, and by its greater weight, that the track or right of way of defendant was foul and full of dry and combustible material, and that it was allowed to remain in this condition, and that defendant's engine or train, while passing over this track in such a condition, set fire to this combustible material, and the same caught fire and communicated fire to the plaintiffs' lands and set out the fire which burned over plaintiffs' land as alleged, then the defendant company would be liable, and you should answer the first issue, 'Yes.')

To the foregoing part of charge in parentheses, defendant excepted, and this is exception No. 15.

"It was the duty of the defendant company to keep its right of way clear and clean of combustible material, and in doing this it was required to use the care that an ordinarily prudent man would use under all the circumstances."

Here the court read to the jury in full the rule laid down by the court in *Williams v. Railroad*, 140 N. C. p. 624, 53 S. E. 449, as follows:

"1. If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence.

"(2. If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way, by a skillful and competent engineer, but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiffs' premises, the defendant is liable.")

To the foregoing part of charge in parentheses, defendant excepted, and this is exception No. 16.

"3. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, whether the fire catches off or on the right of way, the defendant is liable.

"If you answer the first issue, 'No,' you need not answer the next issue. If you answer the first issue, 'Yes,' then proceed to answer the next issue."

Issue as to damages:

"What damage, if any, has been done to the lands of the plaintiffs, Bradley, by reason of the said fire?

"The burden is upon the plaintiff as to the last issue to satisfy you by the evidence and by its greater weight what damages they have sustained by reason of the fire. You remember the evidence as to this issue. The court charges you that you may reward the plaintiffs fair and reasonable compensation in money for their damages, which would be the difference between the value of the land immediately before same was burned over and after same was burned over; what was the value of the property destroyed at the time and place it was destroyed?

"You are the sole judges of the evidence and how much weight to give to the evidence offered by the plaintiffs and defendant. What was the value of this land before this fire burned it on April 14, 1916; what the value of the timber and other material destroyed; how much was this land worth the next day? It is needless for me to say that you ought to approach this matter fairly and squarely; don't let the fact that some of the parties are citizens in this county and defendant a corporation in another state influence you; when people come into this court they stand upon the same plane; don't let these facts prejudice you either for or against either litigant. The court has no opinion and doesn't intend to convey to you that it has. (You are not compelled to accept what the plaintiffs' counsel have said was the evidence, nor the defendant's counsel's recollection thereof, nor the court's.)"

To the foregoing part of charge in parentheses, defendant excepted, and this is exception No. 17.

"You are the sole judges of the evidence and how much weight to give to the evidence. Take the issues and say how you find them."

The court thereupon submitted the following issues to the jury:

"1. Were the lands of the plaintiffs Bradley set fire to and burned by the negligence of the defendant as alleged in the complaint?

"2. What damage, if any, has been done to the lands of the plaintiffs by reason of said fire?"

And the jury answered the first issue, "Yes," and the second issue, "\$1,062.50."

There was ample testimony to show that the fire was set out by defendant's engine, and the jury found that it was negligently done, and assessed the damages. Defendant appealed from the judgment upon the verdict.

Winborne & Winborne, of Murfreesboro, and Peebles & Harris and G. E. Midyette, all of Jackson, for appellant.

W. L. Long, of Roanoke Rapids, W. H. S. Burgwyn, of Woodland, and Geo. C. Green, of Weldon, for appellees.

WALKER, J. [1] As to Massey's testimony concerning the value of the timber, there

was no error, because he testified that, irrespective of what he got for his own timber, or its value, he was of the opinion that the difference in value of plaintiff's land before and after the fire was between \$15 and \$20 per acre. We do not concede, though, that the objection was made in proper time, or that it was not within the discretion of the court whether or not it would consider it.

[2] The question asked the witness J. A. Shaw was leading, and properly excluded on that ground, even if it was otherwise competent, which it seems not to be. *G. F. U. Warehouse Co. v. Am. Agr. Chemical Co.*, 176 N. C. 509, 97 S. E. 472.

[3] The remarks of counsel, to which exception was taken, were not such a flagrant abuse of their privilege as to be ground for a new trial. It is apparent that no real harm was done, and the jury doubtless passed it by, without prejudice, as being merely a too fervid utterance of counsel in the heat of debate. It was intended only to emphasize the absurdity of defendant's very small estimate of the plaintiff's loss. It is one of the inseparable incidents of all trials, and should not be taken too hard, but overlooked upon the principle of "give and take." It was provoked, too, by what the defendant had previously said. The judge's charge as to damages was sufficient to prevent injury to the defendant in this case from the remark.

[4] We do not agree with the learned counsel that there was any intimation of opinion by the court upon the facts. When it is supposed to have occurred, the judge was only stating the allegations, or contentions, of the plaintiff, and the nature of the case, and not expressing any view of his own. If he misstated them, his attention should have been called to it then, when timely correction could be made by him. It is too late after verdict to complain. *Jeffress v. Railroad Co.*, 158 N. C. 215, 73 S. E. 1013; *State v. Cox*, 153 N. C. 638, 69 S. E. 419; *State v. Blackwell*, 162 N. C. 672, 78 S. E. 316; *State v. Merrick*, 172 N. C. 870, 90 S. E. 257; *State v. Johnson*, 172 N. C. 920, 90 S. E. 426; *State v. Earl Neville*, 175 N. C. 731, 95 S. E. 55. He who fails to speak when his time comes to be heard will not be heard when he should be silent. He will not be allowed two chances at the verdict. *State v. Tyson*, 133 N. C. 692, 45 S. E. 838. But a mere recital of contentions, as we have seen, is no expression of an opinion upon the facts or the weight of the testimony. *Jarvis v. Swain*, 173 N. C. 9, 91 S. E. 358.

[5-7] Restricting plaintiff's maximum recovery to the amount stated in the complaint was in favor of defendant, and surely is no expression of opinion that the damages should be the amount thus claimed. If defendant desired more specific instructions as to damages, it should have asked for them.

[8] The charge upon negligence, when considered as a whole, was in accordance with our decisions upon the subject. *Aycock v. Railroad Co.*, 89 N. C. 321; *Williams v. Railroad Co.*, 140 N. C. 623, 53 S. E. 448; *Knott v. Railroad Co.*, 142 N. C. 242, 55 S. E. 150; *Haynes v. Gas Co.*, 114 N. C. 207, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Cox v. Railroad Co.*, 149 N. C. 117, 62 S. E. 884; *Kornegay v. Railroad Co.*, 154 N. C. 389, 70 S. E. 731; *McRaney v. Railroad Co.*, 168 N. C. 570, 84 S. E. 851; *Aman v. Lumber Co.*, 160 N. C. 370, 75 S. E. 931; and especially *Boney v. Railroad Co.*, 175 N. C. 354, 95 S. E. 590, where the principal cases are collected, and the doctrine stated. The charge must be construed as a whole. *Kornegay v. Railroad Co.*, supra.

[9,10] There was sufficient evidence to prove that the track was foul, and also the space within 10 feet of it, and that the fire started there and burned the adjoining lands. It was for the jury to say whether the engine was properly equipped and handled, as the cases we have just cited show; and it was for the defendant to satisfy the jury that there was no negligence in this respect, or take the chance of an adverse verdict. The facts were peculiarly within its knowledge, as it had the possession and control of the engine, and could establish them better than could the plaintiff. *Haynes v. Gas Co.*, supra.

[11] We may further say that the exception to the charge is too broad, as it embraces two separate propositions, one of which is plainly correct. *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 713, and cases cited.

There is no merit in the other exceptions.

No error.

BROWN, J., not sitting.

(177 N. C. 156)

PATILLO et al. v. CAMP MFG. CO.
(No. 102.)

(Supreme Court of North Carolina. Feb. 26, 1919.)

Appeal from Superior Court, Northampton County; Kerr, Judge.

Action by Bella Patillo and others against the Camp Manufacturing Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Winborne & Winborne, of Murfreesboro, and Peebles & Harris and G. E. Midyette, all of Jackson, for appellant.

W. L. Long, of Roanoke Rapids, W. H. S. Burgwyn, of Woodland, and Geo. C. Green, of Weldon, for appellees.

WALKER, J. This case was heard, by consent, with *Bradley v. Camp Manufacturing Co.*,

98 S. E. 318, and is governed by the opinion filed in that case; the facts and exceptions being substantially the same.

No error.

BROWN, J., not sitting.

(112 S. C. 177)

HARWELL v. COLUMBIA MILLS.
(No. 10135.)

(Supreme Court of South Carolina. Jan. 27, 1919.)

1. MASTER AND SERVANT ⇨217(2)—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

A servant did not assume the risk of slipping upon a floor from the mere fact that he knew it was wet.

2. MASTER AND SERVANT ⇨185(7)—INJURIES TO SERVANT—SAFE PLACE TO WORK—FELLOW-SERVANT DOCTRINE.

Where a floor was dangerous by reason of a leaky icebox, and plaintiff slipped and was injured at a time when sand had been swept from floor, mere fact that it was duty of another servant to oversee place and keep sand on floor did not free master from liability on ground that negligence was that of a fellow servant.

3. TRIAL ⇨296(6)—INSTRUCTIONS—CURE OF ERROR.

That instruction eliminated from consideration of jury fact that a servant might assume risk of falling on a wet floor was cured by an instruction almost immediately following, that recovery could not be had if servant knew floor was wet when he stepped on it, or by exercise of ordinary care could have known of such condition.

4. MASTER AND SERVANT ⇨201(9)—INJURIES TO SERVANT—ACTS OF FELLOW SERVANT.

If master was negligent in failing to provide a safe place of work, he would be responsible if it caused injuries to servants, notwithstanding that negligent act of a fellow servant might have contributed to injuries also as a proximate cause.

5. TRIAL ⇨255(4)—INSTRUCTIONS—REQUESTS—EFFECT OF EVIDENCE.

Where injured plaintiff sought to show that he would suffer greater injury because of predisposition, and defendant on cross-examination brought out that such predisposition was to tuberculosis, and court instructed generally that jury could take into consideration greater injury because of some predisposition if shown by evidence, such instruction was not erroneous as allowing speculative damages because of the tuberculosis which might or might not develop, since defendant, if he wished to restrict effect of evidence brought out by him, should have requested an instruction to that effect.

5. APPEAL AND ERROR ⇨1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In action by servant for injuries by slipping on floor, it was harmless to allow a witness for plaintiff to state that defendant put sand on

floor after the accident, where defendant's witness stated without objection that sand had been put on the floor before, and that the orders required it.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by E. T. Harwell against the Columbia Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Davis, of Atlanta, Ga., and Barron, McKay, Frierson & Moffatt, of Columbia, for appellant.

B. L. McDowell and Cole L. Blease, both of Columbia, for respondent.

FRASER, J. The respondent, Harwell, was an employé of the appellant mills. On the 4th day of October, 1916, while Harwell was at work, he went into a closet in the room in which he was working that had been provided for the comfort and convenience of employes. As he came out of the closet he stepped on a wet place on the floor, and fell to the floor and injured himself. This action was brought for damages for the failure of the mills to provide a safe place in which to work. The jury found a verdict for the plaintiff, and from the judgment entered upon the verdict the defendant appealed.

[1] I. The first exception complains of error in refusing to direct a verdict on the ground that no other reasonable conclusion could be drawn from the evidence than that the plaintiff had assumed the risk. The plaintiff admitted that he knew the place was wet, but not that he knew that it was slippery and dangerous. It was another witness who said that the floor was made of maple, and that when a maple floor was wet it was slippery. This exception cannot be sustained.

[2] II. The second exception complains of error in refusing to direct a verdict on the ground that the negligence, if any, was that of a fellow servant. This exception cannot be sustained. It is not necessary to discuss the nonassignable duties of the master. The icebox leaked, and the water that fell on the floor ran across the floor in front of the closet door over which the employes were expected to go. Byer, a witness for the appellant, states that it was his particular business to oversee the conditions of the closets; that Mr. Harwell and a colored man who handled the ice were under him; that he had an instruction, before Mr. Harwell got hurt, to use sand as a precaution. The icebox was on wheels, and could have been repaired or removed to another place where it could have done no harm. The authorities of the mill knew that the floor needed attention and precautionary measures, and did not make the place safe by remov-

ing the cause of danger or taking the steps necessary to counteract the danger. There was evidence that the master had been warned of the danger.

[3] III. Exception 3:

"His honor, the presiding judge, charged the jury as follows: 'But if you find that the risk which occasioned an injury, if any, to the plaintiff, was one which arose out of the master's negligence, then it would not be an ordinary risk incident to the work, assumed by the servant. In other words, the servant, when he enters upon the employment of the master, has a right to expect the master to use ordinary care to provide him a safe place for work, and a safe way in going to and from his work; and the master is not allowed, where he fails to use care to provide a safe place and way, to say that his failure was an ordinary risk assumed by the servant.'

"This constituted error (a) in that it eliminated from the consideration of the jury the fact that a servant might assume a risk of which he was fully aware, the danger of which had existed for some time, and was perfectly obvious and apparent, even though the existence of such condition might be due indirectly to negligence of the master."

This exception cannot be sustained. It was followed almost immediately by:

"If you find from the evidence that the plaintiff knew of the wet and slippery condition of the floor over which he had to pass, if he did have to pass, and if the evidence that it was wet and slippery, or that by the exercise of ordinary care the plaintiff could have known of such condition, or that any reasonable man of ordinary care and prudence would have known of such condition, and that any reasonable man of ordinary care and prudence, knowing of such condition of the floor, would have realized the risk and danger in passing over it, and would not have attempted to pass over it, and that the plaintiff, in attempting to pass over the floor, failed to exercise the ordinary care which would have been exercised by a person of ordinary prudence under similar circumstances, and that such failure to exercise ordinary care and prudence contributed, as a proximate cause, to his injuries, why, then, he could not recover."

[4] IV. Exception 4:

"His honor, the presiding judge, charged the jury as follows: 'However, I charge you that with this qualification: The master is not liable for an injury occurring through the act of a fellow servant; but if the act of a fellow servant merely co-operated or contributed, along with some independent act of negligence on the part of the master, such as a failure of the master to use ordinary care to provide a safe place of work, or a safe way for the servant to use in passing from his work to a toilet provided for his use during the hours of employment, and returning from the toilet to the place of work, then the fact that an injury may have been caused by the act of a fellow servant would not be a defense, if it was also caused by the negligence of the master in failing to furnish a safe place or a safe way for the use of the servant, under the circumstances which I have stated to you. As I have said, the mere fact that an

injury may have been due to the act of a fellow servant would not be a defense, unless it was the sole cause of the injury, or unless you find there was no negligence on the part of the master. The master is not responsible for the act of a fellow servant, but he would be responsible for his own negligence, if he were guilty of negligence, in failing to provide a safe place for work, or safe means and a safe way for the servant while at work, and for such negligence in failing to provide a safe place or safe way for the use of the servant while at work, he would be responsible, if it caused injuries to the servant, notwithstanding that the negligent act of a fellow servant might have contributed to those injuries also as a proximate cause.'

"This was error, (a) in that it eliminated from the consideration of the jury the fact reasonably inferable from the evidence that the wet spot was caused by the failure of a fellow servant to follow the instructions and use the means furnished him by the master to render the place safe, which fact would exonerate the master from liability, even though such failure did result in rendering the place unsafe; (b) in that it constituted a charge on the facts."

The wet place was caused by the defective condition and location of the icebox and not by the sweeper. The master knew it. He knew it required constant attention. The floor was swept every hour and a quarter. The precaution (the sand) was removed every hour and a quarter. The place was made unsafe by the master and not by the fellow servant.

This was a statement of law, and not a charge on the facts.

[5] V. Exception 5:

"His honor, the presiding judge, charged as follows: 'But you are to take into consideration the extent of the injuries, if any, produced by that fall, upon the plaintiff, and if those injuries are greater in his case because of some predisposition of his constitution, if any such predisposition is shown by the evidence, why that is a circumstance which you could take into consideration.'

"This was error in that (a) it constituted a charge on the facts; (b) it allowed the jury to speculate on a vague and uncertain possibility as an element of damage; (c) violated the true rule of damages, that where one suffering from a disability receives an injury he is only entitled to receive compensation to the extent of the aggravation of his previous condition."

This exception cannot be sustained. The plaintiff brought out the fact that, on account of a predisposition of the plaintiff's constitution, he was likely to suffer more than a man of normal constitution. The appellant brought out the fact on the cross-examination that the defect was a tendency to tuberculosis. There is nothing in the charge to suggest that the jury might give damages for tuberculosis that might or might not develop. His honor specifically told the jury, "You are to ascertain from the evidence on the stand what effect any injuries had on this particular man." If the appellant

thought it necessary to guard against the effect of the statement it brought out itself, then appellant should have requested his honor to so charge.

[6] VI. The sixth exception complains of error in allowing a witness for the plaintiff to state that sand had been put on the floor after the accident. This was harmless here, because appellant's witness stated without objection that sand had been put on the floor before and the orders required it. The reason of the rule is that, when it is shown that the master changed conditions after an accident, it may be inferred that the master thereby admits the defective conditions at the time of the accident. The master must therefore admit a defective condition or continue to operate under defective conditions, and thereby endanger other employes. The testimony did not show a change in conditions. The testimony does not violate the reason of the rule, and is therefore harmless.

The judgment is affirmed.

HYDRICK and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(112 S. C. 194)

GREENVILLE NURSERY CO. v. SOUTHERN RY. CO. et al. (No. 10160.)

(Supreme Court of South Carolina. Feb. 11, 1919.)

JUSTICES OF THE PEACE \Leftrightarrow 164(6)—APPEAL—RETURN—CONCLUSIVENESS.

Where appellant's exceptions to acts of magistrate are predicated upon facts contrary to those stated in return of magistrate to circuit court, they cannot be considered on appeal to Supreme Court.

Appeal from Common Pleas Circuit Court of Greenville County; T. H. Spain, Judge.

Action by the Greenville Nursery Company against the Southern Railway Company and the Carolina, Clinchfield & Ohio Railway Company. From a judgment in favor of the plaintiff, the first-named defendant appeals. Appeal dismissed.

The exceptions and grounds of appeal referred to in the opinion are:

I. Because the circuit judge erred in not sustaining appellant's first exception from the judgment of the magistrate, which is as follows:

"(1) Because the magistrate erred in overruling defendant's (Southern Railway Company's) motion for a nonsuit and directed verdict, and in rendering judgment for plaintiff in any amount; the testimony clearly showing that the shipment was made on an open bill of lading, and that there is no testimony that title

was reserved by plaintiff, or that plaintiff was the real party in interest at time of action."

II. Because the circuit judge erred in not sustaining appellant's second exception from the judgment of the magistrate, which is as follows:

"Because the magistrate erred in not granting motion of defendant Southern Railway Company for a nonsuit and directed verdict, and in rendering judgment against said defendant for any amount; the contract of shipment as set out in the bill of lading required the filing of a claim within a specified time, while all testimony showed no claim was ever filed."

III. Because the circuit judge erred in not sustaining appellant's third exception from the judgment of the magistrate, which is as follows:

"Because the magistrate erred in refusing to grant motion of defendant Southern Railway Company for a nonsuit and directed verdict, and in rendering judgment against said defendant for any amount, in holding that the consignee had the right to abandon the shipment on arrival at its destination, while he should have held that it was the duty of the consignee to accept the shipment and handle to the best advantage of all concerned, and file claim with carrier for the difference, if any, between the value at the time of shipment and its value on arrival at its destination."

IV. Because the circuit judge erred in not sustaining appellant's fourth exception from the judgment of the magistrate, which is as follows:

"Because magistrate erred in rendering judgment against defendant Southern Railway Company for an amount greater than \$72.05, it being admitted that the goods were sold at auction in spring of 1917 for \$9.00, and plaintiff's counsel announcing that he would only ask for judgment for full amount less \$9.00, magistrate finding full amount to be \$81.05."

V. Because the circuit judge erred in not sustaining appellant's fifth exception from the judgment of the magistrate, which is as follows:

"Because magistrate erred in holding defendant Southern Railway Company liable for the entire amount of the loss, while he should have, as plaintiff elected to sue both roads, prorated the amount in proportion to delay on each road; the testimony showing the shipment was in hands of defendant Southern Railway Company six days, and in hand of defendant Carolina, Clinchfield & Ohio Railway Company four days."

B. L. Abney, of Columbia, and Cothran, Dean & Cothran, T. K. Earle, and R. N. Ward, all of Greenville, for appellant.

C. G. Wyche, of Greenville, for respondent.

GARY, C. J. The following statement appears in the record:

This action was instituted in magistrate's court for Greenville county on March 22, 1917, for \$80 damages on account of the alleged negligent delay to shipment of fruit trees delivered to defendant Southern Railway Company at Taylors, S. C., on 27th October, 1916, by plaintiff, consigned to J. A. Goode, at Mayo, S. C., a station on C., C. & O. Railway.

The case was tried before Magistrate Daniel, without a jury, on July 30, 1917, and judgment rendered in favor of plaintiff and against defendant Southern Railway Company for \$81.05. The case was duly appealed to the circuit court, and was heard before his honor, Judge Spain, at the November, 1917, term of court of common pleas for Greenville county, and the judgment of the magistrate affirmed.

The complaint, omitting formal allegations, alleges: That plaintiff delivered to defendant Southern Railway Company, at Taylors, S. C., on October 27, 1916, one box fruit trees and nursery products, marked "Perishable," consigned to J. A. Goode, Mayo, S. C., a station on defendant C. C. & O. Railway, calling attention of defendant's agent at Taylors to perishable nature of goods, and that said nursery products were for delivery to various parties at Mayo on November 1, 1916; that said shipment was negligently delayed, and did not reach Mayo by November 1, 1916, and did not arrive until a long time thereafter, and when same did arrive they were worthless.

The answer of defendant Southern Railway Company was a general denial, and set up a special defense, a clause in bill of lading reading as follows:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The defendant Southern Railway Company alone appealed from the order of the circuit court upon exceptions that will be reported.

The following is the return made by the magistrate before whom the case was tried:

"The above case was tried before me and decision rendered on August 13, 1917. I found my verdict for the plaintiff because the evidence showed, in my opinion, that by the negligent and careless handling of plaintiff's property by defendant Southern Railway Company, plaintiff was damaged to the value of his said property, \$81.05. I think there was some evidence of notice being given of the loss. The trees were shipped to itself at Mayo, and plaintiff's agent called for the property, but could not get them. The testimony shows trees were in charge of Southern Railway from October 27th, when they were received by said road at Taylors, S. C., until at least the 4th of November, and possibly until the 6th of November, and these stations are only about 25 miles apart and no changes. I see no excuse for this delay, which of itself, according to the testimony, would render the trees valueless. As to appellant's fourth exception, the evidence shows that the \$9 received by Southern Railway Company for the trees was never delivered to plaintiff; hence there was no reason why I should deduct

this amount from the verdict. I had to decide the case according to the evidence, and not according to some understanding between attorneys, when the testimony showed that the amount of the verdict is proper. I did not see that there was any evidence against the C. C. & O. Ry. I thought all the motions made by defendant Southern Railway should be overruled.

"Respectfully,

"Jno. M. Daniel, Magistrate."

Under the head of "Appeal to the Circuit Court from an Inferior Court," section 407 of the Code of Civil Procedure provides: "Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits;" which was done in this case.

Furthermore, the return made by the magistrate to the circuit court shows that the appellant's exceptions are predicated upon facts contrary to those stated in the return.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(111 S. C. 469)

RICHMOND GUANO CO. v. KIRKPATRICK.
(No. 10163.)

(Supreme Court of South Carolina. Feb. 15, 1919.)

1. AGRICULTURE ⇐7—FERTILIZERS.

In action on note for purchase price of fertilizer, where there was no evidence of fraud by plaintiff, and substantial compliance by plaintiff with its contract was shown, and the only deficiency proved was a slight shortage in the percentage of available ammonia below the guaranteed analysis, the court properly directed verdict for plaintiff, making allowance for the shortage in accordance with Civ. Code 1912, §§ 2315-2330.

2. AGRICULTURE ⇐7—DEFENSE TO NOTE.

Fraud is a defense to action for purchase price of fertilizer, at least where there has been no substantial compliance with the contract; the remedies and measure of damages produced by Civ. Code 1912, §§ 2315-2330, not being, in such case, exclusive.

Appeal from Common Pleas Circuit Court of Fairfield County; J. W. De Vore, Judge.

Action by the Richmond Guano Company against Walter L. Kirkpatrick. From a judgment for plaintiff on a directed verdict, defendant appeals. Affirmed.

Paragraphs 3 and 4 of the answer, to which reference is made in the dissenting opinion, are as follows:

(3) Further answering the said first cause of action defendant says: That some time during the month of March, 1914, the plaintiff com-

tracted and agreed to sell to defendant 56 tons of a special fertilizer to be used during said year in the cultivation and raising of his crops, and by the said contract plaintiff undertook, agreed, and contracted to manufacture the said fertilizer from and out of certain named, specified, and designated ingredients, substances, and materials, and no others, and to deliver the said fertilizer, when manufactured, to defendant at Rockton, in the state of South Carolina, and defendant to pay therefor \$26.55 per ton. Under the contract of plaintiff with defendant the said fertilizer was to be made, compounded, and manufactured from out of the following ingredients, materials, and substances: Acid phosphate, potash, and blood and fish scrap, with sufficient tobacco stem to act as a dryer, and the said fertilizer, when compounded, made, and manufactured out of the ingredients, substances, and materials above mentioned, the same was to contain 8 per cent. of available phosphoric acid, 3 per cent. of potash, and 4 per cent. of ammonia, and by the said contract and agreement the 4 per cent. of ammonia in said fertilizer was to be derived from blood and fish scrap as the source of the same, and from no other material; but plaintiff, unmindful of its said contract, with intent to deceive, overreach, mislead, and defraud the defendant, delivered to him at Rockton 56 tons of cheap and worthless stuff or dirt, which it represented to be the special fertilizers it had contracted and agreed to manufacture and deliver to defendant, and the plaintiff well knew, at the time it delivered the said worthless stuff or dirt, that the same did not contain and was not made and manufactured out of the ingredients, substances, and materials called for by the contract, and that it had knowledge and willfully used, in the manufacture of the same, some other cheap and worthless materials or substance as the source from which the ammonia in said fertilizer was obtained, and defendant, relying upon said contract, and having no knowledge or means of knowledge other than the representation of the plaintiff as contained in said contract, accepted the said worthless fertilizer, believing at the time that the same was what he had contracted for, and gave to the plaintiff the note mentioned in the first cause of action.

(4) That the said fertilizer sold and delivered to defendant was the consideration for the said note mentioned in the first cause of action, but defendant would not have accepted said worthless fertilizer, nor given the said note therefor, had he known at the time that the said fertilizer was not what he had contracted for, and that the plaintiff had falsely, fraudulently, and deceitfully misled him into believing that the same was in every respect what he had contracted for and would come up to the guaranteed analysis, when the same did not come up to the analysis above stated, and was not manufactured or made of the materials and substance contracted for, and the said fertilizer was worthless, and the consideration for the said note has failed, and the same is without consideration, as the defendant has derived no benefit from said fertilizer, but, on the contrary, has been injured by the deceit, false dealing, and deception of the plaintiff in delivering to him a worthless article as a fertilizer, when it well knew defendant was dependent upon said fertilizer to raise a crop during the year 1914, and defendant owes the plaintiff nothing, and there is nothing due and

owing on said note, as the consideration for said note has failed, and said note is without consideration to support it, and is null and void.

James W. Hanahan, of Winnsboro, for appellant.

Glenn W. Ragsdale, of Winnsboro, for respondent.

WATTS, J. This case was tried before Judge De Vore and a jury at the February term of court, 1918, for Fairfield county. After all of the testimony was taken, his honor directed a verdict for the plaintiff. After entry of judgment thereon, defendant appealed.

[1] Exception 1 alleges error in his honor directing a verdict, when there was abundant evidence on the question of fraud to carry the case to the jury on this issue, and also, under the statute, the defendant could not prove fraud, either as a defense or by way of counterclaim. His honor ruled out the evidence offered to show the effect the fertilizer had on defendant's crop, holding that the statute law of this state provided an exclusive remedy for the sale of fertilizers deficient in ingredients guaranteed by analysis, or short in commercial value, either one or both, and, having fixed a measure of damages to cover every possible deficiency, or shortage, this remedy must be followed. His honor also held, where there was a deficiency or shortage in the value of commercial fertilizer, the measure of damage was prescribed by statute, and that an allegation of fraud by the purchaser could not have the effect of admitting testimony showing the results on crops by the use of the fertilizer. We see no error in this ruling. There was no evidence of fraud to go to the jury. The proof was plain as to how the fertilizer sold turned out, as to the guaranteed analysis, and its shortage in value made it only a matter of calculation. This disposes of exceptions 1, 2, and 3, which are overruled.

Exceptions 4 and 5 are overruled. We see nothing in his honor's ruling whereby defendant was prejudiced.

Judgment affirmed.

HYDRICK, J. I concur in affirming the judgment on the ground that, under the evidence, the verdict of any fair jury would have been the same as that directed by the court. I agree with Mr. Justice WATTS that the evidence was not sufficient to require the court to submit the issue of fraud to the jury.

[2] But I do not concur in the view that the remedies and measure of damages provided by the statute for deficiencies in the guaranteed analysis or commercial value of fertilizers sold are exclusive of all others, or that the statute covers all possible cases of fraud in contracts for the sale of fertilizers, or all possible deficiencies that may arise in the guaranteed analysis or guaranteed com-

mercial value thereof. The only deficiency proved was a very slight shortage in the percentage of available ammonia below the guaranteed analysis, and for that the proper allowance was made in accordance with the provisions of the statute. There was substantial compliance with the contract, and substantial justice has been done, and therefore I think the judgment should be affirmed.

GAGE, J. I am of opinion there is no evidence of fraud, and for that reason the judgment ought to be affirmed. I express no opinion on the other issue, because the expression of it would avail nothing.

GARY, C. J. (dissenting). The defendant pleaded failure of consideration; also fraud, and a counterclaim for damages. Paragraphs 3 and 4 of the answer, which will be reported, contain the allegations of fraud. There was testimony tending to sustain these allegations, but his honor, the presiding judge, ruled that fraud was not a defense to this action, and could not prevent a recovery upon the notes.

The notes must be construed as if the provisions of chapter 34, article 1, of the Code of Laws of 1912, were embodied in them, as a part of the contract between the parties. *Phosphate Co. v. Arthurs*, 97 S. C. 358, 81 S. E. 663. In that case it was held that, if fertilizers did not come up to weight and guaranteed analysis and were not actually delivered in kind according to contract, recitals in a note for the purchase price as to the weight, that each sack bore the guaranteed analysis, that it bore inspector's tag, and in all respects complied with the law, and that the seller had neither impliedly nor expressly warranted the effects on the crops, and an agreement therein that the buyer could not hold the seller responsible for practical results, were attempts to dispense with the statutory requirements, and therefore void. That case did not rest upon fraud, but upon the ground that such recitals were against public policy—citing the case of *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845.

We also have cases directly in point arising under chapter 34, art. 1, of the Code of Laws of 1912, announcing the principle that fraud will render a contract for fertilizers void, to wit: *Germofert v. Castles*, 97 S. C. 389, 81 S. E. 665; *Germofert v. Delleney*, 97 S. C. 395, 81 S. E. 667; *Germofert v. Scruggs*, 97 S. C. 396, 81 S. E. 667. The same principle applies in other cases. *Welborn v. Dixon*, 70 S. C. 106, 49 S. E. 232, 3 Ann. Cas. 407. Indeed, we cannot recall any case, certainly in this state, in which our courts have held that a party perpetrating a fraud was not liable for the consequences of his wrongful act.

For these reasons I dissent.

FRASER, J., concurs.

(111 S. C. 467)

STATE v. ROBINSON. (No. 10162.)

(Supreme Court of South Carolina. Feb. 14, 1919.)

JURY ~~90~~—DISQUALIFICATIONS—RELATIONSHIP—"ABUSE OF DISCRETION."

It was an abuse of discretion to retain a juror, in a prosecution for forgery of a tax receipt for state and county taxes, who was the nephew of the county treasurer, who had signed the warrant of arrest and upon whose testimony conviction largely rested; "abuse of discretion" being, not a term of reproach, but simply meaning manifest error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Discretion.]

Appeal from General Sessions Circuit Court of Jasper County; James E. Peurifoy, Judge.

W. J. Robinson was convicted of forgery, and he appeals. Reversed, and new trial ordered.

J. W. Vincent, of Hampton, for appellant.
George Warren, Sol., of Hampton, for the State.

FRASER, J. The facts are stated in the case, and, as it is short, the entire case is quoted.

"The defendant was tried and convicted of forgery by a jury on July 8, 1913, at Ridgeland, S. C.; the specific charge being the forgery of a tax receipt of state and county taxes.

"The jury were put on their voir dire. J. A. Nettles was called and examined as a venireman by the court as to his relationship, and he stated among other things that he was related to J. S. Berg, the county treasurer and a witness for the state, who signed the warrant for the arrest of defendant and on whose testimony the conviction largely rested; the relationship being nephew. The defendant asked that he be excused by the court for this cause, but the presiding judge refused to do this, and the defendant used one of his peremptory challenges to reject this juror, which peremptory challenges were exhausted before the jury was completed, and the defendant contends that the last three jurors were particularly objectionable to him.

"The defendant, upon conviction, was sentenced by the court to pay a fine of \$1 and serve upon the public works for a period of one year.

"The defendant served notice of intention to appeal to this court and was released under bond.

"Exception.

"(1) His honor erred and abused his discretion in not causing the juror J. A. Nettles to stand aside on motion of defendant, it appearing that he was a nephew of the chief prosecutor; it being submitted that the defendant should not have been required to exhaust one of his peremptory challenges to dismiss this juror, in view of the close relationship of the juror to the chief prosecuting witness."

In the case of *State v. Malloy*, 91 S. C. 429, 74 S. E. 988, it was held that it was sufficient to quash an indictment found by a grand jury that one of the jury commissioners was the father of one of the boys for whose killing the defendant was indicted; that the grand jury so drawn could not even bring in an indictment for the killing of the boy who was not related to the prosecuting witness, both being killed at the same time. It is true that the fitness of a juror is within the discretion of the trial judge, yet abuse of discretion is not a term of reproach, but simply means manifest error.

We think it was manifest error to require the appellant to go to trial with a juror who was so closely related to the prosecuting witness, and that prosecuting witness "on whose testimony the conviction largely rested."

It is also true that this juror did not sit in the case, but, to exclude him, it required the defendant to exhaust his challenges and have his case heard by another objectionable juror.

The judgment is reversed; and a new trial ordered.

HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 405)

SPIGENER et al. v. SEABOARD AIR LINE RY. et al. (No. 10142.)

(Supreme Court of South Carolina. Jan. 28, 1919.)

1. DISMISSAL AND NONSUIT ¶26—DISMISSAL OF ONE DEFENDANT.

In an action against a carrier and Pullman Company for leaving a sick passenger at the station after having been notified of her intention to board a Pullman, it was not error, as against the railway, to dismiss as to the Pullman Company, although notice through the Pullman employees of the passenger's intention to board had been given the carrier; plaintiff not relying alone on such notice, but upon actual notice to the railway's agents.

2. CARRIERS ¶278(1)—CARRIAGE OF PASSENGERS—QUESTIONS FOR JURY.

In an action against a carrier for leaving a sick passenger at the station after having notice that she intended to board the train, whether sufficient notice was given the ticket agent of the sickness of plaintiff so as to require his assistance held for the jury.

3. CARRIERS ¶278(1)—CARRIAGE OF PASSENGERS—BOARDING TRAINS—QUESTIONS FOR JURY.

Where a conductor of a passenger train knew he had left behind a passenger who intended to board the train at the station, it was a question for the jury whether it was his duty to go back to the station for such passenger.

4. MASTER AND SERVANT ¶333 — VERDICT AND JUDGMENT—CODEFENDANTS—DAMAGES—AMOUNT.

In an action by a passenger against a carrier, its employees, and a Pullman Company for being left at the station when intending to board, it was not improper to return a verdict and to enter judgment for a larger amount against the carrier than against its servants.

5. MASTER AND SERVANT ¶333 — VERDICT AND JUDGMENT—SERVANT AS JOINT DEFENDANT.

Where a servant is united with a master in an action for damages for tort, and the tort was that of the servant alone, a verdict and judgment against the master alone cannot stand, but, if other servants are involved, the jury might find that the tort was committed by them and may find against the master alone.

6. CARRIERS ¶265—CARRIAGE OF PASSENGERS — NOTICE OF INTENTION TO BOARD TRAIN.

In an action against a carrier for leaving an intending passenger at the station, a verdict for plaintiff was not improper because no notice that the passenger was ill was given the railroad company before the train left the station, when it appeared that it had sufficient notice after the train left and while they might still have gone back.

7. CARRIERS ¶277(5)—PASSENGERS—OPPORTUNITY TO BOARD TRAIN—PUNITIVE DAMAGES.

In an action against a carrier for leaving a passenger at the station knowing that she was sick and intended to board the train, a verdict of \$5,000 punitive damages was not excessive.

8. APPEAL AND ERROR ¶207—OBJECTIONS BELOW—ARGUMENT OF COUNSEL.

Where no objection to the arguments of counsel is made at trial, the question will not be reviewed on appeal.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by Sallie Glass Spigener and another against the Seaboard Air Line Railway and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lyles & Lyles, of Columbia, for appellants. Tompkins, Barnett & McDonald, Barron, McKay, Frierson & Moffatt, and W. H. Cobb, all of Columbia, for respondents.

FRASER, J. It will not be necessary to go into the minute details set out in the case. A general statement is enough in this court.

The plaintiff Mrs. Sallie Glass Spigener lived with her husband near Allendale, in this state. She formerly lived in Columbia, and Dr. Watson, of Columbia, has been her family physician all of her life. Mrs. Spigener was in delicate health and was under the care of Dr. Watson. In the afternoon of

the 30th of May, 1916, Mrs. Spigener was taken sick, and, being apprehensive of a serious and dangerous attack, communicated, through her husband, over the phone, with Dr. Watson in Columbia. Dr. Watson advised that Mrs. Spigener be brought to Columbia immediately. The Southern train from Allendale to Columbia had already left, and plaintiffs found that there was a train on the Seaboard Railway that would pass Fairfax, a station on said road, about 8 o'clock p. m. Fairfax was about 18 miles away. Mr. J. Sims Spigener, one of the plaintiffs, Mr. Bryan, a neighbor of the plaintiffs, Mr. J. Victor Spigener, and a trained nurse went with Mrs. Spigener to Fairfax. The party arrived at Fairfax about 20 minutes before the train. Mr. J. Sims Spigener, the husband of Mrs. Spigener, bought three tickets to Columbia—one for Mrs. Spigener, one for the trained nurse, and one for himself. Mr. Spigener also asked for Pullman tickets for the three. The agent who sold the tickets for the railroad said he did not represent the Pullman Company, but the Pullman Company would sell the Pullman tickets on the train.

It seems that it is the rule at Fairfax for motor and other vehicles to stop on one side of the railroad track, while passengers embark and disembark on the other side. Mr. Spigener asked for, and obtained, permission from the railroad agent to run his automobile near to the passenger side of the railroad track. The reason given for this infraction of the ordinary rule was that the automobile contained a sick lady, and it was very desirable to get the car and its sick occupant as near the coach as practicable. When the train came it stopped, before it reached the station, at a water tank, and then moved up to the station; the Pullman, however, being some distance from the station. The agent of the railroad checked the plaintiffs trunk to Columbia. The plaintiffs had two suit cases, containing articles that would be necessary in the emergency. When the train stopped at the station, Mr. Spigener asked a train official about the Pullman. He was told that the Pullman was closed. Mr. Victor Spigener took the two suit cases and went back to the Pullman, which he found open, and put the suit cases on the Pullman. The train started, and the Pullman conductor told Mr. Victor Spigener to get on the Pullman, as the train was probably pulling the cars up further to the station. Finding, however, that the train was not going to stop, Mr. Spigener got off of the train. When the train arrived at the station, the agent, the defendant Brooks, went to the baggage car to superintend the taking off and putting on of the trunks. There is evidence that, when the flagman gave the signal to start the train, he was told that there was a sick lady to go on the train, and that the

flagman or brakeman told the train conductor. The Pullman conductor promptly went forward to find the train conductor to inquire about his passengers. He found him and asked for his passengers. The train conductor told the Pullman conductor that there were no Pullman passengers. The Pullman conductor then told him of the two suit cases. There was evidence that the train was then in a "stone's throw" of the Fairfax station. The train conductor, the defendant Rhodes, replied, "If we have left any one, we will hear from it at Denmark." Denmark was an hour's ride away; two hours running backwards or a delay of three hours. There is testimony that Mrs. Spigener suffered great nervous shock when she found that she had been left, and continued to suffer intense bodily pain until she got to Columbia the next morning. Complaint was at once made to the station agent, who took up the matter with the head officials of the road. The only concession that was made was that, if the train could be stopped before it reached Denmark, it would go back to Fairfax for Mrs. Spigener. There is evidence that Mrs. Spigener lost an infant child by premature birth by reason of the delay, and that she received by reason of her sufferings serious injury to her physical and nervous constitution, which would be, in all probability, permanent. There was evidence that the defendant could, at small cost, have sent out an extra engine and coach from Savannah that would have taken Mrs. Spigener to Columbia, with only a reasonable delay. Nothing was done to relieve the situation, and Mrs. Spigener was required to go to a hotel and wait for the next train. This delayed her about six or seven hours.

This suit was brought against the railway, the station agent, the train conductor, and the Pullman Company.

At the close of the testimony, the defendant the Pullman Company moved for a direction of a verdict in its behalf. The plaintiffs consented, and the other defendants stated, "We are not interested in the motion," but stated that their position was that, because of notices given to the Pullman employees, it was claimed as one of the acts of negligence for which the Seaboard Air Line Railway was responsible to plaintiffs and the Seaboard Air Line Railway might be entitled to have the Pullman Company answer over to it.

The verdict was \$20,000 for actual damages and \$5,000 punitive damages against the Seaboard Air Line Railway Company, and \$1,250 for punitive damages each against the defendant Brooks and Rhodes.

From the judgment entered on this verdict, the three defendants appealed. Subsequently the defendants Brooks and Rhodes moved to be allowed to abandon their appeals. This motion is granted.

There are 17 exceptions by the Railway Company, but in argument they have been reduced to 7. They will be considered as they are stated in the argument.

[1] Point 1:

"That it was error, after the testimony had been introduced as to the notice given through the employés of the Pullman Company and the arguments had thereon, to dismiss the Pullman Company from the suit and leave the jury to find a verdict for damages against the Seaboard Air Line Railway on account of such notice."

This cannot be sustained. The plaintiffs relied upon notice given to the station agent, the flagman, the railway conductor, while standing between the coaches, and the notice given to the railway conductor by the Pullman conductor, in the thoroughfare coach. It was the actual notice given to the railway conductor, and not the imputed notice to the Pullman conductor.

[2] II. Point 2:

"That the notice given to the ticket agent of the sickness of the plaintiff Mrs. Spigener was not of such a character as to require assistance at his hands."

This cannot be sustained. It may be that the notice did not require manual assistance in getting on the train, but the rule required the conductor to obey the orders of agents or yardmasters while at stations. The station agent could have rendered valuable assistance in requiring the conductor to stop long enough and at a suitable place to enable the sick lady to entrain. It was for the jury to say what kind of assistance was necessary under the circumstances. A mere notice to the railway conductor that there was a sick lady at the station to get on the train might have been very valuable assistance. The record shows that, when the train arrived at the station, the station agent did not tell any official on the train that there was a sick lady there to take the train. The issue was real and properly submitted to the jury.

[3] III. Point 3:

"That it was not the duty of the conductor, under the circumstances proven, to run the train back to Fairfax, after it had left the station, to take up the plaintiff, Mrs. Spigener."

This point cannot be sustained. There was evidence that the conductor knew he had left a passenger while he was within "a stone's throw of the station," and there was no evidence that the conductor would have violated any rule by going back. His honor told the jury that it was sometimes improper to go back. The facts were before the jury, and it was a question for them.

[4] IV. Point 4:

"Our fifth, sixth, seventh, fifteenth, sixteenth, and seventeenth exceptions all make the point that it was error for his honor, the circuit judge, to instruct the jury that they might find a verdict for actual damages against the railway company

without finding a verdict for the same amount, or any part thereof, against the servants of the company, parties to the cause before the court, for whose conduct the railway company is held liable, and also that in finding for punitive damages they might find a larger amount against the railway company than against its servants who caused the injury."

[5] Where a servant is united with the master in an action for damages for tort, and the allegation and proof shows that the tort complained of was the tort of this servant alone, then a verdict against the master alone cannot stand, because, if this servant did not commit the tort complained of, then there was no tort, and a verdict against the master alone cannot stand. If, however, other servants are involved, the jury may find that the tort was committed by other servants and find against the master alone, and a verdict against the master alone can stand.

There was evidence that the flagman, who gave the signal to proceed, was told that there was a sick lady to go on that train. There was also evidence that those in charge of the transportation at the head office were notified, and they gave no assistance and held out no effective hope of relief. A larger amount was given against the railway than against the station master and the railway conductor. The latter had only a few minutes consideration to determine what to do. The former had ample time, and the only relief they offered was the one they must have known would prove ineffectual. The transportation department had ample opportunity to learn the exact status and the danger of a delay, yet did nothing to relieve the situation. The jury might have concluded that injury to the plaintiff might have been temporary only, if relief had been given within a reasonable time, but that the long delay produced the injury that, according to some of the testimony, proved to be permanent. It is one spirit that does a wrong and another to refuse to make reasonable effort to avoid the consequences of the wrong already done.

The difference in the amount of the verdicts is not legal ground to set them aside.

[6] V. Point 5:

"That on the motion for a new trial his honor the presiding judge should have held that there was no notice brought home to the railroad company before the train had left Fairfax that the plaintiff Mrs. Spigener was suffering from any special or peculiar condition; and that there was no evidence of any damages suffered from other cause except from her special and peculiar condition, and therefore the verdict should have been set aside."

There was evidence that they had notice enough after the train left, and while they might still have given relief, and did not do so.

[7] VI. Point 6:

"That there was no evidence of willfulness, wantonness, recklessness, or gross negligence

on the part of the agents and servants of the Seaboard Air Line Railway, and that the verdict for \$5,000 punitive damages should have been set aside, and was, moreover, excessive."

The amount of the verdict was a question for the circuit judge. Enough has been said to show that there was abundant evidence of a willful tort.

[8] VII. Point 7:

"Because, upon the motion for a new trial, his honor, the circuit judge, should have held that the counsel for the Pullman Company so addressed the jury as to unfairly prejudice them against the Seaboard Air Line Railway, and should have set aside the verdict for that reason."

There was no objection made at the hearing, and it was too late afterwards.

The judgment is affirmed.

HYDRICK and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(111 S. C. 496)

STATE v. STONE. (No. 10170.)

(Supreme Court of South Carolina. Feb. 25, 1919.)

1. HUSBAND AND WIFE §304 — ABANDONMENT OF WIFE.

Where a husband abandons his wife, destroys his home, and provides no other place for her, his failure to supply her with necessities at the place where circumstances compel her to live constitutes a violation of Cr. Code 1912, § 697, making inexcusable abandonment a misdemeanor.

2. CRIMINAL LAW §108(1)—VENUE OF PROSECUTION—ABANDONMENT OF WIFE.

Where a husband by his conduct compels his wife to leave him, and she, of necessity, seeks a home in another county, his prosecution for failure to support in violation of Cr. Code 1912, § 697, was properly instituted in such other county.

Hydrick, J., dissenting.

Appeal from General Sessions Circuit Court of Lexington County; J. W. De Vore, Judge.

Defendant Frank Stone was indicted for abandoning his wife, Eva Stone. Defendant's motion to dismiss was granted, and the State appeals. Judgment reversed.

George B. Timmerman, of Lexington, for the State.

C. B. Sawyer, of Aiken, and C. M. Eflrd, of Lexington, for respondent.

FRASER, J. The respondent, Frank Stone, was indicted under section 697, Criminal Code of South Carolina, for abandoning and failing to supply the actual necessities of life to his wife, Eva Stone. The section is:

"Misdemeanor for Husband to Fail to Support Wife and Children.—Any able-bodied man who shall, without just cause or excuse, abandon or fail to supply the actual necessities of life to his wife or to his minor, unmarried child or children dependent upon him, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned for a term not exceeding one year, or be liable to a fine not exceeding two hundred dollars: Provided, that if he, either before or after conviction, shall give bond, with one or more sureties, approved by the clerk of the court, in the sum of not less than \$300, conditioned upon his supporting and maintaining his said wife or said minor unmarried child or children, he shall not be imprisoned or the fine imposed until the condition of said bond is broken."

The defendant and his wife lived together for a short time only. Stone lives in Aiken county, near the Lexington county line, and was married there. His wife, before her marriage, lived with her father in Lexington county. On account of the disagreement between them, Stone left his home in Aiken county and told his wife he did not intend to live with her any longer. He sent to the house and had it stripped of everything, even the stove and cooking utensils which she was using at the time to prepare her dinner. Having nowhere else to go, Mrs. Stone went across the county line to live with her father.

The evidence tends to show that Stone has not returned, nor offered to return, to his wife, or to provide a home for her anywhere, and avows his intention not to do so.

The indictment in this case was given out in Lexington county. The defendant moved to dismiss the proceedings, on the ground that the court of general sessions of Lexington county was without jurisdiction to try the case, because the offense, if any, was committed in Aiken county.

The presiding judge held that the court in Lexington county was without jurisdiction and dismissed the case. From this ruling the state appealed.

[1, 2] Abandonment may be one act, or a continuing act, according to circumstances. The offense is made by the statute a continuing offense. While it is ordinarily true that a husband is only required to furnish the necessities of life at his place of residence, yet, if he destroys his home and provides no other place where she can live, then, from the necessity of the case, she must live where she can live, and the place where she can live is the place where he must provide for her. Mrs. Stone found a home in Lexington county and it was his failure to supply the necessi-

ties in Lexington that was a violation of the statute.

The judgment is reversed.

GARY, O. J., and WATTS and GAGE, JJ., concur.

HYDRICK, J., dissenting.

(111 S. C. 427)

CREED v. NATIONAL FIRE INS. CO., OF HARTFORD, CONN. (No. 10165.)

(Supreme Court of South Carolina. Feb. 22, 1919.)

INSURANCE §213 — FIRE INSURANCE—ASSIGNMENT OF POLICY—RIGHT OF ASSIGNOR.

Where policy insured plaintiff's house for \$800, and his personalty for \$700, and plaintiff, after he sold the house, assigned his interest "as owner of property covered," he could not recover for loss of personalty, although he was admittedly still the owner of the personalty.

Appeal from Common Pleas Circuit Court of Kershaw County; R. W. Memminger, Judge.

Action by J. E. Creed against the National Fire Insurance Company, of Hartford, Conn. Judgment for plaintiff, and defendant appeals. Reversed.

John M. Robinson, of Charlotte, and Douglas McKay, of Columbia, for appellant.

L. A. Wittkowsky, of Camden, for respondent.

GAGE, J. Action on a policy of insurance against loss by fire; verdict for the plaintiff; appeal by the defendant. There are five exceptions, but if one fundamental issue of law shall be determined for the defendant, that ends the cause.

Creed had a house, and in it personal property. He made a contract with the National Fire Insurance Company, whereby, for a single premium of \$36 paid by Creed to the company, the company insured against loss by fire the house for \$800, and the personal property for \$700. Creed sold the house, and assigned to his vendee the contract of insurance and in these words:

"The interest of J. E. Creed as owner of property covered by this policy is hereby assigned to Camden Wholesale Grocery Company subject to the consent of the National Fire Insurance Company, of Hartford.

"Dated December 17, 1912. J. E. Creed."

The company consented to the assignment and in these words:

"The National Fire Insurance Company, of Hartford, hereby consent that the interest of J. E. Creed, as owner of the property covered

by this policy, be assigned to Camden Wholesale Grocery Company.

"Dated Dec. 17, 1912. J. A. McCaskell."

The circuit court was of the opinion that if Creed was owner of the personal property when the fire burnt it, then he ought to recover on the contract.

It is admitted in the case that Creed was owner of the personalty; and his counsel contended before us that no fact was in issue, and that court ought to have directed a verdict for the plaintiff. The issue of law therefore is, does that fact, under the contract he made and under the assignment of the contract, entitle him to recover? It is a question of contract; the parties' rights and liabilities are fixed by the contract.

For \$36 the company agreed to pay Creed \$800 for the house and \$700 for the personalty in the event of loss by fire.

It is true that had Creed not assigned the policy, then, in the event the house had not been burned, but the personalty had been burned, then in that event, Creed might recover for the loss of the personalty; the contract, by necessary construction, so reads. But when Creed assigned the policy he assigned his whole contract; the word of the assignment so expressly run, and there is no pretense that he intended to do otherwise.

The testimony is not that Creed reserved or intended to reserve for himself so much of the contract as related to personalty, but only that he did not sell the personalty when he sold the house. Creed had at the time of the fire no contract with the company, and he therefore has now no right to recover.

A verdict for the defendant ought to have been directed, and must yet be.

Judgment reversed.

HYDRICK and FRASER, JJ., concur. GARY, O. J., and WATTS, J., did not sit.

(111 S. C. 481)

SOTILLE v. STOKES. (No. 10166.)

(Supreme Court of South Carolina. Feb. 22, 1919.)

1. SALES §348(1)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where defendant purchased a defective automobile on the agreement of the seller to repair same, and the seller sues for the price, the buyer is entitled to a deduction of the cost of repairs which the seller failed to make.

2. DAMAGES §40(1) — LOSS OF PROFITS — SPECULATIVE PROFITS.

There can be no recovery for lost profits for interference with business, where such profits are entirely speculative.

Appeal from Common Pleas Circuit Court of Richland County; M. S. Whaley, Judge.

Action by Santo Sotille, doing business as the Sotille-Cadillac Company, against A. M. Stokes. From a verdict and judgment for the defendant, plaintiff appeals. Reversed, and new trial ordered.

Nettles & Tobias, of Columbia, for appellant. James S. Verner, of Columbia, for respondent.

FRASER, J. This is an action by the plaintiff to recover judgment on three promissory notes, aggregating \$500, given for the credit portion of the purchase money of a Cadillac automobile. The defendant set up that the automobile was unfit for use, and asked a rescission of the contract of sale and damages for a breach of warranty. At the trial the defendant was required to elect as to whether he would rely on rescission or breach of warranty, and he elected to rely on breach of warranty. At the close of the testimony, the plaintiff moved for a nonsuit as to breach of warranty. This motion was refused. The jury found the following verdict:

"We find for the defendant five hundred (\$500.00) dollars."

Under the instructions of the court, that canceled the notes, gave the automobile to the defendant, and a judgment against the plaintiff for \$500. The court reduced the verdict to \$150.

There is no dispute as to the cardinal facts of the case. There was a charge of fraud in the answer, but there was no evidence to sustain it. Indeed the defendant said on the witness stand:

"Q. You do not think Mr. Smith [the sales agent] tried to deceive you, do you? A. I do not think so."

The court calls attention of litigants to a too free use of the charges of fraud. Fraud should not be charged, unless there is proof of fraud, and not even then, unless fraud is necessary to a just decision of the cause.

In this case the defendant said:

"I was going to buy a car. I went round, and he had this car. I asked him what he wanted for it, and he said he wanted \$1,000 for it, and so we talked it over a little bit and took it out and tried it, and it would not pull. It skipped and was going on; you know how they do. *He said the car was not in good shape to sell, and it would have to be overhauled thoroughly; it needed new blocks and pistons. And we brought it back to the shop and left it there. He said he could get it ready in about ten days or two weeks for me. I told*

him 'All right,' and he required me to put up \$100. Smith said the car needed overhauling. The car had been used a lot, and it needed a general overhauling. He said for \$1,000 he would put the car in first-class condition."

[1] Smith, the sales agent for the plaintiff, said:

"Stokes and I tested the power of the car. It was very bad. * * * I told him I would put it in good condition. I agreed to get those parts and put them into the car and turn it over to him, running properly and working as it should."

So it seems that the parties, after inspection, agreed upon the purchase and sale of a defective car, and the defendant relied upon a contract to repair the car, and that there was no warranty that it was in good condition. It seems that the car is not yet in good condition.

There are several exceptions, but they need not be discussed separately. The whole case has been tried upon a wrong theory, and in order that justice may be done the case will have to go back for a new trial.

The case of Thompson v. Sexton, 15 S. C. 93, is very similar in principle to this case. The rule, as to the measure of damages, is stated on page 96 as follows:

"The testimony shows that the defendant agreed to give a certain price for the gin, knowing at the time of the defect in it, and relied upon the agreement of the plaintiff to have such defect repaired. If the plaintiff failed to do so, then all that the defendant could require would be to be allowed a discount for so much as such repairs would cost, and the plaintiff would be entitled to judgment for the balance of the price agreed upon, whether that price be larger or smaller than what the jury might believe the article was really worth. Suppose the parties had fixed upon \$150 as the value of the gin with the defect repaired, and that the cost of such repairs would be \$10, then, according to the contract, the plaintiff would be entitled to recover the difference—\$140. But if the jury, as they may have done under the charge of the judge, substituted their own estimate of the value of the gin for that agreed upon by the parties, and, adopting the views of some of the witnesses, had fixed the value at \$50, then the plaintiff could only recover \$40."

[2] There is no basis for lost profits in this case. The defendant said he would sometimes take in \$100 per week, of which about half was profits, and then he said, "Sometimes there is mighty little net profits to me." The profits were speculative entirely.

The judgment is reversed, and a new trial ordered.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 475)

THOMAS v. NORTHWESTERN R. CO. OF
SOUTH CAROLINA et al.
(No. 10164.)

(Supreme Court of South Carolina. Feb. 19,
1919.)

CARRIERS \Leftrightarrow 100(3)—DEMURRAGE CHARGES—
REFUSAL TO PAY—SALE OF SHIPMENT.

A shipper held not entitled to recover value of lumber sold by terminal carrier to pay freight and demurrage charges, where new consignee to whom plaintiff shipper directed initial carrier to divert shipments defaulted in giving instructions, and where instructions finally received gave notice that no demurrage charges would be paid after a certain day.

Gary, C. J., and Watts, J., dissenting.

Appeal from Common Pleas Circuit Court of Clarendon County; Frank B. Gary, Judge.

Action by F. C. Thomas against the Northwestern Railroad Company of South Carolina and another. Motion for directed verdict denied, and the Atlantic Coast Line Railroad Company appeals. Judgment reversed.

Mordecai & Gadsden & Rutledge, of Charleston, and Purdy & O'Bryan, of Manning, for appellant.

Charlton Durant and W. C. Davis, both of Manning, for respondent.

FRASER, J. This is an action to recover the value of three carloads of lumber delivered to the defendants railroad companies, which were sold by the appellant to pay freight and demurrage charges.

There are several exceptions raising interesting questions of interstate commerce law, yet, in the view the majority of this court takes in regard to this case, they are unnecessary to a decision, and need not be considered.

At the close of the testimony the appellant moved for a direction of a verdict in its favor, on the plaintiff's cause of action, but did not include the counterclaim. A short statement of the facts will show that the motion should have been granted.

On the 13th of May, 1916, the plaintiff shipped three carloads of lumber to Bay Lumber Company, Norfolk, Va. He delivered the cars to the Northwestern Railroad Company at Bloomville, S. C., and the Northwestern delivered the cars to the Atlantic Coast Line at Sumter. The cars went forward promptly to Norfolk. A few days later the plaintiff notified the Northwestern to divert the cars to Barker Bond Lumber Company of Brooklyn, N. Y., "who would furnish directions."

The record contains a letter from the Barker Bond Lumber Company that reads as follows:

Exhibit D—Telegram: "New York 530 pm 26 F. C. Thomas, Manning, S. C.

"We gave forwarding orders on three cars two by ten May thirty first to NYP & N agt Norfolk. If cars still on hand Southern Road you should order forward as we assume you had ordered cars to us NYP&N delivery. You better order forward Flatbush Station, Brooklyn to avoid further delay.

"Barker Bond Lbr. Co. 7pm"

There is nothing in the record to show that the Atlantic Coast Line ever received these instructions. Up to the 29th of June there was no evidence in the record to show that the Northwestern had received any shipping instructions, and when they were received it was accompanied with notice that no demurrage charges would be paid after May 31st. The Coast Line held the cars until some time in the fall of the year, when they were sold for demurrage and freight charges. The plaintiff complains that he was not notified that the cars were being held and he thought they had been delivered. Practically the plaintiff ordered the Coast Line to hold the lumber for instructions. The plaintiff appointed the new consignee his agent to furnish the shipping instructions. The default was the default of the plaintiff through his agent for that purpose, and not the default of either defendant.

It needs no citation of authority to show that the Coast Line could not have remitted any of the freight or demurrage charges without incurring the penalty for discrimination.

The verdict should have been directed, and the judgment is reversed.

HYDRICK and GAGE, JJ., concur.

GARY, C. J. (dissenting). This is an action for damages. The complaint (omitting the formal parts thereof) is as follows:

"III. That on or about the 15th day of May, 1916, the plaintiff delivered to the defendant Northwestern Railroad Company of South Carolina at Bloomville, S. C., three cars of lumber, the property of the plaintiff, and of the aggregate value of four hundred and fifty-two and $\frac{21}{100}$ dollars, consigned to Bay Lumber Company at Norfolk, Va., which the said defendant received and agreed to deliver to the said consignee at Norfolk, Va., in consideration of the payment of its usual freight charges.

"IV. That during the transit of the said three cars of lumber, the plaintiff ordered the defendant Northwestern Railroad Company of South Carolina to divert the said three cars of lumber from the Bay Lumber Company at Norfolk, Va., to Barker-Bond Lumber Company, Brooklyn, N. Y., and the defendant Northwestern Railroad Company of South Carolina agreed to so divert the said three cars of lumber, and to deliver them to their new consignee at Brooklyn, N. Y., in consideration of the additional freight charges for such service, and plaintiff is informed and believes that the defendant

Northwestern Railroad Company of South Carolina diverted the said three cars of lumber as directed while in the possession of the defendant Atlantic Coast Line Railroad Company, the last-mentioned company agreeing to such diversion, and undertaking to perform its duty in that behalf.

"V. That notwithstanding such agreement of diversion and to forward to their new consignee the plaintiff's said lumber, the defendants so negligently conducted themselves in that behalf that the said three cars of lumber were never forwarded to the new agreed consignee, but, according to plaintiff's information and belief, were allowed to remain upon demurrage at Norfolk, Va., without any notice to the plaintiff or his new consignee, until about the 3d of June, 1916, and thereafter plaintiff and his consignee repeatedly endeavored to have the cars forwarded as agreed upon, and plaintiff is informed and believes, permitted the said cars to remain upon demurrage in possession of the defendant Atlantic Coast Line Railroad Company, until the value of the said lumber was exhausted by such charges, and were sold in November, 1916, to satisfy the same, to plaintiff's great damage four hundred and fifty-two and $\frac{1}{100}$ dollars."

The defendant Northwestern Railroad Company admitted that it received for shipment the three cars of lumber set out in the complaint, and denied the other material allegations thereof.

"The appellant, the Atlantic Coast Line Railroad Company, denied that it agreed to divert the shipment of lumber, and alleged that it sold the same in due accordance with law for accumulated freight and demurrage charges, and further alleged that even had it agreed to divert the lumber, such diversion would have been improper and illegal, and in violation of its legal duty under its duly filed tariffs, as filed in accordance with the federal Interstate Commerce Act, and set up and invoked the protection and benefit of such federal acts; and set up as a counterclaim the deficit of the proceeds of the sale of the lumber, and the accumulated charges, and demanded judgment for \$202.32."

The jury rendered a verdict in favor of the plaintiff for \$452.31; also a special verdict that, as between the two defendants, it should be paid by the appellant.

There was a motion for the direction of a verdict, but it was properly overruled, as there was testimony tending to prove the allegations of the complaint that the appellant failed to give such notice as was required under the circumstances.

Conceding that a diversion of the shipment, as alleged in the complaint, would have been in violation of the regulations under the federal laws (Act Feb. 4, 1887, c. 104, 24 Stat. 379), this would not, however, be conclusive of the case.

The question upon which the case turns is whether the appellant had the right to keep the cars in its possession for an unreason-

able length of time without giving notice to the plaintiff that it refused to divert the cars, and that they were still in its possession, thereby subjecting the plaintiff to a demurrage account, exceeding in amount the total value of the lumber by \$202.32.

We do not deem it necessary to cite authorities to sustain a proposition that shows upon its face that it is against justice and equity.

Even if his honor, the circuit judge, was in error in some of his rulings, they were not prejudicial to the rights of the appellant. For these reasons I dissent.

WATTS, J., concurs.

(111 S. C. 490)

MIMNAUGH v. BAKER et al. (No. 10167.)
(Supreme Court of South Carolina. Feb. 24, 1919.)

1. VENDOR AND PURCHASER \S 54 — PAROL CONTRACT—EQUITABLE TITLE—POSSESSION.

Purchaser, who takes possession of land under parol contract, becomes owner of an equitable title to the land.

2. APPEAL AND ERROR \S 843(2)—IRRELEVANT EXCEPTIONS—INCONSEQUENTIAL ISSUES.

Exceptions on appeal, which relate only to inconsequential issues, are irrelevant, and will not be considered.

3. JUDGMENT \S 780(3) — LIEN — VENDOR'S EXECUTORY INTEREST.

Judgment rendered against vendor subsequent to parol contract of sale, but prior to actual conveyance, is entitled to be paid out of purchase-money mortgage executed as part of consideration of conveyance.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by J. L. Mimnaugh against Carrie E. Baker and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

The following are the exceptions:

I. His honor, the presiding judge, erred in finding as a matter of fact that the terms of sale between M. A. Evans and Carrie E. Baker was as follows, to wit: "\$200 on plaintiff's mortgage, \$500 cash on delivery of deed, and balance of \$2,800, to be evidenced by her bond payable six months after date, with interest at 8 per cent. per annum, payable monthly, and secured by her purchase money mortgage," there being no testimony to support any such terms as "\$500 cash on delivery of deed," in particular.

II. His honor erred in deciding that the purchase was not concluded until April 20, 1916, on the payment of \$500, when a deed was given by appellant; whereas, as a matter of law, the

purchase was concluded February 27, 1916, when M. A. Evans and appellant reached an agreement as to the sale of the property, and under said agreement the purchaser was given immediate possession of the property and made valuable improvements thereon.

III. His honor erred in finding and concluding that Carrie E. Baker was not the head of a family and not entitled to homestead exemption; the error being in finding, contrary to the evidence and law, that appellant's sister and nieces had not become a part of her household, in that appellant had not adopted the nieces, whom she had supported and educated, and because the said nieces had not "severed their relations to the family in which they were born."

N. J. Frederick, of Columbia, for appellant.

Melton & Belser, of Columbia, for respondent.

GAGE, J. Action to foreclose a mortgage for \$200 on land. The mortgage was made to Mimnaugh by Baker. Subsequent to the execution of the mortgage Baker conveyed the land to Evans for \$3,500, to liquidate which debt:

Evans was to pay the Mimnaugh mortgage	\$ 200.00
Cash to Baker	500.00
Bond and mortgage to Baker	2,800.00
	<hr/>
	\$3,500.00

The first item was not paid; hence this action. The second item was paid. The bond and mortgage were executed, and on the same day assigned to Washington.

[1] Evans and Baker at the outstart made parol contract to buy and sell, and Evans went into possession, and so became the owner of an equitable title to the land. A few months thereafter the parol contract was performed as before stated. Betwixt these two dates, the day of the parol contract and the day of its performance, Mimnaugh got a judgment against Baker. The judgment debt is the chief matter now in issue; there is no issue about the mortgage debt.

The defendants are Baker, Evans, and Washington. The circuit court held, inter alia, that the bond and mortgage for \$2,800 was liable to pay the Mimnaugh judgment debt, and that Baker had no homestead right in the subject-matter of the action. The defendant Baker has appealed; the defendants Evans and Washington have abided the decree of the circuit court.

Let the three exceptions of Baker be reported.

[2] The first and second exceptions are irrelevant; they make inconsequential issues.

[3] Granting that the parol agreement, before referred to, and the entry of Evans on the property thereunder, constituted Evans the holder of the equitable title, and that the Mimnaugh judgment, gotten betwixt the two

events, did not operate to effect a lien on the legal title before it passed from Baker to Evans, yet the judgment is entitled to be paid out of the \$2,800 purchase-money mortgage. *Adicks v. Lowry*, 15 S. C. 135. Besides that, Washington does not object; Evans does not object; and Baker cannot object, for she sold all her interest in the bond and mortgage to Washington.

The third exception has to do with an imagined homestead exemption claimed by Baker. But there cannot be an exemption, unless there be a res to be exempted. So far as the record shows, Baker has no property in sight which is the object of the tentacles of the judgment lien.

It is said, though, that she had a right to transfer the judgment to Washington freed from the judgment lien. But she is not interested in that issue, and Washington does not make the question.

Decree affirmed.

HYDRICK and FRASER, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(148 Ga. 765)

DAVIS v. WILLIAMS. (No. 972.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. COURTS \Leftrightarrow 189(1)—CITY COURT OF BOSTON—TRIAL OF DISTRESS WARRANT PROCEEDINGS.

Under the act creating the city court of Boston (Acts 1914, p. 194), a counter affidavit filed to a distress warrant properly returned to that court is triable at the first term thereafter.

(Additional Syllabus by Editorial Staff.)

2. COURTS \Leftrightarrow 189(1)—CITY COURT OF BOSTON—TRIAL OF DISTRESS WARRANT—PROCEDURE.

Acts 1914, p. 194, creating city of Boston and adopting procedure of superior court "except as otherwise provided," silent as to trial of distress warrant proceedings, but by section 7, making all civil cases returnable to first regular term convening 20 days or more after filing of case, and, if a defense is filed, to next term, does not set up a different rule of procedure from that of superior court.

Certified questions from Court of Appeals.

Distress warrant proceedings between F. A. Davis and G. W. Williams, with counter affidavits. Two questions certified by Court of Appeals. First question answered in the affirmative, and second question answered in the negative.

Clifford E. Hay, of Thomasville, for plaintiff in error.

J. U. Merritt and W. I. MacIntyre, both of Thomasville, for defendant in error.

FISH, C. J. The Court of Appeals desires instructions from the Supreme Court upon the following questions in this case:

"(1) Where a distress warrant is issued and foreclosed, and the defendant files a counter affidavit and bond, all of which are properly returned for the issues thus made to be tried in the city court under the same rules as govern in the superior court, does this issue stand for trial at the term of the city court immediately succeeding the return, irrespective of the length of the period intervening between the date of the return and the commencement of the term?

"(2) The act of the General Assembly creating the city court of Boston adopts the rules and regulations governing the trial of cases in the superior court, 'except as otherwise provided.' It contains nothing relative to the trial of issues made in distress warrant proceedings, but section 7 of the act provides as follows: 'All civil cases shall be returnable for trial to the first regular quarterly term of said court convening twenty days or more, after the filing or docketing of the case. * * * If a defense is filed, * * * then the case shall go to the next regular quarterly term as the trial term.' Does the provision just quoted have the effect of setting up a different rule of procedure in the trial of such an issue than the one obtaining in the superior court?" Laws 1914, p. 198.

[1, 2] As to defenses to distress warrants, the Civil Code, § 5391, provides:

"The party distrained may in all cases replevy the property so distrained, by making oath that the sum, or some part thereof, distrained for is not due, and give security for the eventual condemnation money; and in such case the levying officer shall return the same to the court having cognizance thereof, which shall be tried by a jury as provided for in the trial of claims: Provided, that when the levying officer retains possession of the property of the tenant levied on, it shall not be necessary to give the bond for the eventual condemnation money."

As to statutory claims, section 5167 declares:

"When an execution issued from the superior court shall be levied upon personal property, and claimed by a person not a party to such execution, as provided in this Code, it shall be the duty of the levying officer to return the same, together with the execution, to the next term of the court from which said execution issued; but should such execution be levied upon real property, and the same shall be claimed in the manner aforesaid, it shall be the duty of the officer making the levy to return the same, together with the execution and claim, to the next term of the superior court of the county in which the land so levied upon shall lie."

It appears therefore from the code sections quoted that, where a counter affidavit returnable to the superior court is made to a distress warrant which has been levied, the pa-

pers making an issue therein shall be returned to the next term of the superior court, and then tried, unless continued for cause. Under the act creating the city court of Boston, the rules and regulations governing the trial of cases in the superior court are adopted, "except as otherwise provided." The provision in the act to the effect that "all civil cases shall be returnable for trial to the first regular quarterly term of said court convening twenty days or more after the filing or docketing of the case. * * * If a defense is filed, * * * then the case shall go to the next regular quarterly term as the trial term"—the language just quoted is applicable to civil cases brought by ordinary petition, and not to issues made by counter affidavit where a distress warrant has been levied.

Accordingly we hold, without misgiving, that the first question propounded should be answered in the affirmative, and that the second question should be answered in the negative.

All the Justices concur.

(148 Ga. 690)

MACK v. WESTBROOK. (No. 843.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §247, 303—CRIMINAL LAW §1213, 1214—EMINENT DOMAIN §2(1)—STATUTES §76(1)—DUE PROCESS OF LAW—FORFEITURE OF ESTATE—SPECIAL LAW—CRUEL AND UNUSUAL PUNISHMENT.

Section 20 of the act of the General Assembly approved March 28, 1917 (Acts Ex. Sess. 1917, pp. 7, 16), which provides for the condemnation and sale of "all vehicles and conveyances of every kind and description which are used on any of the public roads or private ways of this state, and all boats and vessels of every kind and description which are used in any of the waters of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law," is not unconstitutional on the grounds (a) that it is violative of the due process clauses of the state and federal Constitutions (Const. Ga., art. 1, § 1, par. 3 [Civ. Code 1910, § 6359]; Const. U. S. Amend. 14, § 1); (b) that it is violative of the provision of the Constitution of Georgia (article 1, § 2, par. 8 [Civ. Code 1910, § 6384]) which declares that "no conviction shall work corruption of blood, or forfeiture of estate"; (c) that it is violative of the Constitution of this state (article 1, § 4, par. 1 [Civ. Code 1910, § 6391]), which declares that no special law shall be enacted in any case for which provision is made by an existing general law; (d) that it authorized the taking and damaging of private property for public purpose without just and adequate compensation being first paid (article 1, § 3, par. 1 [Civ. Code 1910, § 6388]); (e) that it is in conflict with the constitutional provision (article 1, § 1, par. 9 [Civ. Code 1910,

§ 6365]) which prohibits excessive fines and cruel and unusual punishments.

2. INTOXICATING LIQUORS ⇨244—UNLAWFUL TRANSPORTATION — CONDEMNATION — PROCEEDING IN REM.

The proceeding authorized by section 20 of the act in question (Acts [Ex. Sess.] 1917, p. 16) is one in rem, "against the offending thing, and not against the offending owner."

(a) It is not decided that the solicitor of the court having jurisdiction had not legal capacity to institute condemnation proceedings in his name as solicitor; but it is suggested that the proceeding, in the nature of an information, should properly be brought in the name of the state.

(Additional Syllabus by Editorial Staff.)

3. CONSTITUTIONAL LAW ⇨81 — "POLICE POWER."

The "police power" includes everything essential to the public safety, health, and morals, and justifies the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

4. CONSTITUTIONAL LAW ⇨81—POLICE POWER—DISCRETION OF LEGISLATURE.

A large discretion is necessarily vested in the Legislature to determine what the interests of the public require, and what measures are necessary for the protection of such interests.

5. INTOXICATING LIQUORS ⇨17, 18, 21 — PROHIBITION OF MANUFACTURE AND SALE—PENALTIES.

A state has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits, and to prohibit all sale and traffic therein in the state, and to inflict penalties for such manufacture and sale, and provide regulations for the abatement as a common nuisance of property used for such forbidden purposes.

6. INTOXICATING LIQUORS ⇨20—UNLAWFUL TRANSPORTATION.

The state, in the exercise of its police power, may adopt any means reasonably necessary and not unduly oppressive upon the individual to prevent the transportation of liquors, such as the condemnation of a vehicle used in such transportation.

7. ACTION ⇨16—PROCEEDING "IN REM."

A proceeding "in rem" is in effect a proceeding against the owner, as well as a proceeding against the goods, for it is his breach of the law which has to be proven to establish the forfeiture, and it is his property which is sought to be forfeited.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Rem.]

Error from City Court of Albany; Clayton Jones, Judge.

Proceeding by Cruger Westbrook, Solicitor, against Robert Mack, for the condemnation of an automobile used in transporting

liquors contrary to the prohibition law. Demurrer to proceeding overruled. From a judgment condemning the automobile, Mack excepts and brings error. Affirmed.

Peacock & Gardner and Pottle & Hofmayer, all of Albany, for plaintiff in error.

Cruger Westbrook, Sol., of Albany, pro se.

GEORGE J. Robert Mack was arrested by the sheriff of Dougherty county while in the act of transporting twelve quarts of whisky, in a certain Ford automobile, along the public streets of the city of Albany. The automobile was also seized by the sheriff. Mack entered a plea of guilty to the accusation preferred against him in the city court of Albany, which in terms charged that he did "have, possess, and transport whisky, in violation of the prohibition laws of said state," in said county of Dougherty. The sheriff reported the seizure of the automobile to the solicitor of the city court of Albany, who in turn filed a proceeding to condemn the automobile under section 20 of the prohibition law of 1917 (Acts Ex. Sess. 1917, pp. 7, 16). After declaring to be contraband all apparatus or appliances used for the purposes of distilling or manufacturing any of the liquors specified in the act, and providing for the summary destruction of the same when found or discovered by any arresting officer, the section reads as follows:

"All vehicles and conveyances of every kind and description which are used on any of the public roads or private ways of this state, and all boats and vessels of every kind and description which are used in any of the waters of this state in conveying any liquors or beverages, the sale or possession of which is prohibited by law, shall be seized by any sheriff or other arresting officer, who shall report the same to the solicitor of the county, city or superior court having jurisdiction in the county where the seizure was made, whose duty it shall be within ten days from the time he receives said notice to institute condemnation proceedings in said court by petition, a copy of which shall be served upon the owner or lessee if known, and if the owner or lessee is unknown notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. If no defense is filed within thirty days from the filing of the petition, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court. Should it appear upon the trial of the case that said vehicle, conveyance, boat or vessel was so used with the knowledge of the owner or lessee, the same shall be sold by order of the court, after such advertisement as the court may direct. The proceeds arising from said sale shall be applied as follows: (a) To the payment of the expenses in said cause, including the expenses incurred in the seizure. (b) One-third of the remainder to the officer making the seizure and furnishing the proof. (c) To the

payment of the costs of the court, which shall be the same as now allowed by law in cases of forfeiture or recognizance. (d) The remainder, if any, shall be paid into the county treasury to be held as a separate fund to be paid out under order of the court as insolvent costs in other cases arising from the violation of any of the provisions of this article: Provided, that in any county of this state in which any of the officers of either the county, city or superior courts are now on a salary, or hereafter placed on a salary, such remainder of the funds applicable to the payment of insolvent costs of such officer or officers shall be retained in the general fund of, and become the property of such county."

Mack did not answer the proceeding to forfeit, but demurred thereto upon grounds hereinafter indicated. The demurrer was overruled, and judgment was rendered condemning the property as provided in section 20 of the act. Mack excepted.

[1, 3, 4] 1. "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." *Lawton v. Steele*, 152 U. S. 133, 136, 14 Sup. Ct. 499, 38 L. Ed. 385. A large discretion is necessarily vested in the Legislature to determine (a) what the interests of the public require, and (b) what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346. In *Lawton v. Steele*, supra, it was said:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Since the Legislature may not arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations, it follows that—

"Its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

[5] Since the decision in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, it has been recognized by the Supreme Court of the United States:

That "a state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits, to prohibit all sale and traffic in them in said state, to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes, and that such legislation * * * does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor * * * contravene the provisions of the Fourteenth Amendment of the Constitution of the United States." *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *United States v. Knight*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.

This court has steadily recognized the right of the state, under the police power to regulate, restrict, or forbid the manufacture or sale of intoxicating liquors. In the opinion in the case of *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384, it was said:

"It would seem to follow that the state might enact any law which would effectually prohibit the traffic" in intoxicating liquors.

In *Delaney v. Plunkett*, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917D, 926, Ann. Cas. 1917E, 685 (3), this court upheld the right of the state, under its police power, to prohibit the keeping of intoxicating liquors at all in certain places or in excess of certain quantities at any place, as well as their manufacture and sale within the state. It was there ruled:

"The qualities of property theretofore existing in them [intoxicating liquors] were taken away, and it was competent for the Legislature to declare that they should be seized, condemned, and destroyed, upon order of the judge of the court having jurisdiction."

See, in the same connection, *Barbour v. State*, 146 Ga. 667, 92 S. E. 70; *Bunger v. State*, 146 Ga. 673, 92 S. E. 72; *Howell v. Mathieson*, 146 Ga. 838, 92 S. E. 520.

Under section 1 of the act approved March 28, 1917 (Acts Ex. Sess. 1917, p. 7), it is provided that "it shall be unlawful for any common carrier, corporation, firm or individual to transport, ship or carry, by any means, whatsoever, * * * from any point without this state to any point within this state, or from place to place within this state," any intoxicating or prohibited liquors. The demurrer in this case does not call in question the validity of section 1 of the act from which we have quoted. The attack is upon the constitutionality of section 20 of the act.

[6] If the state, in the valid exercise of the police power, may declare it unlawful and illegal for any person to transport, ship, or carry whisky by any means whatsoever from any point without this state to any point within this state, and from place to place within this state, it necessarily follows that the state may, in the exercise of its police power, adopt any means reasonably necessary, and not unduly oppressive upon the individual, to prevent the transportation of such whisky. *Crane v. Campbell*, 245 U. S. 304, 38 Sup. Ct. 98, 99, 62 L. Ed. 304. Such

liquors cannot reasonably be brought from without to a point within this state, nor carried from point to point within the state, without the use of some vehicle or conveyance of some kind or description. The power to prohibit the transportation of liquors is conceded, at least in this case; and it would seem to follow, as a necessary conclusion, that the forfeiture of the vehicles used in the transportation of such liquors upon the public highways, private ways, and waters of this state is a measure reasonably necessary for the accomplishment of the purpose; and we are unwilling to say that the means adopted as applied in this case are unduly oppressive. Inanimate property may, without violence to the due process clauses of the state or federal Constitutions, be forfeited to the state when used as an instrument, and a necessary instrument, in the accomplishment of a purpose declared by the state, within the exercise of its undoubted power, to be unlawful. See *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269, where it was held that the state of Maryland had a right to protect its fisheries in Chesapeake Bay, by making it unlawful to take or catch oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. It is true that the express purpose of the law considered in *Smith v. Maryland* was to prevent the destruction of oysters by the use of particular instruments in taking them. We cannot think this point has a controlling bearing upon the question presented in the instant case. Under our statute the transportation of whiskey into the state, or from point to point within the state, is absolutely prohibited, regardless of the means employed. The Legislature, however, recognized the necessity of the employment of some means in the transportation of such liquors, and provided for the condemnation and sale of any vehicle when so used for such purpose upon the public highways, private ways, or waters of this state. In *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. Ed. 637, it was held that—

"Where the owner of a distillery and other property connected therewith leased them for the purpose of distilling, the acts or omissions of the lessee in carrying on the business of distilling while he was in possession, and with intent to defraud the revenue, although they are unknown to the owner, subject the distillery and such other property to forfeiture to the United States."

The case of *Lawton v. Steele*, *supra*, involved the constitutionality of an act of the Legislature of the state of New York, which in terms declared it unlawful for any person to take from certain waters within the state "any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand." The act further provided that "any net, pound, or other means or

device for taking or capturing fish, * * * had, found, or maintained in or upon any of the waters of the state," should be summarily destroyed by any person. The Supreme Court of the United States declared that the act was constitutional, and that it did not deprive the citizen of his property without due process of law, in violation of the provisions of the Constitution of the United States, although no notice or opportunity to be heard was afforded the owner of the net or device. In the opinion it is pointed out that it is not easy to draw the line between cases "where property illegally used may be destroyed, and where judicial proceedings are necessary for its condemnation." If the article cannot be used for any lawful purpose, or if it is of such character "that the law will not recognize it as property entitled as such to the law's protection under any circumstances," it may be summarily destroyed. If the property, although used for an illegal purpose, is nevertheless capable of being used for lawful and legitimate purposes, notice and an opportunity to be heard would seem to be necessary, at least as a general rule. However, an exception to the general rule was apparently recognized in the case last above referred to, where such property was of trifling value.

In the instant case it is said that the automobile is not within itself a nuisance, but, on the contrary, is ordinarily used for lawful and legitimate purposes. This fact is by no means conclusive upon the power of the state to provide for its condemnation and sale when used as an instrument, and a necessary instrument, in the commission of an act which the Legislature has declared to be illegal; nor is the value of the property to be affected necessarily controlling upon the question. If so, the state may be denied the right to exercise the power if only the citizen be shrewd enough to employ an article of great intrinsic value in the commission of the act which the Legislature has declared to be unlawful. The value of the automobile in this case, however, is not shown; nor does it appear that the car was not regularly used for an illegal purpose. It is not insisted that the statute is violative of the due process clauses of the state or federal Constitution because it fails to provide for notice and hearing. Notice and an opportunity to be heard are, by the terms of the statute, afforded. It is, however, urged that the act cuts off all defenses "save only ignorance of the owner that the liquor was being transported," and that the owner should be given the opportunity to show that the property is intrinsically useful and valuable for some lawful purpose. That there are decisions tending to support this view we do not question. Some of them are noted in *Lawton v. Steele*, *supra*.

The statute does not undertake to declare

a forfeiture of the entire estate, both real and personal, of the offender. Only the particular property employed in the accomplishment of the illegal act is declared subject to forfeiture. The proceeding provided is one in rem. The statute, therefore, is not in conflict with article 1, § 2, par. 3, of the Constitution of Georgia (Civ. Code 1910, § 6384), which provides:

"No conviction shall work corruption of blood, or forfeiture of estate."

The right of one convicted of crime to inherit, hold, and transmit property is guaranteed; but this guaranty imposes no restriction upon the valid exercise by the state of the police power preserved to it in the Constitution. *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 557, 69 S. E. 725, 32 L. R. A. (N. S.) 20.

"Laws enacted in pursuance of police power to abate nuisances or to benefit the health of the public which may result in the destruction of private property, and which do not provide for any payment therefor to the owner, are not violative of the constitutional inhibition against taking private property for a public use without compensation." *Williams v. Rivenburg*, 145 App. Div. 98, 94, 129 N. Y. Supp. 473, 478.

See, also, *Health Dept. v. Rector, etc.*, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579; *Mugler v. Kansas*, supra.

Neither is the act in question violative of article 1, § 4, par. 1, of the Constitution of this state (Civ. Code 1910, § 6391), which provides that no special law shall be enacted in any case for which provision has been made by an existing general law; nor is it in conflict with article 1, § 1, par. 9 (Civ. Code 1910, § 6365), of the Constitution of Georgia, which declares that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted. These grounds of demurrer require no discussion, for reasons that are obvious.

[2, 7] 2. It is further objected in the demurrer that the present action is one in personam, whereas the proceeding authorized by the statute is "one in rem, solely against the offending thing, and not against the offending owner." As indicated above, we agree to the construction placed by the plaintiff in error upon the act; but we do not agree to his conclusion that the present action is one in personam. It is true that the owner is named in the petition, and process is prayed against him. The judgment prayed is, however, one solely in rem, for the condemnation of the automobile.

"A proceeding in rem is in effect a proceeding against the owner as well as a proceeding against the goods; for it is his breach of the law which has to be proven to establish the forfeiture, and it is his property which is sought to be forfeited." 10 Enc. U. S. R. 990; *Boyd*

v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Place v. Norwich, etc., Trans. Co.*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

The judgment rendered in the proceeding was one purely in rem, no costs being taxed against the owner. This fact alone would seem to be a sufficient answer to the contention that the action cannot be converted into one in personam, because the owner would thereby be subject to a judgment for costs.

It is also objected that the plaintiff had not legal capacity to sue; that the proceeding should have been in the name of the state against "one Ford automobile." The proceeding was commenced by petition in the name of Mr. Westbrook as solicitor of the city court of Albany. The prayer was for the condemnation of the particular vehicle, as provided by statute. This is a very plain statement of the capacity in which the plaintiff sues, and could not have misled any one of common understanding. This, we think, is sufficient in the case; there being no special demurrer attacking the petition upon the ground indicated, though the point is urged in the brief. We are not called upon, therefore, to decide whether the plaintiff, in his name as solicitor of the court, had legal capacity to sue (see provisions of the act and section 5510); but we suggest that the proceeding, in the nature of an information, should properly be filed in the name of the state.

Judgment affirmed. All the Justices concur.

(148 Ga. 719)

SWICORD v. CRAWFORD et al. (No. 799.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. BANKS AND BANKING ⚡49(4)—INSOLVENCY—SUIT AGAINST STOCKHOLDERS—SET-OFF.

In a suit brought by the receivers of an insolvent bank, chartered under the laws of Georgia since the act of 1893 (Acts 1893, p. 70), against a stockholder thereof upon his statutory individual liability to depositors of the bank (Civil Code 1910, § 2270), the defendant cannot set off the amount of his individual deposits which he had in the bank when it became insolvent and ceased to operate.

2. BANKS AND BANKING ⚡49(4)—INSOLVENCY—SUIT AGAINST STOCKHOLDERS—SET-OFF.

Nor can he set off an amount of money which, subsequently to the insolvency and closing of the bank, but prior to the commencement of such suit against him, he voluntarily paid to other depositors of the bank to reimburse them for the loss of their deposits.

Certified questions from Court of Appeals.

Suit by W. C. Crawford and others, receivers, against S. P. Swicord. Judgment for plaintiffs, and defendant brings error, and the court of Appeals requests instructions. Instructions given.

See, also, 20 Ga. App. 35, 92 S. E. 394.

S. P. Cain, of Cairo, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

M. L. Ledford and Claude Christopher, both of Cairo, for defendants in error.

FISH, C. J. The Court of Appeals desires instruction from the Supreme Court upon the following questions:

"(1) In a suit brought by the receivers of an insolvent bank, chartered under the laws of Georgia since the act of 1893 (Acts 1893, p. 70), against a stockholder thereof upon his statutory individual liability to depositors of the bank (Civil Code 1910, § 2270), is the defendant entitled to set off the amount of his own individual deposit which he had in the bank when it became insolvent and ceased to operate?"

"(2) In such a suit as is referred to in the preceding question, can the defendant set off the amount of money which, subsequently to the insolvency and the closing of the bank, but prior to the commencement of the suit against him, he voluntarily paid to other depositors of the bank, to reimburse them for the loss of their deposits?"

[1, 2] The act of the General Assembly, approved December 18, 1894 (Acts 1894, p. 76; Civil Code of 1910, §§ 2247-2250), deals with the individual charter liability of a stockholder in any bank or other corporation. Section 3 of that act (Civil Code of 1910, § 2249) declares such individual liability to be "an asset of such bank or other incorporation, to be enforced by the assignee, receiver, or other officer having the legal right to collect, marshal, and distribute the assets of such failed bank or other corporation." Stockholders in a bank incorporated under the laws of this state since the passage of the act of 1893 (Acts 1893, p. 70) are individually liable equally and ratably (and not one for another as sureties) to depositors of said corporation for all moneys deposited therein in an amount equal to the face value of their respective shares of stock. Section 2270 of the Civil Code of 1910 (codified from the act of 1893, *supra*) is "an implied provision in the charter of every bank incorporated in this state since the passage of the act of 1893." *Crawford v. Swicord*, 147 Ga. 548, 554, 94 S. E. 1025. Prior to the passage of the act of 1894, *supra*, the individual liability of a stockholder in a bank or other corporation, under the charter, was not considered an asset of the corporation, and the earlier decisions of this court are to the effect that an assignee or receiver of the corporation could not enforce such charter liability. Only the creditor of the corporation in whose favor such

liability was created was held to have the right to assert the same. *Lane v. Morris*, 8 Ga. 468 (7). It necessarily followed that where a stockholder, prior to the filing of a suit against him, had voluntarily discharged debts of the corporation equal in amount to his statutory liability, he could not be compelled to pay anything more, at the instance of a creditor whose claim remained unsatisfied. *Lane v. Harris*, 16 Ga. 217; *Robinson v. Bank of Darien*, 18 Ga. 65; *Jones v. Wiltberger*, 42 Ga. 575. It also resulted that "a bona fide judgment debt of a stockholder against the company in which he holds stock may be set off by him in equity against a suit to make him individually liable in proportion to his stock." *Boyd v. Hall*, 56 Ga. 563 (2). In each of the cases cited the court, upon a construction of the particular statute involved, reached the conclusion that the liability imposed by charter upon the stockholder was not an asset of the corporation; at least this is the basis of the decision in each case. In *Lamar v. Taylor*, 141 Ga. 227, 235, 80 S. E. 1085, 1089, Mr. Justice Lumpkin, referring to the statutory liability of stockholders as affected by the act of 1894, said:

"We think there can be no doubt that, under the terms of this act, the right to bring suit on such liability was conferred on a receiver, where one was appointed. It did not change the fact that the recovery was for the benefit of depositors, or alter the extent of the liability; but, instead of having numerous suits to enforce the statutory liability which might exist on the part of stockholders, it provided for collecting and disbursing the recovery through one agency of the law."

To the same effect see *Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647; *Harris v. Taylor*, 148 Ga. —, 98 S. E. 86. As pointed out, the act of 1894 was remedial in character, and provided for the enforcement of such statutory liability and for the disbursement of the fund thus collected in accordance with equitable principles. In other words, the statutory individual liability of stockholders to depositors in a bank, upon the insolvency of the bank, becomes a trust fund to be administered, it is true, in favor of a particular class of creditors—depositors. It results from the application of this doctrine, which must be applied to such liability in view of the act of 1894, that a stockholder, when sued by the receivers of an insolvent bank chartered under the laws of this state since the act of 1893, upon his statutory liability to depositors, cannot set off the amount of his own individual deposits which he had in the bank when it became insolvent and ceased to operate; nor can he in such suit set off the amount of money which, subsequently to the insolvency and the closing of the bank, but prior to the commencement of the suit against him, he voluntarily paid to other depositors of the bank to reimburse them for the loss of their de-

posits. At most he is merely subrogated to the rights of such depositors. The effect of the act of 1894, declaring such liability to be an asset of the corporation, is to cut off the right of the stockholder in a "failed" corporation to prefer one depositor above another, and therefore to deny such stockholder, who is also a depositor, the right of set-off in a suit by the receiver of such "failed bank" to enforce the statutory liability. The statutory liability of the stockholder is therefore to be considered as upon the same basis as any other asset belonging to the corporation, and must be enforced and distributed according to the equitable rules discussed above. See 2 Morse on Banks and Banking (5th Ed.) §§ 696 et seq.; 1 Bolles on Law of Banking, § 31.

All the Justices concur.

(148 Ga. 700)

HAYES v. DICKSON. (No. 968.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

1. EVIDENCE — 460(4)—EXECUTORS AND ADMINISTRATORS — 347, 397—ORDER OF SALE — DEFINITENESS — EXTRINSIC EVIDENCE — DEED.

The administrator upon the estate of William Walsh filed an application in the court of ordinary for leave to sell "the lands in said county belonging to said estate, which are described as follows: 245 acres, more or less, of lot of land No. 109, also 122 acres, more or less, of lot of land No. 94, in the fourth land district of Irwin county, Ga." Upon this application the ordinary granted an order authorizing the administrator to sell "the following land of said estate, to wit, 245 acres, more or less, of lot of land No. 109, also 122 acres, more or less, of lot No. 94, in the fourth land district of Irwin county, Ga." *Held*:

On an attack upon the sale based on such order, where it appeared that at the time of the sale the portions of the lots referred to in the order had been staked off, and that the estate was in possession thereof and was not in possession of any other lands in the district, the order of sale was sufficiently definite, and was admissible in evidence as authority to the administrator to make the sale. Civil Code 1910, § 4026; Hall v. Davis, 122 Ga. 252, 255, 50 S. E. 106; Davie v. McDaniel, 47 Ga. 195 (3); Oliver v. Powell, 114 Ga. 592, 40 S. E. 826 (7); Tarver v. Barber, 138 Ga. 607, 75 S. E. 603; Laramore v. Dudley, 145 Ga. 102, 88 S. E. 682; Powell on Actions for Land, 311, § 246.

(a) It was competent by extrinsic evidence to identify the land in dispute as the land contemplated by the administrator's sale.

(b) In a suit by the purchaser at the administrator's sale against a tenant of the heirs at law of the intestate to recover the land, the deed executed by the administrator in pursuance of the sale heretofore mentioned, which

described the property as "the south half of lot No. 109 in the fourth district of Irwin county, Ga., containing 245 acres, more or less, also 122 acres, more or less, in the southwest corner of lot of land No. 94, * * * both of said tracts being in the fourth district of Irwin county, Ga.," construed in connection with the order of sale, sufficiently described the land to be conveyed. Yopp v. A. C. L. R. R. Co., 148 Ga. 539, 97 S. E. 534.

(c) Under application of the foregoing principles, there was no merit in any of the assignments of error based on the rulings of the court on the admissibility of evidence.

2. DIRECTED VERDICT.

Under the pleadings and evidence, the only possible verdict that could have been rendered was that which the court directed in favor of the plaintiff.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Action by Marion Dickson against J. C. Hayes. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Haygood and Eldridge Cutts, both of Fitzgerald, Quincey & Rice, of Ocilla, and W. C. Lankford, of Douglas, for plaintiff in error.

O. H. Elkins and McDonald & Bennett, all of Fitzgerald, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(148 Ga. 734)

CITY COUNCIL OF AUGUSTA v. CLEVELAND. (No. 852.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — 733(2) — "GOVERNMENTAL FUNCTION" — MAINTENANCE OF SEWERAGE DRAINAGE SYSTEM.

The duty of a city to maintain its sewerage drainage system in a good working and sanitary condition is a governmental function.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Governmental Function.]

2. MUNICIPAL CORPORATIONS — 733(2) — MAINTENANCE OF SEWERAGE SYSTEM—PUBLIC HEALTH.

Such maintenance of a sewerage system has reference to the preservation of the public health.

3. EVIDENCE — 14 — JUDICIAL NOTICE — MAINTENANCE OF SEWERAGE SYSTEM.

This court will take judicial notice of that fact.

4. EVIDENCE — 14 — JUDICIAL NOTICE — MAINTENANCE OF SEWERAGE SYSTEM.

This court will also take judicial cognizance of the fact that the cleaning out of an essen-

tial part of a city's sewerage drainage system for the purpose of keeping it open and unclogged by dirt, sand, or other foreign substances, so that it can properly perform its functions as a part of the system, is a necessary work in a proper maintenance of the system, and is a work connected with the preservation of the public health.

5. MUNICIPAL CORPORATIONS ⇨733(2) — NEGLIGENCE OF EMPLOYE — LIABILITY — GOVERNMENTAL DUTY.

Negligence on the part of employes of the board of health of a city, who were paid by the city, in cleaning out a part of the sewer and leaving a heavy iron lid to an opening into the sewer in such a position as to create a dangerous defect or obstruction in the sidewalk, in consequence of which one not chargeable with negligence was injured, would render the city liable to the injured party.

Certified questions from Court of Appeals.

Action by Leroy Cleveland by next friend, against the City Council of Augusta. Judgment for plaintiff, and defendant brings error, and the Court of Appeals certifies two questions. Questions answered in the affirmative.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error.

Alexander & Lee, of Augusta, for defendant in error.

BECK, P. J. The Court of Appeals has certified the following questions upon which it desires instruction:

"(1) Is the duty of a city to maintain its sewerage drainage system in a good working and sanitary condition, so as to prevent it from becoming or causing a nuisance, a governmental or a ministerial function?

"(a) Is such maintenance connected with, or has it reference to, the preservation of the public health?

"(b) Is the fact that such maintenance is connected with or has reference to the preservation of the public health so well known that this court can take judicial cognizance of it?

"(c) Can this court take judicial cognizance of the well-known fact that the cleaning out of a 'sand trap'—an essential part of a city's sewerage drainage system—for the purpose of keeping it open and unclogged by dirt, sand, or other foreign substances, so that it can properly perform its functions as a part of the system, is a necessary work in the proper maintenance of the system, and is a work connected with the preservation of the public health?

"(2) A 'sand trap' forming a part of the sewerage drainage system of the city of Augusta was being cleaned out by the employes of the board of health of the city by removing therefrom sand and dirt. The powers and duties of the board of health and its employes, and their relations to the city, are fixed by the act of the General Assembly of Georgia creating the board (Acts 1890-91, p. 865). While the men cleaning out this sand trap were employes of the board of health of the city of Augusta, it

is inferable from the evidence that they were paid by the city of Augusta. The sand trap was on the edge of a sidewalk near the curbing, and the employes of the board of health, for the purpose of cleaning out the sand trap, removed its iron lid (which was about 3½ or 4 feet square and weighed 200 or 250 pounds, and which, when the trap was closed, formed a part of the surface of the sidewalk used by pedestrians), and propped the lid up at an angle on the edge of the sidewalk by means of a steel bar some 2½ or 3 feet long, while they were engaged in cleaning out the trap. While this work was being done, a boy seven years old, who was upon the sidewalk, walked up to the trap to see what was going on, and accidentally struck with his foot the steel bar which supported the lid, thereby knocking the prop down and causing the lid to fall upon and break his leg. Under these circumstances, was the city in the performance of a governmental or a ministerial function, and was it liable for the negligence of the employes of the board of health (if they were negligent under the facts of the case) in improperly and insecurely propping up the lid, and in failing to warn the boy of his danger when approaching it?"

[1-3] 1-3. We are of the opinion that the duty of a city to maintain its sewerage drainage system in a good working and sanitary condition is a governmental function. That such maintenance is connected with, and has reference to, the preservation of the public health is so well known and so generally recognized that courts will take judicial cognizance thereof. It is unnecessary to cite authorities, either decisions of courts or text-books, to show what facts or classes of facts courts will take judicial notice of, in order to demonstrate that judicial notice will be taken of the fact that the sewerage system has a direct connection with and relation to the health of the inhabitants of the municipality. We will, however, call attention to the case of *Townsend v. Smith*, 144 Ga. 792, 87 S. E. 1039, in which it appears that this court took judicial cognizance of the fact that—

"The prevention of an infectious malady which, unless checked, would become general among the cattle of a given county, and thereby render the flesh of such cattle and the milk of cows diseased, unwholesome, and unfit for food, was a matter affecting the health of the people of the community where this disease appeared."

The removal of garbage of all kinds, the prevention of the escape of noxious vapors and odors, the cleanliness of the persons residing in a city, are all to a large extent dependent upon the maintenance of a sewerage drainage system. It follows from what is here said, under the authority of several of our decisions, that the maintenance of the sewerage and drainage system of a city in a good working and sanitary condition is a governmental function. This conclusion is in accordance with what was said in the case

of *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, and the other cases decided by this court. *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664. See, also, 6 McQuillin, Mun. Corp. § 2639. In answering the question in regard to the sewers and drainage system of a city, we have assumed that the system referred to is not one operated for profit, and that no substantial charges are made for the ordinary use, enjoyment, and benefits of the system.

[4] 4. It will be seen from what we have said above that an affirmative answer should be given to subdivision (c) of the first question, in the form in which that question is submitted. If the question had been propounded as to whether a court would take judicial cognizance of what a sandtrap is, a different question would have been presented. But, where the sand trap is defined as an essential part of the sewerage system, then it follows from what we have previously stated that the keeping of it open and unclogged by dirt, sand, or other foreign substance, so that it could properly perform its functions as a part of the system, is a necessary part of the proper maintenance of the system, and has therefore a natural connection with the preservation of the public health.

[5] 5. While it is one of the governmental functions and duties of a city to effectively maintain its sewerage system, and while, under the authority of the decision in *Love v. Atlanta*, supra, and the cases laying down the same doctrine as there stated, it follows that if, in the exercise of such functions and the discharge of the duties devolving upon the department of the city government having charge of the matters relating to the public health, a private citizen is injured by the negligence of one of the city's servants in and about such work, no right of action arises against the city, nevertheless that doctrine must not be allowed to destroy the other equally well-established doctrine that, if a city negligently and tortiously allows obstructions to remain in its streets or sidewalks, or negligently fails to repair defects in a sidewalk or street, and a citizen in the exercise of due care is injured in consequence of such act of negligence upon the part of the city, there can be a recovery therefor against the city. Each of these two doctrines must be given effect, and have been given effect. In the case of *Mayor, etc., of Savannah v. Waldner*, 49 Ga. 816, it was said:

"It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous works, such as sewers, etc., are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants, or by con-

tract, or by subcontractors under a primary contractor."

The defect in the street which is charged to be negligent and tortious conduct in the case just cited consisted in leaving open "a ditch or sewer across the street." See, also, *Mayor, etc., of Savannah v. Spears*, 66 Ga. 304. In the case of *Kea v. Dublin*, 145 Ga. 511, 89 S. E. 484, it was said:

"Although municipal authorities may have plenary power in the matter of collection, removal, and disposition of garbage, yet they cannot lawfully create, in connection therewith, a nuisance dangerous to health or life; and where such a nuisance is created, and its effect is specially injurious to an individual by reason of its proximity to his home, he has a cause of action for damages. *Bell v. Mayor, etc., of Savannah*, 139 Ga. 298, 77 S. E. 165."

See, also, *Mayor, etc., of Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577; *Williams v. Washington*, 142 Ga. 281, 82 S. E. 656, L. R. A. 1915A, 325, Ann. Cas. 1916B, 196; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Mayor, etc., of Americus v. Chapman*, 94 Ga. 711, 20 S. E. 3; *Cornellsen v. Atlanta*, 146 Ga. 416, 91 S. E. 415.

Consequently the last question propounded by the Court of Appeals should be answered in the affirmative.

All the Justices concur.

(148 Ga. 761)

NEWTON COUNTY v. BOYD. (No. 957.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

CROPS §5—VENDOR AND PURCHASER—GROWING CROP OF CORN—STATUTE.

A crop of corn, not detached from the soil, whether mature or immature, is a part of the realty, and passes by sale of the land without contractual reservation of the crop. Civ. Code 1910, § 3617; *Pitts v. Hendrix*, 6 Ga. 452; *Frost v. Render*, 65 Ga. 15; *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325. See, also, 8 R. C. L. 360, 371, §§ 6, 16; *Cobb's Law of the Farm*, 13.

George, J., dissenting.

Error from Superior Court, Newton County; O. W. Smith, Judge.

Suit by Newton County against William Boyd. Verdict and judgment for defendant, and plaintiff excepts and brings error. Affirmed.

King & Johnson, of Covington, for plaintiff in error.

Rogers & Knox, of Covington, for defendant in error.

ATKINSON, J. In the spring of the year, the county of Newton by parol contract rented certain land to William Boyd, to be planted in corn, the county to pay for one-third of the guano and receive one-third of the crop grown; the rent to become due when the crop matured. On November 7th the county sold and conveyed the land in fee to Boyd, the deed not reserving or otherwise specially mentioning the crop. After the crop was gathered by Boyd, the county brought an equitable suit against him, for an accounting, and to recover the value of one-third of the crop.

On the trial all the evidence showed that the crop was attached to the soil at the date of the conveyance, but there was a conflict of evidence as to whether the crop was mature at the date of the conveyance. The defendant testified that there was a killing frost in that county on October 19th. On November 30th Boyd demanded and received from the county one-third of the cost of the fertilizer used on the corn. The court directed a verdict for the defendant. A motion for new trial was overruled, and the plaintiff excepted.

On application of the principle stated in the headnote to the pleadings and the evidence, there was no error in the direction of the verdict.

Judgment affirmed. All the Justices concur, except

GEORGE, J. (dissenting). Whether matured, but ungathered, crops pass with a grant of the land without reservation, is entirely immaterial in this case. By all the authorities, rent accrued is a chose in action, and is personalty, and does not pass with a grant of the land without reservation. Under Civil Code (1910) § 3341:

"The special liens of landlords for rent shall date from the maturity of the crops on the lands rented, unless otherwise agreed on."

It is admitted by the defendant in this case that no date was fixed for the payment of the rent. The evidence really demanded a finding that the rent was due upon the maturity of the crop, and the agent of the county testified positively that this was the contract. While the defendant denied that the crops were matured on November 7, 1917, he at the same time admitted that "there was a killing frost in Newton county" on October 19, 1917. Moreover, the county was to furnish one-third of the fertilizer, and 23 days after the execution and delivery of the deed to Boyd he called upon the county for one-third of the cost of the fertilizer used on the corn, and the county paid the same. At that time the agent of the county asked the defendant how much corn the county would get from the land, and the defendant replied that he could not say, but that "the lands did not

produce much." Under the decision of *Saulsbury v. McKellar*, 59 Ga. 302(3), and rulings in other similar cases, the rents had accrued and were due at the time of the execution and delivery of the deed to the tenant. In *Autrey v. Autrey*, 94 Ga. 579, 20 S. E. 431, it is said that:

"The rent is personalty, and the right to collect and distribute is in the personal representative of the decedent."

In 16 R. C. L. 914, § 421, the general rule, without exception, is stated as follows:

"The claim of a landlord for accrued rents is on the same general basis as any other chose in action; and though upon a transfer of the reversion the landlord expressly assigns to his transferee the claim for accrued rents, the assignee's rights with respect thereto are the same only as those of any other assignee of a chose in action."

Except in those states that recognize the right of an assignee to maintain an action in his own name, he cannot maintain an action for matured rents assigned. The fact must not be overlooked that this was a suit for rent—for the value of the corn which Boyd agreed to pay for the rent of the lands for 1917 for agricultural purposes. Under any view of the evidence it was a jury question whether the rent was due; that is, whether it had accrued at the date of the deed. In 16 R. C. L. 915, § 422, the general rule of law applicable to the facts of this case is stated as follows:

"A transfer of the reversion does not carry with it any right to the accrued rents, and after such transfer the landlord may still recover all rents theretofore accrued."

This rule is supported by all the text-writers on the subject, as, for example, 1 *Tiffany on Landlord and Tenant*, 1103(5). All the decided cases, it is believed, without exception sustain the rule. See notes in 16 R. C. L. and in *Tiffany*, supra.

(148 Ga. 747)

SHOUP et al. v. WILLIAMS et al.

WILLIAMS et al. v. SHOUP et al.

(Nos. 861, 862.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. *WILLS* §459, 470—CONSTRUCTION—INTENTION—STATUTE.

In construing a will, the intention of the testator is the controlling consideration, and his intention must be ascertained by taking the will, as it is said, "by the four corners," and giving to all parts of it consideration.

(a) In construing a particular item of a will, or a particular clause of an item, the court will view and consider the whole instrument.

(b) Section 3900 of the Civil Code of 1910, which provides that: "In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law; and to this end the court may transpose sentences or clauses, and change connecting conjunctions, or even supply omitted words in cases where the clause as it stands is unintelligible or inoperative, and the proof of intention is clear and unquestionable; but if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention"—does not affect nor is it a limitation upon the application of the general rule stated in the preceding note.

(c) The last clause of the section, to wit, "but if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention," is to be construed as a limitation upon the power of the court to transpose sentences, change connecting conjunctions, or supply omitted words, if the clause as it stands in relation to the whole instrument is intelligible and operative.

2. WILLS ⇐497(1), 601(1), 610(1)—CONSTRUCTION—TRUST—LIFE INTEREST—FEE.

Applying the foregoing, the court did not err in construing the will in this case.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Petition by Frank H. Peck and Walter R. Brown, executors of John C. Peck, deceased, for the construction of the will, and for directions, opposed by Cora Peck Williams and others, and Pearl Peck Shoup and others. From a judgment construing the will, Pearl Peck Shoup and others except and bring error, and Cora Peck Williams and others take a cross-bill of exceptions. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

John C. Peck, on November 30, 1903, made his will as follows:

"Item 1st. I direct that any property which I may own at the time of my death, except such as is specially disposed of hereafter, may be sold as soon as it can reasonably be done, and from the proceeds thereof, together with such funds as may be on hand, that my debts and expenses be paid; and if I have not already done so, I direct that my executors shall erect a suitable monument on my lot in Oakland Cemetery. If the amount realized should not be sufficient to pay the expenses designated, the balance required may be taken from the rental of the trust property. In case there is any money left after paying debts, funeral expenses and monument, as mentioned above, I direct that the same be divided into five equal parts and paid out as follows: One share to my beloved wife, Frances Josephine Peck; one share to my son, Frank H. Peck; one share to my grandchildren, J. C. Peck, Jr., and Arthur J. Peck, sons of my deceased son Arthur J. Peck;

one share to my daughter Cora P. Williams, and one share to my daughter Lillie P. Davis.

"Item 2d. I give and bequeath unto my beloved wife, Frances Josephine Peck, the full and free use of the house and lot in which I now reside, and known as No. 97 Ivy street, all taxes, insurance, and ordinary repairs on same to be paid by my executors out of the income from the other property. This use to continue during the full term of her natural life. I also give her absolutely, all the household goods and fixtures in said house, and any horses and carriages which I may own at the time of my death, all to be hers, without restraint or control.

"Item 3d. The property known as No. 15 and 17 North Pryor street, also property at the junction of Peachtree and Pryor streets, also the house and lot No. 97 and 99 Ivy street I place in the hands of my executors as a trust estate (the house and lot No. 97 Ivy street being subject to the life use of my wife, as indicated in Item 2d); and the said executors shall keep the buildings on said lots insured for about three-fourths of their value, and keep same in good repair. The rental from the above trust estate shall first be applied to the payment of taxes, insurance, and repairs, and the sum of one hundred fifty dollars per month shall be paid to my wife named above, for her use as she may deem proper. Payment to be made to her monthly and to continue during the full term of her natural life. As I think this would make her life easy and without care of looking after property, I have given her this in place of dower and years support. After paying as above, the income from the property shall be applied to the payment of the monument mentioned above, or, if not needed, shall be paid over to my heirs as hereinafter provided. To insure the payment of taxes, insurance, and repairs, as specified above, I direct that my executors shall set aside from the rental of the property, and deposit in some good safe bank, the sum of one hundred fifty dollars per month for each and every month, and on the first of January of each year any surplus of this amount left after paying the taxes, insurance and repairs, shall be divided between my heirs as is provided for the balance of income from property. This trust estate I desire to be continued until the youngest grandchild is twenty-one years old.

"Item 4th. The entire balance of the income from the trust estate (after paying fixed charges as above) I desire to be divided into four equal parts, between my children and grandchildren, viz.: Frank H. Peck, one share; John C. Peck and Arthur J. Peck, sons of my deceased son, Arthur J. Peck, one share; to Cora P. Williams, one share; to Lillie P. Davis, one share. This division may be made monthly or quarterly as may be or may seem best to my executors. Should either of my children be dead, then their children should receive the parent's share, that is, the one share going to that parent shall be equally divided between the children of that parent. At the expiration of the trust, all the property may be divided in kind or may be sold, and the proceeds divided between my children and grandchildren, two shares to each child and one to each grandchild. If the grandchild is dead, leaving chil-

dren, such child or children shall inherit the parent's share.

"Item 5th. In case of the death of either John C. Peck, Jr., or Arthur J. Peck, during the trust, then that portion of the income shall go to the one living; and in case of the death of both of said children before the end of the trust, then the entire share shall revert to the general fund, unless they may have been married, in which case, if there are living children, they shall inherit the father's share; but if no children are living, the amount shall revert as above. The same condition shall apply to any children of my daughters, Cora P. Williams and Lillie P. Davis; that is, in case of the death of the parent, the portion of the property ready for distribution, as well as the portion of the income, should go to such child or children; but in case of the death of such child or children before the final distribution, without leaving living children or grandchildren, then the full share shall revert to the general fund, and be divided between other children; it being my intent and desire that my property shall go to my wife and our children and through them in case of their death to their children according to the terms of this will."

By item 6 executors were appointed.

Upon the death of the testator, which occurred on March 5, 1908, he left surviving him the following persons: His wife, Frances Josephine Peck; one son, Frank H. Peck; two daughters, Cora Peck Williams and Lillie Peck Davis; and eight grandchildren, to wit, Pearl Peck Shoup (formerly Pearl B. Peck), Emerson P. Peck, William Hoyt Peck, George Starr Peck, Eloise Peck Cook (formerly Reba Eloise Peck), children of Frank H. Peck; J. C. Peck and Arthur J. Peck, sons of Arthur J. Peck, a deceased son of the testator; and Josephine Davis Mell (formerly Josephine Davis), daughter of Lillie Peck Davis. All of the above-named persons were in life at the time of the execution of the will. Eloise Peck Cook, the youngest of all the grandchildren of the testator, became of age on February 9, 1917. Frances Josephine Peck, the widow of the testator, died on March 6, 1917. On April 5, 1917, Frank H. Peck and Walter R. Brown, executors of the estate of John C. Peck, filed their petition to the superior court of Fulton county, in which they prayed that the court construe the will and direct them in the following particulars:

(1) "Is each child of testator now entitled to two shares and each grandchild of testator now entitled to one share in said estate absolutely and in fee simple?"

(2) "Or, is each child of testator now entitled to two shares and the two grandchildren of testator, J. C. Peck and Arthur J. Peck, now entitled to one share in said estate, to the exclusion of the other grandchildren of testator, absolutely and in fee simple?"

(3) "Do any of the distributees take a life interest contingent upon their leaving children; and, if so, whom?"

At the time of the filing of the bill for direction all the above-named children and

grandchildren of the testator were then in life (no other grandchild having been born since the execution of the will), and were made parties defendant. All the defendants answered, except Josephine Davis Mell, the daughter of Lillie P. Davis, and except Frank H. Peck, who, being in his representative capacity one of the plaintiffs, did not further plead. The five children of Frank H. Peck contended, in substance, that the proper interpretation of the will was that when the so-called trust estate terminated the corpus thereof was to be divided into fourteen shares; two shares to go to each of the three living children of the testator, namely, Frank H. Peck, Cora P. Williams, and Lillie P. Davis, and one share to each of the grandchildren of the testator, namely, the five children of Frank H. Peck, the two children of the deceased son, Arthur J. Peck, and the one child of Lillie P. Davis. Cora P. Williams and Lillie P. Davis, daughters of the testator, and John C. Peck and Arthur J. Peck, the sons of a deceased son of the testator, in their answers contended, in substance, that the property of the testator not included in the so-called trust estate was disposed of under item 1 of the will, and passed partly by the provisions of the will and partly by inheritance from the deceased widow of the testator to the three living children of the testator and two children of testator's deceased son, in the proportion of one-fourth to each living child and one-fourth to the sons of the deceased child, and that as to the corpus of the so-called trust estate the will disposed of it so that it would also be received in equal shares by the living children of the testator and the two sons of the dead son representing their deceased father. The court, to whom the case was submitted without the intervention of a jury, construed the will as follows:

"First. That the property not included in the trust estate, and disposed of in item 1, went, in fee simple, one-fifth to the widow, one-fifth to each of the children of the testator, and one-fifth to the two children of Arthur J. Peck, as set forth in item 1; that the widow having died intestate, her share follows the law of inheritance, going in equal shares to the same persons, so that Frank H. Peck is entitled to one-fourth of said funds or property, Cora P. Williams to one-fourth, Lillie P. Davis to one-fourth, and J. C. Peck, Jr., and Arthur J. Peck together to one-fourth.

"Second. That each child of the testator is now entitled to two shares of the trust estate, and the two grandchildren of the testator, J. C. Peck and Arthur J. Peck, are each entitled to one share in said estate, to the exclusion of the other grandchildren of the testator, absolutely and in fee simple.

"Third. That neither of the distributees take a life interest contingent upon their leaving children."

To the judgment construing the will as indicated in the second and third divisions set

forth above, the five grandchildren of the testator (children of Frank H. Peck, son of the testator) excepted. At the hearing the two daughters of the testator and the two sons of the deceased son of the testator moved to strike so much of the answers filed by the plaintiffs in error in the main bill of exceptions as sought to set up an old will of the testator and certain accompanying documents, on the ground that there was no such ambiguity in the will as authorized the introduction of extrinsic evidence. This motion was overruled, and during the progress of the trial the documents were received in evidence over the objection of the defendants in error in the main bill; and the rulings of the court in these particulars are assigned as error in the cross-bill of exceptions.

G. S. Peck and Rosser, Slaton, Phillips & Hopkins, all of Atlanta, for plaintiffs in error.

Anderson, Rountree & Crenshaw and Brewster, Howell & Heyman, all of Atlanta, for defendants in error.

GEORGE, J. (after stating the facts as above). [1] 1. In the able brief of counsel for the plaintiffs in error various arguments are used, and sundry rules of law are applied to uphold the construction given by them to the will of John C. Peck, but they mainly rely upon the following provision of item 4 of the will:

"At the expiration of the trust, all the property may be divided in kind or may be sold, and the proceeds divided between my children and grandchildren, two shares to each child and one to each grandchild. If the grandchild is dead, leaving children, such child or children shall inherit the parent's share."

It is insisted that the language of this provision, which manifestly refers to the corpus of the estate, is plain and unambiguous; that the words, "my children," "grandchildren," "each child," and "each grandchild," in the particular clause involved, should have their usual and ordinary meaning. In this connection we are referred to section 3900 of the Civil Code, which is as follows:

"In the construction of all legacies, the court will seek diligently for the intention of the testator, and give effect to the same as far as it may be consistent with the rules of law; and to this end the court may transpose sentences or clauses, and change connecting conjunctions, or even supply omitted words in cases where the clause as it stands is unintelligible or inoperative, and the proof of intention is clear and unquestionable; but if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a different testamentary intention."

And it is said that the last clause of this section, to wit, "if the clause as it stands may have effect, it shall be so construed, however well satisfied the court may be of a dif-

ferent testamentary intention," is controlling in this case. If the provision of the will above quoted stood alone, that is, if nothing went before it or followed after it, it may be conceded that the will should be given the construction placed upon it by plaintiffs in error. But the rule laid down in the section quoted in no wise limits the well-recognized doctrine that the intention of the testator is the controlling consideration, and that this intention must be gathered from the whole will. *Choice v. Marshall*, 1 Ga. 97, 102; *Winn v. Tabernacle Infirmary*, 135 Ga. 380, 383, 69 S. E. 557, 82 L. R. A. (N. S.) 512; *Tyler v. Theilig*, 124 Ga. 204, 52 S. E. 606. The instrument must be taken, as it is sometimes said, by the "four corners," and every part of it given effect so far as sound public policy and the rules of law will admit. In the recent case of *Rutland v. Emanuel*, 80 South. 107 (5), the Supreme Court of Alabama ruled:

"In construing a particular item of a will, the court will view and consider the whole instrument."

This ruling is in harmony with the well-recognized rule that the intention of the testator, as gathered from the whole will, is the controlling consideration. *Miller v. Hurt*, 12 Ga. 357, 361; *Gaboury v. McGovern*, 74 Ga. 133, 140; *Ezell v. Head*, 99 Ga. 560, 27 S. E. 720. In *Randolph v. Bond*, 12 Ga. 362, 367, this court, speaking through Judge Warner, said:

"The counsel for the defendants in error insists, that they are to take per capita, share and share alike, and such certainly would be the legal effect of the latter part of the seventh clause of the will, but for the other expressions contained in it denoting a different intention. While we admit the general rule as contended for by the defendants in error, in the absence of any contrary intention, yet, the legatees will take per stirpes, if the testator's intention to that effect appears from other expressions in the will"—citing *Roland v. Gorsuch*, 2 Cox, 187.

It is proper to say that counsel for plaintiffs in error contended that the clause of the will quoted can be given literal effect without doing violence to any other part of the will, and that the will, taken as a whole, clearly reveals the intention of the testator to divide his estate into fourteen shares, two shares to each of his children and one share to each of his grandchildren. The provision in the latter part of the third item of the will, "This trust estate I desire to be continued until the youngest grandchild is twenty-one years old," and other provisions of the will, are pointed out as sustaining this view. It is, under the facts of this case, immaterial whether the "trust estate" was to terminate absolutely when the youngest grandchild became 21 years of age, without regard to whether the wife of the testator was then in

life. If the sentence last above quoted refers to the youngest of all the grandchildren of the testator, it is material only as bearing upon the general intent of the testator in the making of his will. Of course, if the "trust estate" is to be continued until the youngest of all his grandchildren "is twenty-one years old," the presumption would arise that he intended the youngest grandchild to take under the will; but this is not necessarily true. Looking to the whole will, however, we think it clear that as to the property which was included in the so-called trust estate, the testator intended that it should also be received in equal shares by the three living children of the testator and the two sons of the dead son, representing their deceased father. In the first item of the will the testator refers to his grandchildren by name, and includes only the sons of his deceased son, Arthur J. Peck; and this reference is to his grandchildren in connection with his wife and his three living children. In item 4 of the will, in making a bequest of the remainder of the income from the "trust estate," he provides that it be "divided into four equal parts, between my children and grandchildren, viz.: Frank H. Peck, one share; John C. Peck and Arthur J. Peck, sons of my deceased son, Arthur J. Peck, one share; to Cora P. Williams, one share; to Lillie P. Davis, one share." It is in item 4 of the will, and almost immediately following the bequest above quoted, that the clause mainly relied upon by plaintiffs in error appears. At the end of item 5, after the testator has finally disposed of his entire estate, income and corpus, we find this significant statement:

"It being my intent and desire that my property shall go to my wife and our children and through them in case of their death to their children according to the terms of this will."

[2] Upon these and other considerations arising from a careful scrutiny of the whole will, we are satisfied that the testator referred to his two grandchildren, the sons of his deceased son, as coming within the descriptive words employed by him when he devised the corpus of the "trust estate" to "my children and grandchildren, two shares to each child and one to each grandchild."

2. None of the distributees, under a proper construction of the will, took a life interest contingent upon their leaving children. The will created a vested remainder in the corpus of the "trust estate" in Cora P. Williams and Lillie P. Davis, subject to be divested if they did not survive the termination of the "trust estate." *Speer v. Roach*, 145 Ga. 852, 854, 90 S. E. 57.

As indicated, we are of the opinion that there was no ambiguity apparent upon the face of the will. While the court admitted

certain allunde evidence consisting of an old will with certain pencil memoranda said to have been made thereon by the testator, and other documentary evidence, the conclusion finally reached by the court was correct. No other construction would give effect to the wording of the will, considered in its entirety.

Judgment on the main bill of exceptions affirmed. Cross-bill dismissed. All the Justices concur.

(148 Ga. 711)

MARSHALL v. NEISLER et al. (No. 1021.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

BANKS AND BANKING \S 77(5)—RECEIVERS—
—SALE—CONFIRMATION—PRICE.

The receivers of the Farmers' & Merchants' Bank were ordered by the court to sell the entire property of the bank held by them, and to make report of the sale to the court for confirmation or rejection. They filed a report reciting that the property had been sold to W. E. Marshall upon his bid of \$4,510, and recommended that the sale so reported be confirmed. C. H. Neisler filed objections to the confirmation of the sale to Marshall, upon the ground, among others, that the property had been cried off to him for the sum of \$3,850, he being the highest and best bidder. The evidence before the court disclosed that the property was bid off by Neisler at the last-named sum, and that thereafter the receivers again exposed the property for sale, over Neisler's protest, when it was cried off to W. E. Marshall for the sum of \$4,510, as reported by the receivers; Neisler also being a bidder when the property was offered a second time. When the matter of confirming the sale was before the court, the judge passed an order reciting that at the sale the property had been knocked off to Neisler at \$3,850, and that this was not a fair and adequate price therefor, but that, Neisler having in open court offered to raise his bid to \$5,000, and it appearing that this sum was a fair and adequate price for the property sold, it was ordered that the sale to him be confirmed, and that upon payment of the \$5,000 in cash the receivers deliver the property to him and make to him an appropriate conveyance. To this order Marshall excepted upon various grounds. *Held*, that the court committed no error in rendering the decree complained of. See *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882 (5). See, also, 16 R. C. L. § 81, p. 113, as to right of bidder to except.

Error from Superior Court, Taylor County; H. A. Mathews, Judge.

Objection by C. H. Neisler and others to confirmation of receivers' sale of property of Farmers' & Merchants' Bank to W. E. Marshall. From an order confirming a sale to Neisler, Marshall excepts and brings error. Affirmed.

Jule Felton, of Montezuma, for plaintiff in error.

Hardeman, Jones, Park & Johnston, of Macon, for defendants in error.

HILL, J. Judgment affirmed. All the Justices concur.

(148 Ga. 711)

COOPER v. NEISLER et al. (No. 1016.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

DISMISSAL OF INTERVENTION.

Under the ruling made in the case of Marshall v. Neisler, 98 S. E. 352, the court did not err in dismissing the intervention filed by the plaintiff in error.

Error from Superior Court, Taylor County; H. A. Mathews, Judge.

Objection by C. H. Neisler and others to confirmation of receiver's sale, with intervention by G. L. Cooper. From a judgment dismissing the intervention, intervener brings error. Affirmed.

Jere M. Moore and G. C. Robinson, both of Montezuma, for plaintiff in error.

Hardeman, Jones, Park & Johnston, of Macon, and Jule Felton, of Montezuma, for defendants in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 701)

THOMPSON v. TENNYSON. (No. 998.)

(Supreme Court of Georgia. Feb. 12, 1919.)

(Syllabus by the Court.)

FISH \S 5(1, 2)—WATERS AND WATER COURSES \S 89, 156(7)—RIPARIAN RIGHTS—OWNERSHIP OF SOIL—RIGHT OF FISHING—"MILL PRIVILEGES."

The owner of land adjoining a nonnavigable stream is the owner of the soil to the center of the thread of the stream, and of the fishing rights to the center of the thread on his side of the stream. If one proprietor owns the land on both sides of the stream, he has the exclusive right of fishing therein.

(a) The right of fishing is not severed from the ownership of the fee by grant which does not by its terms either expressly convey the right, or necessarily include it, as, for instance, an unrestricted grant of all water rights or privileges.

(b) The grant by the owner of the fee of "mill privileges" carries the right to the reasonable use of land and water necessary to the operation of a mill, but does not grant any fishing privileges.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mill Privilege.]

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Suit for injunction by Mrs. S. F. Tennyson against J. T. Thompson. Injunction granted in part, and defendant excepts and brings error. Reversed, with direction.

Mrs. S. F. Tennyson brought an equitable petition against J. T. Thompson, alleging, that she was the owner of a gristmill which her husband, J. N. Tennyson, as her agent, conducted for her; that in the operation of the mill for the purpose of grinding corn she had acquired by deed the privilege of maintaining a millpond on certain land described in the deed; that she was in the possession of the same, operating the mill and using the pond through her husband as agent, and her predecessors in title had been in the peaceful possession of the same without interference for 30 years or more; that the defendant and his agents patrolled the pond and forbade those working in plaintiff's employment, and her licensees, from using or going on the pond, and had put up signs forbidding any one from going on the pond; that defendant ordered plaintiff's husband off the pond and made threats intimating that he would shoot any one caught on the pond; that defendant interfered with persons who desired to visit the mill and premises for the purpose of having their corn ground, and he still continues to patrol the pond and premises, interfering with plaintiff's business; that defendant has been notified to stay off the premises and pond, but he willfully and maliciously disregards and violates her rights of private property. Plaintiff prayed that defendant and his agents be enjoined from going on the pond and premises, and from intimidating the customers of plaintiff, etc. The part of plaintiff's deed material here is as follows:

"Plaintiff attached to her petition a deed from Mrs. Siddah Perry, of Thomas county, Ga., dated October 3, 1917 conveying the privilege of having and maintaining a millpond known as the Bullock millpond, situated on lot No. 207 in the seventeenth land district of said state and county; also that portion of lot of land No. 208, containing 107 acres, more or less, and bounded as follows: On the east by original land lot line, on the south by the run of a certain branch, on the west by lands of Mrs. Freeman Carden, and on the north by lands of Mrs. Freeman Carden, being the same land upon which my residence is located, and which is and has been used in connection with the operation of the mill above described; also that portion of lot No. 194 in said district of said state and county as is and has been used for the purpose of backing water thereon in the use, maintenance, and operation of said mill."

The defendant filed an answer, denying the material allegations of the petition, and

averring that he held the land on which the pond is located under a warranty deed from T. T. Thompson to himself. He also attached a copy of a deed from James A. Bullock to T. T. Thompson, by which the grantor of defendant acquired title and possession of lot No. 297. Defendant averred that "the plaintiff has no interest or equity in or respecting lot of land No. 207, save the mill privileges defined in the deeds hereto attached"; that the defendant was the owner of that part of lot of land No. 207 covered by and adjacent to the millpond, and is entitled to the hunting and fishing privileges thereon, whereas the plaintiff's agent and husband "has, without authority of law, endeavored to seize and hold the exclusive hunting and fishing privileges on and adjacent to said pond, which hunting and fishing privileges are entirely separate and distinct from the mill and the mill privileges." The defendant prayed that the plaintiff's prayers for relief be denied, and that she be enjoined from hunting or fishing upon the pond, or that part of lot of land No. 207 adjacent to the pond, without first obtaining the written permission of the defendant or his assigns. He also prayed that the deed from Mrs. Perry to the plaintiff be canceled as a cloud upon his title.

Upon the interlocutory hearing the trial judge granted the injunction as prayed for by the plaintiff, "in so far as the water and pond are concerned," and the defendant and his agents were enjoined from going upon the pond or premises described in the petition. To this judgment the defendant excepted.

Clifford E. Hay, of Thomasville, for plaintiff in error.

Titus, Dekle & Hopkins, of Thomasville, for defendant in error.

HILL, J. From the averments of the petition and answer it will be seen that the main question at issue between the parties is: Who is entitled to the exclusive hunting and fishing privileges in the millpond referred to in the petition? It appears that the fee of lot No. 207 was conveyed by James A. Bullock on December 4, 1874, to Tandey Thompson (T. T. Thompson), together with all the privileges except for mill privileges; and on February 20, 1908, T. T. Thompson conveyed to J. T. Thompson, the defendant, lot No. 207 of the seventeenth district, it being recited, "This deed subject to water mill privileges." At the time of the conveyance by Bullock to T. T. Thompson there was a creek on the property, but no mill or millpond had been constructed. Thereafter the grantor built a mill and maintained a millpond for a number of years. On August 17, 1908, James A. Bullock conveyed to Mrs. Siddah Perry "the privilege of having and maintaining a millpond" on lot 207; and on October 3, 1917,

Mrs. Perry conveyed to Mrs. Tennyson, the plaintiff, "the privilege of having and maintaining a millpond, known as the Bullock millpond, situated on lot 207."

We will first deal with the question of who possesses the exclusive right of fishing so far as the right is dependent upon the conveyances of the respective parties. Under the common law the owner of land bordering on a nonnavigable stream owned the soil to the center or thread of the stream, and likewise had the exclusive right of fishing on his side of the stream. If the same person owned the land on both sides of the stream, he was entitled to the exclusive right of fishing. *Carter v. Murcot*, 4 Burr. 2162; 12 Eng. Rul. Cas. 166. And the doctrine of the common law has been adhered to by the courts of this country. *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; *Commonwealth v. Chapin*, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; *Griffith v. Holman*, 23 Wash. 347, 68 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821.

This is also the law as decided in Georgia. In the case of *Joiner v. Wilkes*, 148 Ga. 300, 96 S. E. 385, it was held that—

"Under the pleadings and the evidence, the court did not err in granting the interlocutory injunction."

There is no statement of facts and no opinion in the report of that case. Reference to the record, however, discloses that the case there decided was submitted to the judge for decision upon an agreed statement of facts, from which it appears that the plaintiff, Wilkes, whose right to an injunction was maintained by the decision rendered, was the owner in fee of lot of land No. 57, adjoining one side of a millpond; his title coming through a chain of conveyances from one *Tharp Spence*. *Joiner*, the defendant, through a chain of conveyances from the same common grantor, had been granted "all the water and mill privileges on lot of land No. 57 in the seventeenth district of Thomas county, Ga., together with their every right and privilege desired, wanted, or required for the purpose of erecting, building, and operating a water mill and gin and such other machinery as may at any time be added or operated by water power." Under this grant the defendant claimed to be entitled to the exclusive fishing privileges in the millpond, notwithstanding the plaintiff's ownership of the soil adjoining a portion of the pond. The effect of that decision, therefore, was to hold that the owner in fee on land on one side of a pond was entitled to fish in that portion of the pond which extended over the soil owned by him, and, further, to rule that a previous grant by the common grantor of all the water and mill privileges on lot of land No. 57

did not have the effect of conveying to the grantee an exclusive right of fishing in the pond. In the case of *Lee v. Mallard*, 116 Ga. 18, 42 S. E. 372, it was held:

"The owner of water in a stream or pond not navigable, or of all the privileges therein, has the exclusive right of fishing in the same, though the land lying under the water may belong to another. Accordingly a conveyance of land lying upon the natural bank of an unnavigable stream, upon which is located a mill standing on other land of the grantor and across which is a dam, causing a pond a portion of which covers a part of the land conveyed, does not pass to the grantee any right to fish in such pond at any point below the then existing high-water mark thereof, when by the terms of the conveyance an exception is made in the grantor's favor as to 'all water privileges up to high-water mark, and all other privileges in going to his mill.'"

The decision just quoted, on first consideration, might seem to conflict with the ruling in the *Joiner Case*, *supra*, but it will be noted that in the *Lee Case* the exception in the grantor's favor was of "all water privileges up to high-water mark," without any language which would qualify or restrict the water privileges granted, whereas in the *Joiner Case* the language was so coupled with the right and privilege of erecting, building, and operating a water mill and gin as to make the deed capable of the construction that the words "all water and mill privileges on lot of land No. 57" meant all such water and mill privileges as were reasonably necessary for the purpose of erecting, building, and operating the water mill or gin referred to; and with this construction placed upon the deed there is no real conflict between the decisions in these two cases.

In the case now under review the only exception which the common grantor made in conveying the fee of the land was to reserve to himself the mill privilege. In the case of *Gould v. Boston Duck Co.*, 79 Mass. (13 Gray) 442, 452, it was said that the term "mill privilege" in a conveyance of land embraces the right which the law gives the owner to erect a mill thereon, and to hold up or let out the water, at the will of the occupant, for the purpose of operating the same in a reasonable or beneficial manner. In *Moore v. Fletcher*, 16 Me. 63, 65, 33 Am. Dec. 633, the term "mill privilege" was defined as meaning the land and water used with the mill, and on which it and its appendages stand. In a decision of this court, *Rome Railway & Light Co. v. Loeb*, 141 Ga. 202, 80 S. E. 785, Ann. Cas. 1915C, 1023, it was said:

"The general rule is that riparian owners are each entitled to the center of the stream. Civil Code 1910, § 3630. But it is insisted that the plaintiff, by the division of the property in kind and the order of the court, had the right

to 'mill privileges,' and that this included all the water in the pond. But we cannot agree to that proposition without qualification. The general rule as to the rights of riparian proprietors is that each may use the water for any purpose to which it can be beneficially applied without material injury to the rights of others. *Gould on Waters* (3d Ed.) § 204. Every riparian owner may make a reasonable use of the stream passing by his land. *Id.* § 208. Prior to the building of the mill and pond and the grant of the 'mill privileges' to the predecessors in title of the plaintiff, the riparian owners would undoubtedly each have the right to use the water to the middle of the stream, provided the use was reasonable and did not injure other riparian proprietors; and, though she subsequently became the owner in fee, yet in the partition of the property the 'mill privileges' were carried forward. We do not understand that the term 'mill privileges,' as contained in the order of the court, gives the plaintiff the exclusive use of all the water in the pond, whether needed or not for mill purposes, to the exclusion of a reasonable use by other riparian proprietors. The grantee of a mill privilege, without special mention of water rights, takes a right to the actual flow of the stream, subject to its reasonable use by upper riparian owners. *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396 (24 N. E. 774, 7 L. R. A. 613). * * * The effect of the proceedings to divide the property in kind was to vest in the plaintiff the title to the mill property described in the division, as set aside to her, and also to the 'appurtenant mill privileges,' with the use of so much of the water in the millpond as is necessary for the operation of the mill in a reasonable manner. See *Gould v. Boston Duck Co.*, 18 Gray [Mass.] 442. But we do not understand the law to be that the owner of the mill property, with mill privileges, can deprive riparian owners contiguous to the stream of a reasonable use of the water, where it does not interfere with the operation of the mill in a reasonable manner. It is to be observed that the plaintiff does not own the title to the land under the pond at the point where the defendant takes its water, but the title is in the defendant to the center of the original stream. Under these circumstances, we think the defendant is entitled to a reasonable use of the water in the millpond adjacent to its property, provided it does not materially interfere with the mill privileges of the plaintiff or other riparian proprietors."

In view of the authorities above cited, we conclude that, so far as the respective grants are concerned, the effect of the conveyance by James Bullock to T. T. Thompson in 1874 was to pass to the latter the fee, which would include the hunting and fishing privileges, in the absence of language expressing a contrary intent, and that the language "with all the privileges except for mill privileges" had only the effect to reserve in the grantor such privileges, water or otherwise, as were reasonably necessary for the operation of the mill, and did not reserve to him any hunting or fishing rights, and that under the subsequent conveyance J. T. Thompson

is now the owner of the fee, including the fishing and hunting rights, and that Mrs. S. F. Tennyson only has the mill privileges, as above defined.

The case of *Mallet v. McCord*, 127 Ga. 761, 58 S. E. 1015, seems to have been decided solely with respect to the rights conferred by a reservation of the grantors of "the right to fish in said pond;" this reservation occurring in a conveyance wherein they had conveyed to the grantees the right to "keep and maintain a dam on Yellow River creek in said county," and to keep the water at its present height.

The defendant in error contends, however, that, irrespective of the rights of the parties under the deeds under which they hold, she now has by prescription acquired the exclusive right of fishing in the millpond. If it be conceded that an exclusive right of fishing in private waters can be acquired by prescription, since no such right is purported to be given by the deeds under which the defendant in error claims, it would require twenty years' possession to ripen a title by prescription, and to do this she seeks to tack on the possession and use of the hunting and fishing privileges by James A. Bullock, the common grantor, who we have seen had conveyed these privileges by his deed to T. T. Thompson in 1874. Manifestly any attempt to establish prescription in his behalf would have failed because his possession could not be in good faith, as it would be an attempt to prescribe against his own title which he had conveyed to another, which certainly could not be done without proof that he had ousted his grantee.

In addition to seeking to restrain the defendant from patrolling and going on the pond it was also alleged in the petition that the defendant interfered with the customers of the mill and forbade them from using the pond and mill, and it was sought to enjoin him from intimidating the customers of the plaintiff and from interfering with her agent in the conduct of the mill business, etc. The only support of this allegation found in the evidence is contained in the affidavit of J. M. Tennyson, in the statement "that the defendant, Jim Thompson, does not only attempt to order and keep people off so much of the pond as is located on lot 207, but that he attempts to keep people off of the pond and mill premises entirely."

In so far as the order of injunction restrains the defendant from going upon the pond or premises described, it is reversed; and the court is directed to modify it so as to restrain the defendant only from interfering with the plaintiff's business and customers on the mill premises themselves.

Judgment reversed, with direction. All the Justices concur.

(23 Ga. App. 395)

SOUTHERN RY. CO v. RICE. (No. 9727.)(Court of Appeals of Georgia, Division No. 2
Feb. 11, 1919.)*(Syllabus by the Court.)***1. NEW TRIAL — VERDICT CONTRARY TO EVIDENCE.**

The evidence, viewed in the light most favorable to the plaintiff, failed to show any negligence on the part of the defendant which contributed to the injuries sued for; moreover, it showed that the plaintiff, by the exercise of ordinary care, could have avoided the injuries. It follows that the recovery for the plaintiff was unauthorized, and that the court erred in overruling the general grounds of the defendant's motion for a new trial.

2. EXCEPTIONS PENDENTE LITE.

The foregoing ruling being controlling in the case, it is unnecessary to consider the exceptions pendente lite or the special grounds of the motion for a new trial.

Error from City Court of Elberton; H. S. West, Judge.

Action by Lennice Rice, by next friend, against the Southern Railway Company. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed.

A. G. & Julian McCurry, of Hartwell, and Geo. C. Grogan, of Elberton, for plaintiff in error.

Worley & Nall, of Elberton, and Horace & Frank Holden, of Athens, for defendant in error.

BROYLES, P. J. Judgment reversed.

BLOODWORTH, J., concurs.
STEPHENS, J., disqualified.

(23 Ga. App. 473)

HINSON et al. v. HAYNES. (No. 9736.)(Court of Appeals of Georgia, Division No. 2
Feb. 20, 1919.)*(Syllabus by the Court.)***1. DIRECTED VERDICT.**

The evidence, with all reasonable deductions therefrom, demanded a verdict for the plaintiff, and the court did not err in so directing.

2. AMENDED MOTION FOR NEW TRIAL.

The court committed no error as set out in the first and sixth grounds of the amendment to the motion for new trial.

3. OTHER ASSIGNMENTS.

The other special assignments of error do not properly raise any question for consideration by this court.

4. DAMAGES FOR PROSECUTING ERROR.

The motion of defendant in error that he be allowed damages against the plaintiff in error for prosecuting the case in this court is denied.

Error from City Court of Hazlehurst; Gordon Knox, Judge.

Action by F. M. Haynes, receiver, against W. F. Hinson and others. Judgment for plaintiff upon a directed verdict, and defendants bring error. Affirmed.

J. C. Bennett and S. D. Dell, both of Hazlehurst, for plaintiffs in error.

Newton Gaskins, of Hazlehurst, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 396)

CENTRAL OF GEORGIA RY. CO. v. S. R. JAKES & TINSLEY CO. (No. 9733.)

(Court of Appeals of Georgia, Division No. 2, Feb. 11, 1919.)

(Syllabus by the Court.)

1. WITNESSES — 258 — TESTIMONY FROM RECORDS — KNOWLEDGE.

In the light of the qualifying note of the trial judge, it does not appear that he erred in excluding the testimony of the witness Montgomery as to the weights of the carload lots of corn shipped. It is not permissible for a witness to testify to facts, the knowledge of which he has obtained from records not personally kept by him.

2. APPEAL AND ERROR — 728(1) — ASSIGNMENT OF ERROR — EXCLUSION OF DOCUMENTARY EVIDENCE — SUFFICIENCY.

The assignment of error, based upon the sustaining of the defendant's objections to certain documentary evidence, and the exclusion of the evidence, is too indefinite to raise any question for consideration by this court, as it does not show what were the objections sustained by the court, nor wherein the court erred in sustaining them and in excluding the evidence.

3. EVIDENCE — 73, 208(7) — QUOTATION OF RATES — ADMISSIBILITY — STRICKEN PLEADING.

The court did not err in admitting in evidence, over the objections of the plaintiff, a paragraph of the original petition which had been stricken by amendment. *Lydia Pinkham Med. Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945; *McElmurray v. Blodgett*, 120 Ga. 9, 16, 47 S. E. 531. This paragraph was offered by the defendant, and contained an admission that the plaintiff's agent quoted the particular rate under which the shipment of corn moved. In the absence of proof to the contrary it would be

presumed that the agent quoted the correct rate, and the evidence was therefore relevant and admissible.

4. DIRECTED VERDICT.

It was not error to direct a verdict for the defendant.

Error from City Court of Macon; Du Pont Guerrey, Judge.

Action by the Central of Georgia Railway Company against the S. R. Jaques & Tinsley Company. Judgment for defendant upon a directed verdict, and plaintiff brings error. Affirmed.

R. C. Jordan, of Macon, for plaintiff in error.

Hardeman, Jones, Park & Johnston and R. Curd, all of Macon, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 394)

BOWEN v. J. J. O. FULLER & SON.
(No. 9650.)

(Court of Appeals of Georgia, Division No. 2, Feb. 11, 1919.)

(Syllabus by the Court.)

EVIDENCE — 441(9) — PAROL EVIDENCE — WARRANTY.

This case is controlled by the decision in *Cochran v. Jones & Oglesby*, 11 Ga. App. 302, 75 S. E. 143, the headnote of which is as follows: "Where, in an instrument in the form of a note and mortgage for the purchase price of a mule, it is stated that the purchaser agrees to pay for the mule if it should die, and that he assumes this risk in consideration of the credit extended, and purchases on his own judgment, he is not, upon the death of the mule, entitled to prove an express warranty of soundness, and defeat the purchase price on account of a breach of such warranty." As in the *Cochran* Case, the note in the instant case contained the clause, "I or we insure the good condition and safe-keeping of said property, and will pay if it be lost, damaged or destroyed, and, if live stock, will pay though it may die. I or we assume said risk in consideration of the credit extended, and purchase the property on my or our own judgment." This differentiates the *Cochran* Case and the present case from that of *Whigham v. Hall & Co.*, 8 Ga. App. 509, 70 S. E. 23, relied on by the plaintiff in error. The court did not err in sustaining the demurrer to the plea of defendant, or in directing a verdict for the plaintiff.

Error from Superior Court, Gordon County; M. C. Tarver, Judge.

Action by J. J. O. Fuller & Son against S. C. Bowen. Demurrer to plea sustained, judgment for plaintiff upon a directed verdict, and defendant brings error. Affirmed.

Maddox, McCamty & Shumate, of Dalton, for plaintiff in error.

J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 398)

PENNSYLVANIA FIRE INS. CO. v. SORRELLS. (No. 9815.)

(Court of Appeals of Georgia, Division No. 2. Feb. 11, 1919.)

(Syllabus by the Court.)

1. INSURANCE §130(7)—OFFER AND ACCEPTANCE.

"Where the proposal to insure comes from the insurer, he must be notified of the acceptance of the offer by the insured." Cooley's Briefs on the Law of Insurance, §§ 423, 424, 432.

2. CONTRACTS §15, 26—SALES §22(4)—OFFER AND ACCEPTANCE—VARIANCE.

"While a contract can be made by correspondence through the mails or by telegrams, the offer of the seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort. There must be a mutual assent of the parties, and they must assent to the same thing in the same sense." Robinson v. Weller, 81 Ga. 704, 8 S. E. 447; Stix v. Boulston, 88 Ga. 748, 15 S. E. 826; Harris v. Lumber Co., 97 Ga. 465, 25 S. E. 519; Larned v. Wentworth, 114 Ga. 209, 39 S. E. 855; Harper v. Ginners' Mutual Insurance Co., 6 Ga. App. 139, 142, 64 S. E. 567.

3. INSURANCE §145(1)—CONTRACT—OFFER AND ACCEPTANCE.

Where the holder of a fire insurance policy receives from the insurer a letter notifying him that the policy has expired, but that it has been renewed on certain terms and conditions stated in the letter, and he fails to answer the letter, or to comply with the terms and conditions stated therein, or to notify the insurer that he has unconditionally accepted the policy, before the property has been destroyed by fire, there is no completed contract of insurance, but merely an offer by the insurer to make such a contract, not accepted by the insured. Harper v. Ginners' Mutual Insurance Co., supra.

4. FIRE INSURANCE—ACTION ON POLICY—SUFFICIENCY OF PETITION.

When the principles of law stated above are applied to the facts of the instant case, as disclosed by the plaintiff's petition, it is evident that the alleged contract of insurance sued upon was not a completed one. The court, therefore, erred in overruling the defendant's oral motion

to dismiss the petition on the ground that it set forth no cause of action.

5. OTHER PROCEEDINGS.

The error in the ruling on the demurrer rendered the further proceedings in the case nugatory.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by M. E. Sorrells against the Pennsylvania Fire Insurance Company. Defendant's oral motion to dismiss the petition because setting forth no cause of action, overruled, and it brings error. Reversed.

Shipp & Kline, of Moultrie, and King & Spalding and Dan MacDougald, all of Atlanta, for plaintiff in error.

Parker & Gibson, of Moultrie, for defendant in error.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 430)

MORRIS et al. v. SWAIN. (No. 9572.)

(Court of Appeals of Georgia, Division No. 1. Feb. 12, 1919.)

(Syllabus by the Court.)

COURTS §189(3)—JURISDICTION OF CITY COURT OF HAZLEHURST—RESIDENCE OF PARTIES.

The petition in this case alleged that "on the 7th day of March, 1916, G. O. Swain was arrested by Henry C. Ellis, who was a constable from Coffee county, and E. H. Ellis, who was a resident of Jeff Davis county. This arrest was made by these parties without any warrant, and without any legal process or authority to make this arrest. At the time of making this arrest B. Morris was the bondsman of Henry C. Ellis, and the said H. C. Ellis stated to G. O. Swain, when called upon for his authority to make the arrest, that he was an officer from Coffee county, and that he (Swain) had escaped from the convict camp in Coffee county, and that he (H. C. Ellis) needed no warrant to make the arrest. After the arrest Swain was brought to Hazlehurst and placed in a dirty little calaboose used by the city of Hazlehurst in confining negroes. * * * He was not allowed to see any one, so that he could identify himself and show to the officers that he was not the man wanted and who had escaped; and later he was taken from the jail and handcuffed to a bed, and in this condition was forced to remain all night long, and * * * next day the officer, H. C. Ellis, and E. H. Ellis discovered they were wrong and liberated the said Swain. H. C. Ellis was acting as an officer and by virtue of his office of constable, and made the arrest as an officer and by reason of his being an officer from Coffee

county." *Held*, the city court of Hazlehurst was without jurisdiction to entertain and try this suit, which was against H. C. Ellis, as constable, and B. Morris, as his bondsman, both residents of Coffee county, and against E. H. Ellis, who resided in Jeff Davis county, since a suit on the bond of the defendant H. C. Ellis—an action *ex contractu*—could not be brought in Jeff Davis county, the residence of neither the principal nor the surety on the bond, by merely joining in the suit E. H. Ellis, a joint tort-feasor with H. C. Ellis in certain acts in which his bondsman did not participate. The court erred in overruling the demurrer, which attacked the petition upon the ground that there was a misjoinder of causes of action and of parties.

Error from City Court of Hazlehurst; J. Mark Wilcox, Judge pro hac.

Action by G. O. Swain against Ben Morris and others. Demurrer to petition overruled, and defendants bring error. Reversed.

Newton Gaskins, of Hazlehurst, and W. C. Lankford, of Douglas, for plaintiffs in error.

S. D. Dell, of Hazlehurst, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and JENKINS, J., concur.

(28 Ga. App. 465)

MYERS v. McLENDON et al. (No. 9834.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(*Syllabus by the Court.*)

NEGLIGENCE §110—LIABILITY OF CONTRACTOR—SUFFICIENCY OF PETITION.

The court erred in overruling the demurrer to the petition.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by W. F. McLendon against C. B. Myers and others. General demurrer to the petition filed by defendant Myers overruled, and he excepts and brings error. Reversed.

McLendon sued Myers, Pierce, and Healey Real Estate & Improvement Company for damages for personal injuries alleged to have been sustained by falling through a hole in the floor of a building owned by the Healey Real Estate & Improvement Company. The petition alleges that certain repairs were being made on the building by the owner at the instance of Pierce, who was to become a tenant thereof, and that the owner employed Myers "to make certain alterations in said building"; that thereupon Myers "began work upon said building, sending his agents and employes there to work, and

himself going there many times each day to superintend the work being done." Paragraph 8 of the petition is as follows:

"That the defendant Healey Real Estate & Improvement Company did not surrender, but retained, possession, custody, and control of said premises and had said premises in its possession, custody, and control at the time plaintiff sustained his injuries as hereinafter set forth, and prior thereto."

Paragraph 12 recites that on or about March 25, 1917, Pierce and Myers—

"each severally requested petitioner to go to said premises and there to make an estimate of the cost of installing therein a complete system of electric lights, fans, etc., through the entire building."

It is further alleged that on or about the 27th of March petitioner went to said building for the purpose of making an estimate of the cost of the work desired; that it was necessary for him to inspect all the parts of the first floor of said building, and to get the measurements of its walls and other parts of the building, and while engaged in these measurements he fell through a hole or trap in the floor, which was obscured by plank, dirt, and rubbish, and of which he was not aware and could not have discovered by the exercise of ordinary care. The allegations of negligence were in substance that the defendants failed to construct around said hole or trap a barrier sufficient to keep a person from falling therein; in failing to place a light that would give a warning of the presence of the hole; in allowing plank, rubbish, and refuse to become accumulated around and over said hole or trap; and in inviting petitioner to go into said building without giving him warning of the presence of said hole or trap. The defendant filed both general and special demurrers to the petition, the general demurrer was overruled, and he excepted.

Dodd & Dodd, of Atlanta, for plaintiff in error.

Madison Richardson, F. A. Quillian, and O. T. L. C. & J. L. Hopkins, all of Atlanta, for defendants in error.

BLOODWORTH, J. (after stating the facts as above). We think the court erred in overruling the demurrer. There is nothing in the petition to show what repairs were being made by Myers, or that the repairs or the making thereof had any connection whatever with the hole through which the plaintiff fell. Paragraph 8 of the petition above quoted distinctly negatives any possession, custody, or control of the premises by Myers at the time of the injury or prior thereto. Before damages for personal injuries, such as are sued for in this case, can be recovered, it must appear that the person against whom

damages are sought owed some legal duty to the plaintiff, and that the failure, or negligent performance, of that duty resulted in the damages. Under the pleadings in this case, what duty did Myers owe to McLendon? Certainly not to have the hole through which plaintiff fell protected by placing around same barriers, lights, or other things to warn him of the presence of the hole, for he had no possession, custody, or control of the building.

There is no allegation that Myers was present at the building at the time plaintiff sustained his injury, and no allegation that he knew that the measurements necessary to make the estimates would carry plaintiff to the immediate locality of the hole through which he fell. Surely it cannot be seriously insisted that the mere fact that Myers and Pierce "each severally requested petitioner to go to said premises and there make an estimate of the cost of installing a complete set of electric lights, fans, etc., through the entire building," without more, and, so far as the petition shows, without any suggestion from plaintiff that he would comply with the request, and without any knowledge on the part of Myers that petitioner was complying therewith and making measurements of the building, would impose upon Myers the duty of giving to petitioner any warning as to the hole through which he fell. The petition, failing to show the breach of any duty which defendant Myers owed the plaintiff, does not set out a cause of action against Myers, and the demurrer thereto should have been sustained.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J.,
concur.

BROYLES, P. J. (specially concurring). I think that the petition failed to set out a cause of action against the defendant Myers. Even if it could be held that the petition showed that Myers was negligent in some of the particulars as charged therein, it clearly appears from the petition as a whole that the proximate and preponderating negligence that caused the plaintiff's injuries was the failure to warn him of the hidden danger—the hole in the floor—*after he had entered the building and while he was engaged in measuring the right wall thereof*. As to this negligence, the petition shows that Pierce, one of the defendants, was present and saw the plaintiff when he entered the building, and knew for what purpose he had come, and yet, although Pierce was aware of the existence of the partially hidden hole, he failed to warn the plaintiff of his danger, and that while the plaintiff was measuring this wall he fell into the hole and was injured. The petition does not allege that

Myers was present on this occasion. On the contrary, construing the petition, as we must, most strongly against the plaintiff, it shows that Myers was not there. The petition further shows that this negligence of Pierce was that of an intervening independent agency. In my opinion, therefore, the petition clearly shows that, even if Myers were guilty of some antecedent negligence, the controlling and proximate cause of the injury sued for was the negligence of Pierce, for which Myers was not accountable. This being true, Myers' general demurrer to the petition should have been sustained.

(23 Ga. App. 423)

THOMAS v. GEORGIA RY. & POWER CO.
(No. 9828.)

(Court of Appeals of Georgia, Division No. 2
Feb. 12, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 853—PLEADING \S 225(3)—LAW OF THE CASE—AMENDMENT.

"The court sustained defendant's * * * demurrer, but allowed plaintiff 20 days in which to amend her petition and meet this demurrer. To this ruling no exception was taken, nor is error assigned thereon in the bill of exceptions. Therefore the ruling that the petition was subject to this * * * demurrer became the law of the case. The plaintiff, within the 20 days allowed, filed a purported amendment to her petition. This amendment, however, * * * clearly failed to meet the objections raised by the demurrer. No further amendment was offered within the 20 days allowed in the court's order. Under these facts the court did not err in dismissing the plaintiff's case." *Baker v. City of Atlanta*, 22 Ga. App. —, 96 S. E. 332.

2. DISMISSAL AND NONSUIT \S 68—GROUNDS—FAILURE OF AMENDMENT TO COMPLY WITH ORDER.

The amendment to the plaintiff's declaration having been allowed subject to demurrer, it was not error to entertain defendant's motion, made after the call of the case for trial, but before plaintiff's counsel finished reading his declaration to the jury, to dismiss plaintiff's suit upon the ground that the amendment failed to comply with the terms of the original order sustaining defendant's demurrer to the declaration. *Marbut v. Southern Railway Co.*, 22 Ga. App. —, 95 S. E. 1021; *Neal v. Moultrie*, 12 Ga. 104 (4); *Hart v. Henderson*, 86 Ga. 568 (1); *Cooney v. Sweat*, 133 Ga. 511, 66 S. E. 257 (2), 25 L. R. A. (N. S.) 758.

3. PLEADING \S 54—DECLARATION—SEPARATE COUNTS—COMPLIANCE.

The original demurrer having been sustained, and the declaration dismissed, with leave to plaintiff to amend by "separating the petition into two counts, each setting up separate causes of action," it was not a compliance with this order "to make paragraphs of one count a

part of another count by mere reference to same," and the court did not err in dismissing plaintiff's suit upon defendant's motion. *Cooper v. Portner*, 112 Ga. 894, 38 S. E. 91 (3); *Train v. Emerson*, 137 Ga. 730, 74 S. E. 241 (1).

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mary Thomas against the Georgia Railway & Power Company. Suit dismissed upon defendant's motion, and plaintiff brings error. Affirmed.

C. D. Maddox and S. A. Massell, both of Atlanta, for plaintiff in error.

Colquitt & Conyers, of Atlanta, for defendant in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 458)

LOTT v. PETERSON. (No. 9799.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. USURY \S 67, 69—USURIOUS TRANSACTION—COLORABLE TRANSACTION.

Where a lender requires as a condition precedent to the making of a loan, upon which the maximum legal rate of interest has been charged, that the borrower discharge and pay off certain obligations due by the borrower to the lender together with usurious interest thereon, the transaction is usurious. If one who owes to another a debt infected with usury obtains from him a loan of money at a lawful rate of interest, and out of the proceeds thereof actually and bona fide pays off the old debt with usurious interest, whether at the time of obtaining the new loan or afterwards, the new loan is not thereby usurious. If, however, the new transaction as a whole be merely colorable and used and designed as a cloak to cover up usury, the new loan is usurious.

2. PRINCIPAL AND SURETY \S 7, 159—DISCHARGE OF SURETY—WAIVER OF HOMESTEAD—BURDEN OF PROOF—USURY.

The surety on a promissory note secretly infected with usury, of which he had no knowledge, is discharged from liability if the note contains a waiver of homestead. In a suit against the surety, the burden is on the plaintiff, after proof of the usury, to show that the surety signed the note with knowledge of the usury.

3. PRINCIPAL AND SURETY \S 162(2)—ACTION AGAINST SURETY—DEFENSE OF USURY—QUESTION FOR JURY.

There was enough in the evidence in the present case to authorize the jury to infer that the notes sued on were infected with usury, and it was therefore error for the trial judge to direct a verdict in favor of the plaintiff.

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Suit by Mrs. Vacey Peterson, as executrix of B. Peterson, deceased, against J. S. Lott. Judgment for plaintiff on a directed verdict, and defendant excepts and brings error. Reversed.

W. C. Lankford, of Douglas, for plaintiff in error.

Dickerson, Kelly & Roberts and F. Willis Dart, all of Douglas, for defendant in error.

STEPHENS, J. Mrs. Vacey Peterson, as executrix of the estate of B. Peterson, deceased, brought suit upon two promissory notes against J. S. Lott, as indorser. The defendant by way of defense set up the plea that the notes sued on were secretly infected with usury, and that thereby the waivers of homestead contained therein were void, thus increasing the liability of the surety and releasing him from his obligation. In support of this plea the maker of the notes, W. C. Lankford, testified, so far as is material to our purpose here, as follows:

"The consideration of this note was made up as follows: \$500 cash actually advanced by Mr. Peterson to me; \$1,000 was added in to settle a previous item claimed by Mr. Peterson against me. There was \$500 of this thousand dollar item that was charged out that I had agreed to pay Mr. Peterson as bonus for a previous loan of \$2,500, which I had obtained from him. The other half of this thousand dollar item charged out was for money actually previously advanced. The balance of this small note was money I was due him as interest at 12 per cent. per annum on the \$2,500 I had borrowed from him or on another loan; I don't remember which one now. * * * As to the second note for \$4,218.24, my best recollection is that the amount I actually got out of that was \$2,300; it might have run to \$2,500; the balance of that note was for money I was due him, which he claimed against me as interest on \$10,000 and other money I had borrowed from him. At least three-fifths of the balance charged out was for interest he had charged against me at the rate of \$12 per thousand per month, on money I had previously borrowed from him, and the balance of the amount, or at least two-fifths of the amount charged out was for interest charged against me at the rate of 12 per cent. I don't remember whether he gave me checks for the full amount of these notes and I gave him checks back or not. * * * I know I was only to get and only got \$500 cash out of the little note, and not over \$2,500 out of the big note. * * * I gave Mr. Peterson back checks for the money. * * * I think Mr. Peterson gave me a check for the whole amount of the smaller note, and of the small note I gave back the amounts I have heretofore mentioned. * * * These checks were given to Mr. Peterson right at the time. * * * I don't know whether Mr. Peterson gave me a check or not for the full amount of the notes. * * * I don't re-

member whether Mr. Peterson gave me checks for the whole amount, and I gave my checks back to him, or whether he gave me checks for the difference. * * * I do know that there were checks passed back on the larger note. I got the full amount, but in that same transaction it was agreed that that note should cover all the other items. I simply paid part of those other debts to Mr. Peterson at the same time. The balance was paid to me in cash. I got \$2,300 in actual cash on the big note, and the balance went on what I owed on interest. I didn't get that amount on the big note or small note so that I could take it and carry it away and do what I pleased with it. I got that amount turned over to me with the distinct understanding that I give those checks back to Mr. Peterson. * * * It was agreed between us that I was to pay it back to him; it was a part and parcel of the same transaction; he gave me the check, and I gave him the check back. I owed him other amounts; he calculated the interest at 12 per cent. on the other amounts. Mr. Lott had nothing to do with what I did with this amount; he didn't know I was paying this excessive interest; that was 12 per cent. on the other indebtedness I paid Mr. Peterson."

It was in evidence that the defendant Lott at the time of the signing of said notes was ignorant of the fact that Lankford, the maker, was paying usurious interest. The defendant Lott knew nothing of the usurious transactions. The notes sued on, each containing a waiver of homestead and drawing interest at 8 per cent. were introduced in evidence. The trial judge directed a verdict for the plaintiff against the defendant for the full amount sued for. This judgment was excepted to and brought here for review.

[1] 1. The sole question to be determined is, Was there enough in the evidence from which the jury could infer that the making of either one of the notes was a part of a usurious contract, or whether the circumstances surrounding the transaction would authorize the inference that it was a scheme or cloak to cover up usury? The Supreme Court of this state held in the case of *Bishop v. Exchange Bank*, 114 Ga. 962, 41 S. E. 43 (2) that:

"Where a lender requires, as a condition precedent to making a loan upon which the full legal rate of interest is expressly charged, that the borrower shall assume and pay off a promissory note held by the lender against one who is known by the lender to be insolvent, and whose debt the borrower is under no obligation to pay, the transaction is usurious."

Our first headnote is paraphrased from this case and the case of *Bates v. Harris*, 112 Ga. 32, 37 S. E. 105 (2). In the former case the condition precedent to the making of the loan and a part of the consideration therefor was that the borrower should pay off the debt of another, while in the case here under consideration there is evidence to the effect that as a condition precedent to, and as a consideration for, the making of the loan, was

that the borrower should pay off his own usurious debts to the lender. This distinction makes no difference in the principle of law applicable. The principle is the same. The decision in the *Bishop Case* was based upon the principle that the borrower in making the loan contracted to pay more than the maximum rate of interest which the lender was allowed by law to charge, and thus assumed a burden and obligation to pay in addition to the highest lawful rate of interest, an amount in excess of that which he was legally under obligation to pay. If the borrower contracted and promised, or the lender reserved, charged, or took more than the lender was legally permitted to exact for the use of his money the transaction was usurious. It is immaterial whether the borrower, in order to obtain the loan, agreed to pay to the lender, a debt due the latter by a third person, or whether the borrower agreed to pay the borrower's own usurious debts to the lender with usurious interest thereon. In either case the borrower would obligate himself to pay that which he was under no obligation to pay and thus would increase his obligation to the lender, which, if it amounted to more than the highest rate of interest which the lender was allowed by law to charge for the use of the money, would constitute usury. In the case of *Siesel v. Harris*, 48 Ga. 652, it was held that where money was loaned at a usurious rate of interest and a mortgage given by the borrower to secure the payment of the principal and usurious interest, and where such mortgage was given up and foreclosure abandoned upon partial payment of the debt with usury by the borrower and the giving of new notes for the balance, the new notes were infected with usury.

The witness Lankford, the maker of the notes, testified:

"It was agreed between us that I was to pay it back to him; it was a part and parcel of the same transaction."

In *Archer v. McCray*, 59 Ga. 546 (2), it was held that—

"Where the original transaction was usurious, the usury infects all the securities given in renewal for the same debt, however varied in form and amount, and the law applies all payments made on the debt to the principal and legal interest."

This case was cited with approval in *Lockwood v. Muhlberg*, 124 Ga. 660, 53 S. E. 92 (2), where it was held that—

"A renewal thereof does not divest a usurious contract of its taint, although the illegal interest thereon to the date of renewal be then fully paid."

See, also, *Hammond v. Buys*, 1 Ga. 416. Webb, in his work on Usury, § 306, says:

"If a transaction is usurious in its inception, it remains usurious until purged by a new

contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced."

Judge Bleckley, in his opinion in the case of *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107, says:

"If there was usury in the original loan which was not purged out when these notes were given, and if that usury is in them, they are contaminated just as the original contract was."

The original indebtedness which was paid off with usury when the notes sued on were executed was clearly usurious. Was this original taint of usury purged upon the execution of the new notes, or were the new notes given as a part of a transaction that was colorable and designed as a cloak to cover up the usury in the original transaction? These are questions of fact to be determined from all of the circumstances surrounding the execution of the new notes. The new transaction, being confused with the original usurious indebtedness and making provisions for its extinguishment, is at least subject to the inference that it is colorable and tainted with usury. We fully recognize the doctrine that a borrower may obtain money at a legal rate of interest and use it to pay off usurious debts to the lender without thereby rendering the new loan usurious. If, however, the new loan was made with the distinct understanding and condition that the borrower would use the money to pay off the old loan with usury, even though the borrower received the full amount of the principal of the new loan and afterwards repaid the old loan with usury to the lender, the new transaction would be tainted with usury. *Bates v. Harris*, 112 Ga. 32, 37 S. E. 105 (2).

Whether or not, as a condition precedent to the making of the loans sued upon, the borrower agreed to pay up the original indebtedness with usurious interest, or whether the new transaction was bona fide or free from any usurious taint or a mere cloak to cover up usury, were questions of fact for a jury to determine. The law goes to the substance of the matter and seeks for the real truth. "No disguise of language can avail for covering up usury, or glossing over a usurious contract. The theory that a contract will be usurious or not according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance." Judge Bleckley in *Pope v. Marshall*, 78 Ga.

640, 4 S. E. 118. "The usury stalks like a pestilence through every form of contract, and poisons all it touches." Judge Bleckley in *Tribble v. Anderson*, 63 Ga. 56.

[2] 2. It is well settled that where a promissory note is infected with usury of which the surety had no knowledge, the latter is released from liability if the note contains a waiver of homestead. The waiver is void by reason of the usury, and for that reason, if the surety be ignorant of the usury, his risk is increased. The notes sued on were so-called waiver notes drawing interest at the maximum legal rate of 8 per cent. per annum. The evidence is undisputed that the surety, plaintiff in error Lott, was ignorant of the usurious taint, if any, of the transaction surrounding the execution of the notes which he indorsed. Besides, the burden would be on the plaintiff, upon proof of usury to show affirmatively that the surety had knowledge of the usury when he signed the notes. *Bank of Omega v. Ford*, 20 Ga. App. 496, 93 S. E. 106.

[3] 3. Whether or not the notes sued on were infected with usury was, under all the circumstances in this case, a question of fact to be submitted to the jury, and the court erred in directing a verdict for the plaintiff.

Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(28 Ga. App. 432)

GARNETT v. ROYAL INS. CO., Limited.
(No. 9888.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 12, 1919. Rehearing Denied Feb. 24,
1919.)

(Syllabus by the Court.)

1. INSURANCE ⇄123—FIRE INSURANCE—INSURABLE INTEREST—DEATH OF LIFE TENANT.

A policy of fire insurance, issued to one who has only a life estate in the property insured, is inoperative and of no binding legal force, where the loss occurred subsequently to the death of the assured, since his death terminated the life estate, and consequently his insurable interest.

2. DEEDS ⇄16, 194(5)—FRAUDULENT CONVEYANCES ⇄172(2)—COLLATERAL ATTACK—CONSIDERATION—ESTOPPEL—PRESUMPTION OF DELIVERY.

"A deed, signed, sealed, and delivered, and expressing a valuable consideration on its face, imports a legal consideration; and the maker is estopped from alleging or proving the contrary to defeat the deed as title, if to do so involves setting up his own turpitude, and convicting himself of a deliberate intent to defraud

his creditors." *Parrott v. Baker*, 82 Ga. 373, 9 S. E. 1068.

(a) "Where a properly executed deed, purporting on its face to have been delivered, was recorded, this raises a presumption of delivery." *Shelton v. Edensfield*, 148 Ga. 128, 96 S. E. 8.

(b) If there are any reasons why the deed in this case could be set aside, it cannot be accomplished by a collateral attack in a suit between different parties, in which neither the grantee nor his heirs are parties. *Moore v. Mabley*, 123 Ga. 424, 51 S. E. 351.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Suit by G. R. Garnett, administrator of J. U. Rowe, deceased, against the Royal Insurance Company, Limited. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

W. T. Burkhalter, of Reidsville, for plaintiff in error.

King & Spalding, of Atlanta, and Collins & Stanfield, of Reidsville, for defendant in error.

LUKE, J. In order that the first headnote may be better understood, it may not be amiss to briefly state the salient facts of the case, and our reasons for the decision here made. G. R. Garnett, as administrator of the estate of J. U. Rowe, brought suit against the Royal Insurance Company, Limited, on an insurance policy issued by the defendant company in favor of Rowe, and subsequently transferred by him, with the consent and approval of the insurance company, to Mrs. Della Easterling, and after the loss of the property insured the policy was transferred by Mrs. Easterling to the plaintiff for value. The defendant's answer admitted the issuance of the policy, but denied any and all liability, on the ground that at the time of the issuance of the policy the assured had no title to the property insured, save only a life estate, having previously conveyed the property to Mrs. Sallie Easterling by fee-simple warranty deed, reserving only a life interest therein, and that prior to the fire the assured died, thereby terminating his life estate, and all insurable interest which he had in the property ceased, causing the policy to become of no legal effect. When the evidence adduced on the trial was all in, and, after both sides had closed, the trial judge, on motion of counsel, directed a verdict in favor of the defendant, to which the plaintiff excepted.

[1] The record in this case shows that the policy sued on was dated September 1, 1913, and that on this date Rowe was possessed of only a life estate in the property insured, as he had previously conveyed the legal title to Mrs. Sallie Easterling on January 10, 1908, reserving for himself a life interest only. Rowe died on March 13, 1916. After his death, and on April 28, 1916, the property in-

sured was destroyed by fire. Upon the conveyance by Rowe of his interest in the property to Mrs. Della Easterling, she became the possessor of an estate per auter vie; and upon the transfer of the policy—consented to and approved by the insurance company—a new contract was created between Mrs. Easterling and the company, in which she became the assured instead of Rowe. See *Hughes v. Hartford*, 144 Ga. 740, 741, 87 S. E. 1042. A contract of fire insurance is one of indemnity. It is wholly personal to the assured, and has no connection with the property insured, except to fix the amount of the indemnity. If the insured parts with the property as to which he seeks indemnity, the contract necessarily is at an end; and were he to assign the contract under these circumstances, no right of action whatever could grow out of it to the assignee. However, if the insurer is informed of the cessation of the interest of the assured and its transfer to another, and thereupon accepts the transferee as the assured, this is a new contract to pay, the former insurance being only used to show the terms on which the insurance was effected. See *Virginia-Car Chemical Co. v. Insurance Co. (C. C.)* 108 Fed. 451, 456.

Rowe having conveyed his life interest in the property insured, he no longer had any insurable interest therein, and in fact ceased to be a party to the contract. The transfer of the policy by Rowe to Mrs. Easterling, and the conveyance of his interest in the property to her, operated to make the insurance cover the interest of Mrs. Easterling, to wit, her estate for the life of Rowe. Therefore the legal effect of his death was to terminate the interest of Mrs. Easterling in the property, and consequently she ceased to have any insurable interest therein. In other words, at the time the property was destroyed by fire, which was subsequent to the death of Rowe, the entire title to the property was in Mrs. Sallie Easterling, since the life estate of Rowe, which he conveyed to Mrs. Della Easterling, terminated upon his death. Mrs. Della Easterling having, therefore, no interest in the property at the time of its destruction by fire, suffered no loss, and her subsequent transfer of the policy to Garnett, administrator of the estate of Rowe, conveyed no rights whatever to him, who is the plaintiff in this suit.

[2] The contention of the plaintiff in error that the insurance company was estopped from setting up the defense that the policy in question was of no legal effect, since the assured at no time had more than a life estate in the property insured, and that this estate was terminated by his death which occurred prior to the loss, is of no consequence, for, regardless of whether or not the company at the time of the issuance of the policy had notice of the true status of the title, this could not in any way operate to change or

alter the controlling fact that the assured had only a life estate in the property insured, which terminated with his death, and the loss having occurred subsequently thereto, the policy was of no legal effect. To sum up the whole matter, the assured, at the time of the loss, had no insurable interest in the property insured, and our statute (Civ. Code, § 2472) declares that in order to sustain "any contract of insurance, it *must* appear that the assured has some interest in the property * * * insured."

Under the facts in this case, the trial judge therefore did not err in directing a verdict for the defendant company.

Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 422)

**CARTER v. AMERICAN SLICING
MACH. CO. (No. 9732.)**

(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919.)

(Syllabus by the Court.)

**1. SALES ~~479~~(5)—RESERVED TITLE—ACTION
OF TROVER—DEMAND.**

The American Slicing Machine Company sold to Y. L. Carter a slicing machine and retained title thereto. The terms of the sale were \$10 cash, 12 monthly payments of \$10 each, and a final payment of \$5 within 13 months. After making three payments of \$10 each, Carter refused to pay more, claiming that the machine was "not any good to me at all." The vendor brought an action of bail trover. Carter filed pleas, and, among other things, alleged failure of consideration. On the trial, after all the evidence, including the contract, was in, the trial judge directed a verdict for \$105, being the amount of the purchase price, less the payments of \$30. The defendant excepted.

"In an action of trover by a vendor against a vendee, in which the former claims title based upon a note reserving to himself title to the property sold until the purchase money is paid, no demand is necessary, where it appears that the defendant was in possession of the property, claiming title thereto, at the time of the action; his defense being that, owing to a partial failure of consideration, he was not due the balance of the purchase money to the plaintiff." *Muse v. Wright & Co.*, 103 Ga. 783, 30 S. E. 662. While the facts in the case under consideration differ somewhat from those in the case of *Muse v. Wright*, supra, yet the principle involved is the same in both cases. See Civ. Code (1910) § 4483; *Grant v. Miller*, 107 Ga. 804, 33 S. E. 671 (2); *Scarboro v. Goetha*, 118 Ga. 543, 45 S. E. 413; *Moore v. Ramsey & Legwen*, 144 Ga. 118, 36 S. E. 219 (1); *Young v. Durham*, 15 Ga. App. 679, 84 S. E. 165 (5); *Pearson v. Jones*, 18 Ga. App. 448, 89 S. E. 536 (4a).

2. SALES ~~479~~(9)—PRICE—AGREEMENT.

"It has been held a number of times by this court that, as between the original seller and the original purchaser, the agreed price as stated in the contract of sale is prima facie, but not conclusive, evidence of the actual value of the property, and that upon proof of the contract, in the absence of rebutting testimony as to value, the plaintiff was entitled to recover the balance due thereon." *Lott v. Banks*, 21 Ga. App. 249, 94 S. E. 324. See, also, *Elder v. Woodruff Hardware Co.*, 9 Ga. App. 486, 71 S. E. 806; *Young v. Durham*, 15 Ga. App. 678, 84 S. E. 165; *Elder v. Woodruff Hardware Co.*, 16 Ga. App. 255, 35 S. E. 268; *Jordan v. Jenkins*, 17 Ga. App. 58, 36 S. E. 278; *Moore v. Furstenwerth-Uhl Jewelry Co.*, 17 Ga. App. 669, 87 S. E. 1097. The written contract of sale showed an agreed purchase price of \$135 for the machine. There was no other testimony as to value. It was admitted that \$30 of the purchase price had been paid. Under the pleadings and the evidence, the court properly directed a verdict for \$105, being the amount of the purchase price, less the admitted payments.

Error from City Court of Carrollton; Jas. Beall, Judge.

Action of trover by the American Slicing Machine Company against Y. L. Carter. Judgment for plaintiff by direction, and defendant excepts and brings error. Affirmed.

Sidney Holderness, of Carrollton, for plaintiff in error.

Buford Boykin, of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., concurs.

STEPHENS, J., concurs dubitante.

(23 Ga. App. 393)

**E. E. BASS & CO. v. VINSON et al.
(No. 9515.)**

(Court of Appeals of Georgia, Division No. 1.
Feb. 11, 1919.)

(Syllabus by the Court.)

**1. CHATTEL MORTGAGES ~~277~~—ACTION TO
FORECLOSE—PLEA—RESCISSION OF SALE.**

Where a vendor of certain personal property took from the vendees a promissory note, secured in the same instrument by a mortgage on the property sold, in which it was stated that the note was given "for purchase money of one sorrel mare mule four years old, and one black mare mule seven years old, title only guaranteed," and the vendor instituted a proceeding to foreclose the mortgage for the amount of the note, to which the vendee interposed an affidavit of illegality containing the following plea (after stating the consideration of the mortgage and the purchase price of each of the animals): "Affiants say that at the

time the sorrel horse mule was delivered to them the said mule was sick, and affiant Dan Vinson called plaintiff's attention to the fact, and was informed by plaintiffs that the mule was not sick and would be all right in a few days. Acting on said statement affiant Dan Vinson took said mule back to his farm. The said mule grew worse, and in two or three days he returned the mule to plaintiffs, with the complaint that he was sick and that he could not use him. Affiants say that the *plaintiffs accepted said mule, took possession of him, and in a few days he died in their possession.* (Italics ours.) Affiants say, therefore, that they are not liable for the purchase money of said mule, or any part thereof; that there has been a total failure of consideration in so far as the value of said mule is concerned. Such affidavit of illegality was not subject to general demurrer attacking it for legal insufficiency. The plea was a good plea of rescission, and the fact that the pleader denominated his plea as a plea of failure of consideration does not defeat the plea or its effect. See Civil Code 1910, § 5635. *Bates v. First National Bank*, 111 Ga. 756, 36 S. E. 949; *Daniel v. Burson*, 18 Ga. App. 39, 84 S. E. 490. The court did not err in overruling the general demurrer to the plea.

2. RULING ON MOTION FOR NEW TRIAL.

The issue presented was one of fact, and for no reason assigned did the court err in overruling the motion for a new trial.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by E. E. Bass & Co. against Dan Vinson and others. General demurrer to plea overruled, judgment for defendants, motion for new trial denied, and plaintiff brings error. Affirmed.

Sibley & Sibley, of Milledgeville, for plaintiff in error.

Allen & Pottle, of Milledgeville, for defendants in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and JENKINS, J., concur.

(23 Ga. App. 421)

ROBINSON v. STATE. (No. 9694.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919.)

(Syllabus by the Court.)

1. CHARGE OF COURT—CRIMINAL CASE.

The various exceptions taken to the charge of the court are without merit, and show no error. The charge fairly presented all the issues and substantially covered all matters contained in the various requests to charge.

2. ADMISSION OF EVIDENCE.

The court committed no error in sustaining the objection to the testimony offered as set out in the nineteenth ground of the amendment to

the motion for new trial. Nor was there error in overruling the objections to the admission of the testimony offered for the purpose therein stated, as set out in the twentieth, twenty-first, twenty-second, and twenty-third grounds thereof.

3. CRIMINAL LAW §941(1)—NEW TRIAL — CUMULATIVE EVIDENCE.

The alleged newly discovered evidence set forth in the twenty-sixth ground of the amendment to the motion for new trial was merely cumulative in its nature, and, a counter showing having been made on the hearing of the motion, there was not presented sufficient cause for a new trial.

4. MOTION FOR NEW TRIAL OVERRULED.

The evidence supported the verdict, and no error of law was committed by the trial judge in overruling the motion for new trial.

Error from Superior Court, Talbot County; G. H. Howard, Judge.

Proceeding by the State against Dewey Robinson. From the judgment, defendant brings error. Affirmed.

W. D. Crawford, of Buena Vista, A. P. Persons, of Talbotton, and Geo. C. Palmer, of Columbus, for plaintiff in error.

C. T. McLaughlin, Sol. Gen., and T. T. Miller, both of Columbus, and J. H. McGehee of Talbotton, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 471)

INSURANCE CO. OF STATE OF PENNSYLVANIA v. EUBANKS. (No. 9473.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 20, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR §977(4)—GRANT OF FIRST NEW TRIAL—REVERSAL.

This case comes to this court upon exceptions to the first grant of a new trial. In *Weinkle v. Brunswick & Western R. Co.*, 107 Ga. 367, 33 S. E. 471, the Supreme Court said: "It may be now considered as settled that this court will not, under any circumstances, reverse a judgment granting a first new trial, whether the grant be general upon all the grounds of the motion, or special upon one or more grounds only, or whether it be upon a ground which involves questions of evidence, or upon a ground which involves purely questions of law, unless it is made to appear that no other verdict than the one rendered could possibly have been returned under the law and facts of the case. Unless the case can be brought within the exception just stated, it is useless for parties to bring before this court the judgment of a trial judge granting a first new trial." See, also, *Ellis v. Spell*, 20 Ga. App. 347, 93 S. E. 49, and *Southern Fertilizer & Chemical Co. v. Pea-*

cock, 19 Ga. App. 592, 91 S. E. 928, and cases cited. The judge of the superior court, in the exercise of his discretion, thought best to send the case back to the municipal court for a new trial, and this court will not interfere.

Broyles, P. J., dissenting.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by L. P. Eubanks against the Insurance Company of the State of Pennsylvania. Judgment for defendant, and from judgment sustaining a certiorari, and sending case back to municipal court for new trial, defendant brings error. Affirmed.

Dorsey, Shelton & Dorsey, of Atlanta, for plaintiff in error.

Moore & Branch, of Atlanta, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

STEPHENS, J. (concurring). This being the first grant of a new trial, and the verdict not being demanded by the law and the evidence, I concur in the judgment of affirmation. There was evidence from which it might be inferred that the agent of the insurance company, by virtue of his previous dealings in similar transactions, with the company's consent or ratification, had authority to waive a written stipulation in the policy. *Western Assurance Co. v. Williams*, 94 Ga. 128, 21 S. E. 370.

BROYLES, P. J. (dissenting). In my opinion, the evidence demanded the verdict directed by the trial judge, and the judge of the superior court erred in sustaining the certiorari.

(23 Ga. App. 438)

WALDON v. STOKES. (No. 9830.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919.)

(Syllabus by the Court.)

1. FRAUD — 27—REPRESENTATIONS—VENDOR AND PURCHASER.

"False representations relating to easements or appurtenances to land affecting its value, which were made by the owner of such land to another with intention to deceive, and which actually did deceive him to his injury, and induce him to purchase the property for more than its value, will give a right of action of deceit to the vendee against the vendor, when the falsity of such representations could not have been ascertained by an examination of the premises purchased." *Fenley v. Moody*, 104 Ga. 790, 30 S. E. 1002.

2. OVERRULING OF CERTIORARI.

The court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by Mrs. S. McA. Stokes against A. H. Waldon. Judgment in municipal court of Atlanta for plaintiff, motion for new trial overruled, and on appeal to appellate division of municipal court there was a final judgment of affirmance, denying a new trial, and from the overruling of his certiorari, defendant excepts and brings error. Affirmed.

Evins & Moore and Bachman & Simmons, all of Atlanta, for plaintiff in error.

W. F. Buchanan, of Atlanta, for defendant in error.

BLOODWORTH, J. In the municipal court of Atlanta Mrs. S. McA. Stokes sued A. H. Waldon, alleging in part that she purchased from him three vacant lots in the city of Atlanta; that he represented to her—

"that Forrest & George Adair had an agreement with the city of Atlanta by which the city of Atlanta was to lay chert paving on Catherine street in front of said lots, without charge whatever against the person or persons owning said three lots, nor against said three lots; that your petitioner relied on the said representations as being true, and, partly because of the value of said representations, did purchase of defendant the said lots at a price of \$2,700; that recently petitioner discovered that there was no such agreement between Forrest & George Adair and the city of Atlanta by which the said city was to pave the street without charge against the property owners; that the city of Atlanta has paved the street and levied on the said three lots an assessment of \$210.95, which is a legal charge and lien against said property; that the defendant willfully misrepresented to petitioner the alleged agreement between Forrest & George Adair and the city of Atlanta, for the purpose of inducing petitioner to purchase the said land, and that said representation was fraudulently made, with intent to deceive petitioner, and did deceive her into purchasing the said land, and that petitioner has, as a result, been damaged in the sum sued for; that your petitioner has paid the full purchase price of the said property."

Defendant filed a general demurrer and a plea. The plea denied all the paragraphs of the petition, except the one alleging that the defendant lived in Fulton county. The plea further alleged that:

"The promise alleged in said petition was a promise to answer for the debt, default, or miscarriage of another. * * * Said promise was not in writing, signed by the defendant, the party sought to be charged therewith, or by any person by him lawfully authorized."

The case was tried by Judge Rosser, who rendered judgment for the plaintiff. A motion for new trial was overruled, and

an appeal was taken to the appellate division of the municipal court, which division "rendered a final judgment in said case, affirming the judgment of the lower court, and denying defendant a new trial." The defendant sued out certiorari; the certiorari was overruled, and he excepted.

[1, 2] The principle announced in the first headnote controls the instant case, and neither headnote needs elaboration.

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J.,
concur.

(23 Ga. App. 396)

CARSWELL v. GREEN. (No. 9798.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 11, 1919.)

(Syllabus by the Court.)

LANDLORD AND TENANT — 252(5) — **LANDLORD'S LIEN—JUDGMENT — SUFFICIENCY OF EVIDENCE.**

There is no evidence to support the finding and judgment in favor of the plaintiff, and the court erred in overruling the motion for a new trial.

Error from City Court of Macon; Du Pont Guerry, Judge.

Suit by B. A. Green against R. E. Carswell. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed.

John M. Hancock, of Macon, for plaintiff in error.

Sidney W. Hatcher, of Macon, for defendant in error.

BLOODWORTH, J. Trammell was indebted to Carswell for supplies, and owed Green as landlord for rent. Green sued Carswell, alleging that Carswell had purchased from Trammell produce raised on Green's land, to wit: Fodder worth \$11.75; hay, \$3.50; one bale of cotton, \$69; one bale, \$61; cotton seed, \$11; total, \$156.25—and that at the time of purchasing this produce Carswell knew that the rent had not been paid, that Trammell had no other property, and that the only way the plaintiff had of collecting his rent was by enforcing his

lien as landlord against the property purchased, which was removed beyond his reach by the defendant and converted to the defendant's own use. The defendant's plea denied every allegation of the petition. The judge passed upon the case without the intervention of a jury, and rendered a finding and judgment for the plaintiff for \$90. A motion for new trial was made and overruled, and the movant excepted. The record does not show that a demurrer to the petition was filed. The special grounds of the motion for a new trial were but amplifications of the general grounds, so we have for determination the one question of whether or not the judgment should be reversed on the general grounds.

There is no evidence to show that the "property was removed out of the reach of petitioner by defendant," except it be some of the fodder; nor is there any evidence to show that the defendant ever bought from the tenant of the plaintiff any of the produce named above, except some of the fodder (\$3 worth), the total value of all of which is alleged in the petition to be \$11.75, and yet the finding and judgment are for \$90. The greatest amount shown by the testimony to have been received by the defendant from Trammell was \$97.50, and this was in cash, and not in the value of produce purchased. Deducting from this sum \$32.50, which the undisputed evidence shows was paid to Carswell from the sale of a cow, it appears that the total cash received by Carswell from the tenant was \$65, which might have been the proceeds from produce sold to others. However, as stated above, the evidence fails to show that this amount resulted from produce sold by Trammell to Carswell. Even granting that all this came from the sale of produce raised on the plaintiff's farm, and that all of it was purchased by Carswell from Trammell (which is not true according to the evidence in the record), and adding thereto the alleged value of the fodder, \$11.75, the total amount would be only \$76.75. The record clearly shows that there is no proof to support the finding and judgment, and the court erred in overruling the motion for new trial.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J.,
concur.

(177 N. C. 170)

HOLT v. OVAL OAK MFG. CO. (No. 101.)

(Supreme Court of North Carolina. March 5, 1919.)

1. TRIAL \S 127 — REMARKS OF COUNSEL — PERSONAL INJURY ACTION—REFERENCE TO INSURANCE COMPANY.

In employe's personal injury action, it was improper for employe's counsel to refer to insurance company by which employer was indemnified, such remarks being calculated to prejudice jury and divert minds of jurors from material issues.

2. TRIAL \S 133(2)—REMARKS OF COUNSEL—CORRECTION BY COURT.

In action for injuries to employe, where employe's counsel made improper allusions to insurance company indemnifying employer, court by immediately cautioning jury as to the only issues, removed the prejudice that such allusion was calculated to produce.

3. APPEAL AND ERROR \S 1060(4)—HARMLESS ERROR—IMPROPER REMARKS BY COUNSEL—VERDICT SUSTAINED BY EVIDENCE.

In employe's action for injuries, reference by his counsel to insurance company by which employer was indemnified was not prejudicial, where verdict upon issue of negligence was well warranted by evidence, and damages allowed were very small in view of serious injury inflicted.

4. MASTER AND SERVANT \S 278(20)—INSTRUCTIONS BY EMPLOYER—UNGUARDED RIPSAP.

In action by 17 year old employe for injuries sustained while operating groover with unguarded ripsaw, without experience in so doing, and without instructions from employer, evidence held to warrant verdict finding employer negligent.

5. MASTER AND SERVANT \S 281(4)—INJURIES TO EMPLOYE — UNGUARDED RIPSAP — CONTRIBUTORY NEGLIGENCE.

In action for injuries to 17 year old employe resulting from employer's negligence in directing employe to operate unguarded ripsaw without first instructing him in so doing, evidence held to warrant verdict finding employe not guilty of contributory negligence.

6. MASTER AND SERVANT \S 91 — DUTY OF MASTER—YOUTHFUL EMPLOYEES.

Employer of young persons is required to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed.

7. MASTER AND SERVANT \S 93—PROTECTION OF YOUNG EMPLOYEES — DELEGATION OF DUTY.

Master's duty to protect young employes from risks they cannot appreciate, and to which they should not be exposed, cannot be delegated.

9. MASTER AND SERVANT \S 153(5) — YOUNG EMPLOYEES—MASTER'S DUTY TO INSTRUCT.

Master must instruct young servants in their work, and warn them against damages to which it exposes them, and in so doing must

use such plain language as to be reasonably sure that they understand it and appreciate the danger.

9. MASTER AND SERVANT \S 286(2) — INJURY TO YOUNG EMPLOYE—UNGUARDED RIPSAP—JURY QUESTION.

In action for injuries to 17 year old employe while operating ripsaw, where there was conflicting evidence of whether machine was unguarded and in defective condition at time of injury, the case was one for the jury under proper instructions.

10. MASTER AND SERVANT \S 270(7)—ACTION FOR INJURIES—EVIDENCE—SUBSEQUENT REPAIRS TO MACHINE.

In employe's action for injuries while operating ripsaw in groover, employe's evidence that employer placed guards on machine after the accident was admissible to show machine was unguarded at time of injury, but was not admissible as an admission, by employer, of negligence.

Appeal from Superior Court, Lee County; Daniels, Judge.

Action by Bruce Holt against the Oval Oak Manufacturing Company. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff was employed by the defendant to fire the boiler in its mill, and was ordered, on the day he was injured, to take the place of the man who operated the ripsaw at the bench, or grooving machine, in which it was placed. This saw revolved with great rapidity, 5,000 revolutions to the minute, and there was evidence tending to show that there was no guard, or other appliance, to keep the boards from falling on the saw while it was in motion, and that the machine, in this respect, was not constructed like those of the same kind which were approved and in general use in other mills, and which had protective guards to prevent such accidents as the one in question. The plaintiff was 17 years old when he was injured, and, according to his testimony, had objected to working at the machine, as he was afraid of being cut by the saw, but he was told it was safe, and to go on with the work. There also was evidence, on defendant's part, that there were guards on the machine to hold the boards in their proper position, but plaintiff disputed this, and stated that they were put there after he was injured. He had worked at the groover only half a day when he was hurt. He testified, in part, as follows:

"I am the plaintiff in this action, 19 years old, and live at Broadway, N. C. About a year and a half ago I worked at Siler City, and was there about a year and a half. I worked about two months with the Oval Oak Manufacturing Company, being hired by Mr. Stone, the superintendent. Mr. Stone looked after the plant and hired and discharged the men. I

was firing the boiler, and the man who operated the grooving machine was out, and Mr. Stone put me to work on it. I was scared I'd get my fingers cut, and told him so. He told me there was no danger in the machine. He did not tell me any of the dangers of the machine. He gave me no instructions, but in his presence the fellow that had operated the machine told me to pile up the blank pieces, or work, between the standards and the saw four wide and four deep, and when he finished Mr. Stone said, "That will be right; it will make it out on the truck even." The machine was a flat table with a saw coming up through the top of the table, with two pieces on each side of the saw to run the timber up between, to hit the piece exactly in the center, to groove the sides of the washboard. The pieces were about an inch by half an inch, and about a foot long. There were no rollers on the table to draw the pieces on the saw. You pushed the piece with your hands, pushing the piece with your thumb and holding it down with your left hand. There were standards between which I was told to put the finished pieces, but no standards between the blank pieces to be worked and the saw. I was instructed to put the blank pieces between the standard and the saw. There were no standards to protect the work on the side of the saw. I stacked the blanks up as I was instructed to do. I stacked a pile of the pieces up, and turned to get my position, and as I did so, some of the pieces rolled over on the saw and hit it, and that is the last I know. Just at that time the machine speeded up. I heard it shaking and rattling, and I know of my own knowledge that this was caused by the throwing of a belt on some part of the machinery. The engine caught up slack and shook the machine. I saw the pile as it started to fall, and saw the piece as it started toward me from the saw. The machine was pretty shakily."

Plaintiff here described his wound, which was very severe and caused him great suffering and permanent injury.

He then further testified:

"I had worked at wood-working plants about 2 years, but had never operated a machine like this before; never operated a groover. You had to push the blank with your right hand, between little wooden guides, onto the saw, and hold them down with your left hand. There was a piece at the end to stop the blank at the right place, and it was grooved only to about six inches of the end. There were four little wire standards on the machine; on the back side you put the timber you had finished, and on the far side your raw timber. The finished product was laid over on the other side of the raw material between the little standards. In operating you picked up an unfinished piece next the saw, put it through, and placed it over between the standards. I do not know whether or not a piece dropped diagonally across the guides would touch the saw; I did not mess with it long enough to find out. Mr. Stone showed me how to push the blanks through and to pick them up. I had operated the machine only a half day before, and returned to its operation that morning. I did not whistle to Mr. Coggins after I was hurt, or have any conversation with him. I do not remember anything that happened until I re-

gained consciousness in the hospital at Greensboro about four weeks afterwards. After the second operation was performed in Greensboro, about September 10th, I was able to go to the moving picture show, and on the 23d I left the hospital. On January 9th I returned to the hospital. I was not fat, and weighed only about 120 pounds. I had a piece of gauze in the wound, because the doctor had advised me to do so. In May, after this suit was started, I went to the hospital for another operation, when the wound was closed, and remained there nine days. I then came home. At the time I was hurt I wasn't operating the stick. I was piling stuff, and went to turn around. I had used all the timber up and was putting up some more. (Stick is shown witness.) Do you know whether or not this is the stick which hit you? No, sir. The stick looks like the ones I handled. Mr. Coggins was working a good ways off. The pieces went into the machine the wide, or flat way. I have seen the machine since then. They were not using it when I went to Siler City again. They were using a molder for this work, through which the piece passed entirely, coming out at the other end. Mr. Stone did not instruct me where to stand. The pieces were stacked at the right-hand side, and it was necessary for me to get into the position I was in when hurt in order to get the material and stack it there. The piece which fell on the saw and was thrown back was one of 16 pieces which were stacked up at the right of the saw."

The allegations of the plaintiff, as to the construction of the groover and other material matters, were denied by the defendant, and testimony introduced to show that there was no negligence, either in the construction of the machine or in the failure to give proper instructions as to its operation, and, further, that the injury was caused by the plaintiff's own negligence.

The jury returned a verdict for the plaintiff upon all the issues, negligence and contributory negligence, and assessed his damages at \$5,000. Judgment was entered thereon, and an appeal taken by the defendant.

Wilson & Frazier, of Greensboro, for appellant.

Seawell & Milliken, of Sanford, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] The remarks of counsel, with reference to the insurance company, by which the defendant was indemnified, were not proper, as there was no legal basis for the suggestion, because they were irrelevant to the issues, and were calculated to prejudice the jury and to divert the minds of the jurors from the material issues. If the judge had not removed any such prejudice by his clear instructions to the jury, as to what were the only issues, we would be authorized to grant a new trial, but we are satisfied that the caution of the judge to the jury, which came immediately after the allusion to the insurance

company was made, had the desired effect, and placed the parties at arm's length in the very beginning of the trial.

[3-5] We are also convinced that no actual prejudice resulted from the remark, as the verdict upon the issues of negligence was well warranted by the evidence, and the damages allowed were very moderate and small, in view of the serious, if not horrible, injury inflicted, and the racking pain suffered by the plaintiff, which may continue and perhaps will be permanent. To be deprived of the comfort resulting from the normal operation of his physical and bodily functions is a dreadful affliction. Deducting the medical and hospital bills, which were very large, from the amount of damages, the balance was an exceedingly small compensation for the damage done, the painful operations undergone, and the long period of confinement and loss of earnings.

With reference to the remarks of counsel, this case is not altogether like Featherstone v. Cotton Mills, 159 N. C. 429, 74 S. E. 918, and Norris v. Cotton Mills, 154 N. C. 480, 70 S. E. 912, for the inquiries there were not necessarily foreign to the case. In the former case, which may, in one aspect, apply here, the court held that on the facts, as presented, both the questions asked of the jurors the same being as a rule competent, and that addressed to defendant's counsel, were matters which must be left largely to the discretion of the court below, and it must be presumed that the character and good sense of the jurors selected, when they are properly cautioned, have protected them from improper bias, or that any tendency in that direction has been effectually checked and corrected by the learned and impartial judge who presides at the trial. In Lytton v. Manufacturing Co., 157 N. C. 331, 72 S. E. 1055, Ann. Cas. 1913C, 358, the evidence of the insurance was admitted and the ruling was reversed by this court, and, therefore, it does not apply, as in our case the judge intervened, and is supposed to have neutralized the prejudice, if any had resulted. The penalty for such remarks, when not properly and fully corrected by the court, and all prejudice removed, is a new trial, as was held in Starr v. Oil Co., 165 N. C. 587, 81 S. E. 776, where we said:

"Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing."

And again, to the same effect, in Deligny v. Furniture Co., 170 N. C. 189, 86 S. E. 980, we held that whenever such questions are asked, if they are irrelevant to the controversy and have a tendency only to prejudice one side or the other, the presiding judge should act promptly in preventing any such

result and take drastic measures to do so, if necessary. When it is clear that either of the parties resorts to such questions to gain an unfair advantage, it is done at the sacrifice of the verdict, if he succeeds in securing one, on account of the very dangerous character of the questions. Lytton v. Manufacturing Co., supra. The subject is fully discussed in the cases we have cited, and needs no further elaboration. In this case, we see no reason for such a course. Counsel here may not have intended any wrong, and we can draw no inference, that they did, from what was said. They may have asked the question for a legitimate purpose to obtain information in the proper conduct of their case. But for the objection, the answer might have been that defendant had no indemnity insurance. The defendant felt aggrieved by the question, and prayed for the intervention of the court, and relief was speedily granted by the learned presiding judge. Parties should act promptly, as was done here, in the assertion of their rights. This being an appellate tribunal, with jurisdiction merely for the correction of errors in law, it will not grant the relief, which can the more readily be given by the court below, in the exercise of its sound discretion, unless in very exceptional cases, of which this is not one. We caution the judges, though, to guard carefully the rights of the parties, when such questions arise, and to be prompt in eliminating from the trial anything tending to prevent an impartial hearing and verdict. It may be that, in some cases, where the reference to insurance is clearly irrelevant, and can only have the effect to prejudice the opponent, the judge should be even drastic, and order a continuance, at plaintiff's cost, as it may do incalculable damage. Lytton v. Mfg. Co., supra.

The other exceptions relate mainly to the charge of the court upon the question of negligence. We have examined the latter with the utmost scrutiny, and have been unable to find any departure from the principles which have been settled by this court as applicable to cases of this kind. It covered the entire inquiry, and presented to the jury in clear and vigorous language every question raised by the pleadings and evidence, and explained the law and the testimony of the witnesses in perfectly correct manner, as required by the statute.

The case, in all of its essential features, is like Ensley v. Lumber Co., 165 N. C. 687, 81 S. E. 1010, and Dunn v. Lumber Co., 172 N. C. 136, 90 S. E. 18. It resembles the former case very much, and sufficiently so to be controlled by it. The plaintiff in that case, who was injured, was 17 years of age, and was hurt in a way and under circumstances somewhat similar to those set forth in this record. We held in the Ensley Case:

"It is the duty of the master to exercise due care in furnishing his servant with a reason-

ably safe place to work and reasonably safe and proper machines, tools, and appliances with which to do the work, and, in the case of youthful or inexperienced employes, this further duty rests upon him: Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such dangers, it is his duty to give him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand his perils. But the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him, if he in fact knows and appreciates the dangers of the employment; and generally it is for the jury to determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work, and how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself. 26 Cyc. 1174-1178; *Turner v. Lumber Co.*, 119 N. C. 387 [26 S. E. 23]; *Marcus v. Loan*, 133 N. C. 54 [45 S. E. 354]; *Walters v. Sash & Blind Co.*, 154 N. C. 323 [70 S. E. 635]; *Fitzgerald v. Furniture Co.*, 131 N. C. 636 [42 S. E. 946]; *Rolin v. Tobacco Co.*, 141 N. C. 300 [53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638]; *Leathers v. Tobacco Co.*, 144 N. C. 350 [57 S. E. 11, 9 L. R. A. (N. S.) 349]. Those cases fairly illustrate the rule as it has been applied by this court, and the *Fitzgerald Case* would seem to be essentially the same in its salient facts as this one, and, if not entirely so, there is a sufficient likeness between them to make it a controlling authority. The authorities elsewhere are in harmony with our decisions."

The following additional authorities, which state the law as held and applied in other jurisdictions, will be found applicable to our case:

"The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. The duty of the employer to take special cautions in such cases has sometimes been emphatically asserted by the courts.' Cooley on Torts, p. 652. 'The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all: The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the

same state as if he were an adult.' Thompson on Negligence, 978. 'When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children, wherever they go, must be expected to act upon childish instincts and impulses—a fact which all persons who are *sui juris* must consider, and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character and one likely to do an injury to the child itself or to others is liable in damages for injury resulting which is a natural result of the original wrong, though there may be an intervening agency (of the child) between the defendant's act and the injury.' Bailey on Personal Injuries, 1291. It was said in *R. R. v. Fort*, 84 U. S. [17 Wall.] 553 [21 L. Ed. 739], in which a parent was suing for injuries to his son, who was 16 years old: 'This boy occupied a very different position (from an adult). How could he be expected to know the peril of the undertaking? He was a mere youth without experience, not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so.'"

[6-8] It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be reasonably sure that they understand it and appreciate the danger. The principles governing the employment of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble, or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant and to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow

him to undertake the work without a full explanation of its perils.

[9] And this may also be said upon another branch of the case, viz., whether the groover was constructed after the pattern of those which have been approved and are in general use. There was evidence that it was not similar in the very respect which, if it had been, the boards could not have jostled onto the saw. There also was testimony that the machine was old, out of style, and shaky or rickety, and not fit to be placed in the hands of a comparative novice, with only one-half day's experience, and working too under an express order to go ahead, after making objection because of the risk, and being assured of safety. *Atkins v. Madry*, 174 N. C. 187, 93 S. E. 744. The defendant must have known of the dangerous character of the groover. It had been in use for a long time, and was out of date—evidently an antiquated model, and a trap for the inexperienced and unwary. It was also cranky from constant wear and tear. Besides, it was rendered more unsteady by the slipping of a belt from an adjoining pulley, which was operated by the same engine, which accelerated its speed and violently agitated the groover, or, at least, helped to cause the boards to lose their balance and fall upon the saw. There was full evidence of these and other facts, more or less showing negligence of the defendant, and disproving contributory negligence. In this conflict, the case was evidently one for the jury to settle under the correct instructions of the court.

One witness, Mr. Gregson, testified that, within a 30 years' experience in such mills, he had seen many such machines, and practically every one had the groover saw protected, so that the boards could not drop down and upon the saw.

The case of *Dunn v. Lumber Co.*, 172 N. C. 137, 90 S. E. 18, is also directly in point, and strongly supports the view that upon plaintiff's evidence, if accepted as true by the jury, which was done here, he was entitled to recover for the injury he suffered. We have so fully and exhaustively discussed in that and *Ensley v. Lumber Co.*, supra, the general and prevailing principles applicable to this class of cases that we forbear to prolong this opinion by any further reference to them. We held, in the recent case of *Ammons v. Manufacturing Co.*, 165 N. C. 449, 81 S. E. 452, that repeated adjudications had established the rule we have stated, and that an employer of labor, in the exercise of reasonable care, must provide for his employees a reasonably safe place to do their work, and supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision. *Pigford v.*

Railroad, 160 N. C. 93, 75 S. E. 860, 44 L. R. A. (N. S.) 865; *Young v. Fiber Co.*, 159 N. C. 376, 74 S. E. 1051; *Alley v. Pipe Co.*, 159 N. C. 327, 74 S. E. 885; *Patterson v. Nichols*, 157 N. C. 406, 73 S. E. 202; *Mercer v. Railroad*, 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002; *Marks v. Cotton Mills*, 135 N. C. 287, 47 S. E. 432.

[10] The remaining objection is equally untenable. The change in the machine, by putting up guards to keep the boards in their place, was shown by the plaintiff, not to prove an admission that the groover was defective when he was hurt, but to show merely the difference in conditions in order to support plaintiff's testimony that they were not there when he was hurt by the saw hurling the board against his body. It was defendant's object to contradict him as to the guards not being there when he was operating the machine, and we have held frequently that this may be done for that purpose, and not as an admission of negligence. Such evidence, for the purpose just indicated, was held to be competent in *Pearson v. Clay Co.*, 162 N. C. 224, 78 S. E. 73; *Boggs v. Mining Co.*, 162 N. C. 393, 78 S. E. 274; *McMillan v. Railroad Co.*, 172 N. C. at pages 856, 857, 90 S. E. 683, and *Muse v. Motor Co.*, 175 N. C. 466, where it is said at page 469, 95 S. E. 900, at page 901:

"It was competent to show that the repairs were made afterwards, not that the repairs were evidence tending to prove negligence, but simply to prove their date to contradict the defendant's witnesses"—citing *Tise v. Thomasville*, 151 N. C. 281, 65 S. E. 1007; *Westfeldt v. Adams*, 135 N. C. 591, 47 S. E. 816.

But *West v. Railroad Co.*, 174 N. C. 125, 93 S. E. 479, is exactly in point, and fully sustains the judge's ruling. It is there said by the court (174 N. C. at pages 130 and 131, 93 S. E. at pages 481 and 482):

"The question of evidence raised by the defendant, which is, that the court admitted incompetent evidence as to the condition of the track and roadbed at the time of the injury, and its reparation since that time, is founded upon a misapprehension of the true nature of that evidence. It was not admitted as an implied admission of negligence on the part of the defendant, but as tending to corroborate the plaintiff, as a witness in his own behalf, as to their condition at the time of the accident, and the instructions to the jury clearly show that the evidence was let in solely for such purpose. In that view, it was competent, as we have held"—citing *Shaw v. Public Service Corporation*, 168 N. C. 611, 84 S. E. 1010, and the cases in this opinion, supra.

The remaining exceptions, which are not merely formal, are considered by us to be without any real merit, and were not stressed in this court.

The case has been fairly and correctly tried, and we find no reason for disturbing the judgment.

No error.

(177 N. C. 187)

NALL et ux. v. McMATH et al. (No. 98.)

(Supreme Court of North Carolina. March 5, 1919.)

1. APPEAL AND ERROR §230—OBJECTIONS—TIME—SUFFICIENCY OF EVIDENCE.

Where neither of the parties, although they had notice that the jury was not satisfied to find dividing line as contended by either, made opposition to departure from contentions, or requested instruction that jury must find as contended by one or the other, the contention that there is no evidence to sustain the verdict will be overruled where made after return of verdict establishing line different from that contended by either.

2. BOUNDARIES §37(1)—DIVIDING LINES—VERDICT—EVIDENCE TO SUPPORT.

Evidence held to support verdict establishing dividing line equally distant between lines claimed by plaintiffs and defendants.

3. JUDGMENT §199(1)—JUDGMENT NON OBSTANTE VEREDICTO.

Motion for judgment non obstante veredicto can only be granted when it appears from the pleadings and the verdict, and not from the evidence, that the party is entitled to judgment.

Appeal from Superior Court, Chatham County; Daniels, Judge.

Special proceedings by J. J. Nall and wife against M. B. McMath and others, before the clerk for the establishment of a dividing line. Plaintiffs appealed from the decision in favor of defendants, and the cause was transferred to the trial docket. Judgment in accordance with verdict, and defendants appeal. Affirmed.

This is a special proceeding instituted before the clerk for the establishment of the dividing line between the respective parties. The case was heard before the clerk after the survey had been made and the surveyor had filed his report, and he decided in favor of the contentions of the defendant. The plaintiffs appealed, and the cause was transferred to the trial docket, and when the same was called for trial before his honor he referred the same to R. H. Dixon, Esq., as referee to hear the evidence, find the facts, and report his finding of fact and conclusion of law. The said reference was a compulsory one. The referee made his report to the court, again finding in favor of the defendants. To this report the plaintiffs filed exceptions, proposed an issue, and demanded a trial by jury thereon, and the cause came on for hearing on the said exception of the plaintiffs. After the jury had retired for some hours, one of the jurors approached the judge, and after a short conference the judge called counsel for both parties to the bench and told them that the juror wished to know if they had a right to disregard the contentions of both par-

ties and to establish the line at a point different from that contended by either, the judge asking the counsel what they thought should be his instruction, if anything, whereupon the counsel for the defendant suggested that under the word of the issue he thought all he could tell the jury was that they could begin the line where they chose, and found from evidence to be true point; that it was their duty to find from the evidence what was the true dividing line and to so declare. This proposition was not objected to as to the judge's duty in response to the juror's inquiry, but neither side consented as to where they should find the line, nor did either side consent that they should find the line, except as to where they should find it under the evidence. There was no consent on either side or suggestion as to what the verdict should be, or where they should find the line, and there was no request for such consent from inquiring jurors as to his province. When the jury returned they stated to the court what they had decided, and the court in helping the jury with its findings asked them if they meant to divide the disputed land, to which they replied in the affirmative. The attorneys for both sides aided the court in suggestions as to what they understood the jury wanted to do while the jury was standing in the bar waiting for the court to aid them in getting their answer as they wished it, but there was no consent or intimation of consent from either side that such should be their verdict or that they were satisfied with it. The evidence of the plaintiffs tended to prove that the true line was from 6 to 7 on the plat, and that of the defendants that it was from 9 to 10. The jury returned a verdict establishing the line equally distant from 6 to 7 and 9 to 10. The defendants moved to set aside the verdict upon the ground that there was no evidence to support it, which motion was refused, and defendants excepted. Judgment was entered in accordance with the verdict, and the defendants appealed.

Siler & Barber, of Siler City, and R. H. Hayes, of Pittsboro, for appellants.

W. P. Horton, of Pittsboro, and Fred W. Bynum, of Rockingham, for appellees.

ALLEN, J. [1] The principle is well established that an objection that there is no evidence to support a verdict will not be considered when made for the first time after the verdict has been returned (State v. Leak, 156 N. C. 643, 72 S. E. 567), and there is no reason for refusing to enforce the rule when it appears, as it does in this record, that both parties had full notice that the jury was not satisfied to find the true line to be as contended for by either party, and when, not only was there no opposition to a departure from these contentions and

no request to instruct the jury they must find according to the contention of one or the other, but, on the contrary, counsel on both sides aided the court and jury in framing the answer to the issue, without suggesting that there was no evidence to support this finding until after the return of the verdict.

[2] We have, however, examined the evidence, and cannot say that the jury has not established the true line between the parties. It is true that most of the evidence was directed to the lines according to the respective contentions of the plaintiffs and the defendants, but the surveyor testified that the acreage of the plaintiffs and defendants exceeded that called for in their deeds, and a number of deeds were introduced by both parties, which required allowances for variations in the compass, and as to the deeds of both plaintiffs and defendants the distances in order to reach their respective claims required more than was called for in the deeds.

We would not be understood as holding that the jury has the right to compromise the claims of litigants; and, if it clearly appeared that they had done so, and had returned the verdict with nothing to sustain it, and that there was no notice of the purpose to do so, the parties would be entitled to relief.

[3] The motion for judgment non obstante veredicto has nothing to sustain it, as this motion can only be granted when it appears from the pleadings and the verdict, and not from the evidence, that the party is entitled to judgment. *Baxter v. Irvin*, 158 N. C. 277, 73 S. E. 882.

The judgment must be affirmed.

No error.

(177 N. C. 179)

WELDON v. SEABOARD AIR LINE RY.
(No. 100.)

(Supreme Court of North Carolina. March 5, 1919.)

1. TRIAL ¶365(1)—CONSTRUCTION OF VERDICT.

A verdict must be interpreted and allowed significance by proper reference to the testimony and charge of the court.

2. MASTER AND SERVANT ¶217(26)—INJURIES TO SERVANT—ASSUMPTION OF RISK—BRAKEMAN.

Railroad's brakeman did not assume risk of injury when railroad caused its train suddenly to stop in so extraordinary a manner as to cause brakeman to be violently thrown off car, he having had no opportunity to know of conditions or appreciate dangers.

3. MASTER AND SERVANT ¶240(4)—INJURIES TO SERVANTS—CONTRIBUTORY NEGLIGENCE.

Where railroad's freight conductor locked door of caboose, thereby forcing brakeman ei-

ther on platform or steps, and brakeman stood on steps that he might alight to open switch, holding onto grabiron, and was thrown from train by sudden and unusual stoppage, he was not negligent.

Appeal from Superior Court, Warren County; Kerr, Judge.

Action by Mrs. Minnie J. Weldon, administratrix, against the Seaboard Air Line Railway. From judgment for plaintiff, defendant appeals. No error.

This is an action brought by Minnie J. Weldon, administratrix of the estate of Claude T. Andrews, to recover damages for the death of Claude T. Andrews, which was alleged to have been caused by his being thrown under the wheels of the car by the sudden stopping of a freight train on which he was employed by the Seaboard Air Line Railway Company as flagman at Norlina, N. C., on November 1, 1917. The leg of the plaintiff's intestate was run over by the wheels of the caboose on defendant's freight train and so mangled that amputation was necessary. He was carried from Norlina to Raleigh, his leg was amputated, and he died as the result of the injury on November 4, 1917.

The intestate was a flagman on the train which was preparing to stop in order to put it on a siding at Norlina. The train was in charge of C. L. Jeannette, conductor. As the train approached Norlina, the conductor and the intestate were in the caboose. Both of them left the caboose, and the conductor locked the door.

The conductor, a witness for the defendant, testified, among other things:

"As we neared the switch, Andrews and I came out of the caboose. He was first and went down on the step, and I stood above him. As we got near the switch, I held my hand over Andrews' shoulder and gave the signal to slow the train. * * * When he fell, there was no jolt of the train that I could discover, and I was standing on the step above him; he was standing on a lower step preparing to get off. It was his place to get off and open the switch; his duty was to get off on the ground safely as I was to do."

The evidence for the plaintiff tended to prove that the train was moving at a high rate of speed and was stopped so suddenly and with such violence that the intestate was thrown from the train and was injured, while the evidence of the defendant tended to prove that the intestate jumped from the train.

His honor charged the jury upon the issue of negligence as follows:

"If you find from the evidence, and by its greater weight, as I have defined to you, that the defendant carelessly and negligently attempted to stop its train upon which plaintiff's

intestate was brakeman, and while so attempting to stop its train, caused said train to suddenly and violently check up or stop in such an unusual and extraordinary manner as to cause plaintiff's intestate to be violently thrown off the car upon which he was riding, or preparing to alight from, and under the said car, and find that this said negligent, violent, and sudden stopping or slowing up of said train was the proximate cause of the plaintiff's intestate being ejected from the train and run over, then you will answer this first issue, 'Yes.' If you do not so find, you will answer, 'No.'"

There was no exception to this charge.

This is the only charge upon the issue of negligence, except certain general charges defining negligence and proximate cause.

The court also instructed the jury on the second issue, as to contributory negligence, as follows:

"Now, as to this issue the burden shifts to the defendant company to satisfy you by the evidence, and by its greater weight as I have defined the same to you, that plaintiff's intestate's injuries and subsequent death was due to his own negligence, in that he carelessly and negligently stepped off defendant's moving train and was thrown down and under same and his leg was cut off, from which injury he died a few days thereafter; if you so find, then you should answer this issue as to contributory negligence, 'Yes.' If you do not so find, then you should answer, 'No.'"

The defendant excepted to this charge upon the ground that it made the contributory negligence of the plaintiff dependent on his jumping from the train, and left out of consideration the allegations of negligence in the answer that the intestate assumed a position on the steps of the caboose while the train was in motion and before it had come to a full stop, and that he failed to hold to the grab iron on the caboose.

His honor also instructed the jury on the third issue, as to assumption of risk, as follows:

"The burden is upon the defendant to satisfy you, and by the greater weight of the evidence, that plaintiff's intestate assumed the ordinary risk and hazards incident to his occupation and employment, and which are known to him and are plainly observable, and that the occurrence which threw him from the train was a risk or hazard which he assumed, ordinary and incident to his employment in some degree. If you so find, you will answer this issue, 'Yes'; if you do not so find, you should answer this issue, 'No.'"

"If you find from the evidence, and by its greater weight as I have defined the same to you, that plaintiff's intestate was injured by the negligent conduct of the defendant company, or its agents or its employees in stopping or attempting to stop its train in such a manner as to violently throw plaintiff's intestate off the train, you should answer this third issue, 'No,' for this doctrine does not include extraordinary risks which an employé does not assume, and has no application to injuries which an em-

ployé may receive from a negligent act of his master or that of another to whom the master had delegated a duty as his employé."

The defendant excepted.

The ground of exception to these instructions upon the third issue is that his honor confined the doctrine of assumption of risk to those that were ordinary and usual, and did not tell the jury that the intestate under certain conditions assumed extraordinary risks of the employment.

The jury returned the following verdict:

"1. Was the plaintiff's intestate, Claude T. Andrews, injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff's intestate, Claude T. Andrews, by his own negligence contribute to his injury? Answer: No.

"3. Did the plaintiff's intestate, Claude T. Andrews, assume the risk of injury? Answer: No.

"4. What damage, if any, is plaintiff entitled to recover? Answer: \$5,000."

Judgment was entered in favor of the plaintiff upon the verdict, and the defendant excepted and appealed.

Murray Allen, of Murray, for appellant.

Chas. J. Katzenstein, of New York City, Tasker Polk, of Warrenton, and W. E. Daniel, of Newbern, for appellee.

ALLEN, J. [1] As stated in *Jones v. R. R.*, at the last term, 176 N. C. 260, 97 S. E. 48, "It is the accepted principle in our procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and charge of the court," and when so considered the verdict in this case establishes the fact that the plaintiff's intestate had gone upon the steps of the caboose in company with the conductor and in the performance of his duty, and while on the steps he was thrown to the ground and under the train because the train was checked and stopped in an unusual and extraordinary manner.

[2] The court charged the jury that they could not answer the first issue in the affirmative unless the defendant "caused said train to suddenly and violently check up or stop in such an unusual and extraordinary manner as to cause plaintiff's intestate to be violently thrown off the car upon which he was riding," and the finding upon the first issue in response to this charge disposes of the defendant's exceptions to the charges on the issue of assumption of risk, because, as held in the *Jones Case*, supra, the employé does not assume the risk "in cases of unusual and instant negligence and under circumstances which afforded the injured employé no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and op-

portunity must 'come in time to be of use.'"

Substantially the same objection was made to the charge of the court in the Jones Case, and the court, dealing with the exception of the defendant, said:

"But, having restricted the fact of liability on the first issue to the single question whether the engineer made the flying switch negligently by bringing his engine to an unnecessary and unusual and sudden stop, and this having been determined in plaintiff's favor, the court, under the authorities, was justified in ruling that there could be no assumption of risk, and his definition was without appreciable significance and should not be allowed to affect the result."

This fits the facts of the present case, and would have justified his honor in going further than he did, and in instructing the jury that if the intestate of the plaintiff was thrown from the train by reason of an unusual and extraordinary stop, which is the finding on the first issue, there would be no assumption of risk.

The authorities supporting this principle are cited and discussed in the learned and valuable opinion of Associate Justice Hoke, and the case of *Boldt v. R. R.*, 245 U. S. 442, 38 Sup. Ct. 139, 62 L. Ed. 385, on which the defendant relied, is considered and distinguished.

[3] The exception to the charge on contributory negligence, in that the court failed to submit to the jury the alleged negligence of the intestate in going upon the steps and in not holding to the grab iron, is not supported by the evidence, as the conductor testified that he had locked the door of the caboose, thereby forcing the intestate either upon the platform or the steps, and that the intestate was standing on the steps in order that he might alight in the performance of his duty to open the switch, and the evidence shows that he had hold of the grabiron when he was thrown from the train. We see nothing in this tending to prove negligence.

No error.

(177 N. C. 29)

HARVELL v. HAYNES AUTO CO.
(No. 99.)

(Supreme Court of North Carolina. March 5, 1919.)

1. EVIDENCE §468 — PAROL EVIDENCE AFFECTING WRITING—SALE OF AUTOMOBILES.

In action to recover from automobile company deposit made on contract for purchase of cars, testimony of plaintiff that company's agent stated to him that certain type of car would not be furnished held admissible, its effect not being to change or alter contract, but to corroborate plaintiff's contention that contract had not been complied with.

2. EVIDENCE §244(7) — STATEMENTS OF AGENT ADMISSIBLE AGAINST PRINCIPAL.

In action to recover deposit on contract for purchase of automobiles, statements to plaintiff after contract was made, of agent of the auto company, who was acting by its authority, in regard to the subject of his mission, were competent.

3. SALES §391(7)—DEPOSIT ON CONTRACT—RIGHT TO RECOVER.

Where automobile company, without assent of buyer of cars, altered contract, all cars actually delivered having been paid for by buyer, failure of company to perform contract as made entitled buyer to recover deposit.

Appeal from Superior Court, Halifax County; Kerr, Judge.

Action by H. A. Harvell against the Haynes Auto Company. From judgment for plaintiff, defendant appeals. No error.

This was an action brought to recover a deposit of \$250 under contract 16th March, 1917, made by plaintiff with defendant's agent for the purchase of ten cars, two of which were delivered, and eight of which were never delivered though demanded. The contract was signed in Weldon, but was not to be binding until accepted by the defendant in Atlanta. When the duplicate of the contract was returned from Atlanta it had been materially altered, and Harvell did not accept the contract as altered, but demanded delivery upon the original contract. Verdict and judgment for plaintiff. Appeal by defendant.

W. E. Daniel, of Weldon, for appellant.

George C. Green, of Weldon, for appellee.

CLARK, C. J. The first issue was, "Did the defendant alter the contract of 16th March, 1917, after execution by the plaintiff and without his consent?" To which the jury responded, "Yes."

[1, 2] The only question necessary for determination is whether there was error as to this issue in that the court permitted the plaintiff to testify as to a conversation with Turnage, the agent with whom he made the contract, and three months after it was made, when, after a dispute had arisen, Turnage was sent to adjust the difference with the plaintiff.

The plaintiff testified that on that occasion Turnage stated to him that the "Little Haynes Junior" car, which was one of those stipulated for in the original contract, would not be furnished, and that he (the plaintiff) asked Turnage about the \$250 deposit, and Turnage stated that as soon as he got to Atlanta he would have the check for the \$250 sent back to plaintiff.

At the time the plaintiff made the deposit of \$250 he had bought two light Haynes cars.

Later he wired the defendant to hold up the shipment of the two touring cars, though he was not canceling the contract. The evidence by him is that he did not cancel the order for the two cars named, but merely was asking that the shipment of them should be held up. There is no testimony in the record that the plaintiff ever recognized the amended contract, or ever purchased any cars other than the two ordered 16th March, or that he ever ordered any cars except the Haynes Junior, all three of which were called for in the contract of 16th March.

The effect of this testimony is not to change or alter the contract, but to corroborate the plaintiff's contention that the contract had not been complied with. Turnage was acting by authority of defendant at the time, and his statements in regard to the subject of his mission were competent.

[3] The jury having found upon competent testimony that the contract had been altered by the defendant without assent of the plaintiff, and there being no controversy that all the cars actually delivered had been paid for, the failure of the defendant to perform the contract, as set out in the written agreement, entitled the plaintiff to recover the \$250 deposit, both because made under the contract which the defendant vitiated by the alteration as found by the jury, and because of the failure of defendant to comply therewith. The defendant holds it without any equivalent rendered therefor, and should return it.

No error.

(177 N. C. 156)

In re SAUNDERS' WILL

ARNOLD et al. v. WINDLEY et al.

(No. 172.)

(Supreme Court of North Carolina. March 5, 1919.)

1. WITNESSES §158 — COMPETENCY — TRANSACTIONS WITH DECEDENT.

Grandson of testatrix and devisee under will was competent to testify that when will was opened it contained erasures in question, and that he did not make them; Revisal 1906, § 1631, disqualifying parties in interest from testifying only as to personal transactions with deceased.

2. WITNESSES §158 — COMPETENCY — TRANSACTIONS WITH DECEDENT.

Testatrix's daughter and devisee under will was competent to testify that she had not seen will before her mother's death, and did not make erasures in question; Revisal 1906, § 1631, disqualifying parties in interest from testifying only as to personal transactions with deceased.

3. WILLS §290, 297(4)—ERASURES—BURDEN OF PROOF.

Declaration of testatrix that she had stricken out a part of will was competent, and the burden was on the parties claiming to hold under the erased part to show that it was not erased by testatrix.

Appeal from Superior Court, Craven County; Whedbee, Judge.

Proceedings by James T. Arnold and others against Mary E. Windley, executrix, and others, to annul the probate of the will of Eliza J. Saunders, deceased. From decree rendered, caveators appeal. No error.

A. D. Ward and W. F. Ward, both of Newbern, for appellants.

Abernethy, Henderson & Willis, for appellees.

CLARK, C. J. The will of the testatrix has been probated both in common and solemn form. The only question presented was as to whether certain words which had been erased with pen and ink were erased by the testatrix or some one else at her request, or whether it was done without authority. When the will was opened, the erasures were in the will. There was testimony that the testatrix had told the witness that these names had been marked out by her, and that the propounders, her daughter and grandson, would get all the property.

[1, 2] The exceptions are solely to the competency of the grandson and the daughter, devisees under the will. The grandson, Elias Windley, testified that when the will was opened these erasures were in the paper, and that he did not make them. Mary E. Windley, the daughter of the deceased and also a beneficiary in the will, testified that she did not see the will before her mother's death, and that she did not make the alterations. These were matters which occurred after the death of the testator and which were not transactions or communications between her and the witness.

[3] The declaration of the testator, after he made the will, that he had stricken out any part thereof, was competent, and the burden was on the parties claiming to hold under the erased part that it was not erased by the testator. *Barfield v. Carr*, 169 N. C. 574, 86 S. E. 498.

Under Revisal 1631, formerly Code 590, the parties in interest are disqualified from testifying only as to personal transactions with the deceased. For instance, such party could testify that a paper writing was in the handwriting of the deceased (*Hussey v. Kirkman*, 95 N. C. 65; *Armfield v. Colvert*, 103 N. C. 147, 9 S. E. 461; *Sawyer v. Grandy*, 113 N. C. 42, 18 S. E. 79), or as to any independent fact which was neither a trans-

action nor communication with the testator (McCall v. Wilson, 101 N. C. 600, 8 S. E. 255; Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381; Davidson v. Bardin, 139 N. C. 3, 51 S. E. 779). The subject is fully discussed with citation of authorities. Johnson v. Cameron, 136 N. C. 243, 48 S. E. 640; Brown v. Adams, 174 N. C. 502, 93 S. E. 989, L. R. A. 1918C, 911. The latest case on the subject is Sutton v. Wells, 175 N. C. 3, 94 S. E. 688, which holds that a party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not derived from such source.

No error.

(177 N. C. 166)

HARTSFIELD v. BRYAN et al. (No. 171.)

(Supreme Court of North Carolina. March 5, 1919.)

1. PARTITION ⇐107 — PETITION TO SET ASIDE JUDGMENT — CAPTION — TITLE OF CAUSE.

As there are no terms of court where special proceeding in partition is pending before clerk, each case having its own return day, a petition entitled in the original cause, but addressed to clerk, to set aside judgment rendered therein, is not demurrable because not giving term of court or any court in caption.

2. PARTITION ⇐107—SETTING ASIDE JUDGMENT — PLEADING — PERSONS INTERESTED — SUFFICIENCY.

A petition or written motion in partition proceeding to set aside judgment entered by clerk, properly entitled, but stating, "Your petitioner R. W., attorney at law and in fact, for and in behalf of W. I. Hall, and many others (naming them), heirs at law of John Haywood, deceased," sufficiently showed that persons named were heirs at law of particular John Haywood whose property was being partitioned, and that R. W. appeared for heirs and not for himself.

3. PLEADING ⇐193(5) — COMPLAINT — DEMURRER.

A complaint will be sustained as against demurrer, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it under a liberal construction of its terms.

4. PLEADING ⇐18 — CONSTRUCTION OF PLEADINGS—STATUTES.

Although pleadings are now under the Code construed favorably to pleader to effectuate main purpose of having cases tried upon their real merits, pleadings must be so drawn as to present clearly the issue in the case, and all facts going to make up a cause of action must be stated as plainly and concisely as is consistent with perfect accuracy.

Appeal from Superior Court, Craven County; Whedbee, Judge.

Proceeding for partition by J. L. Hartsfield against James A. Bryan and others. From a judgment overruling a demurrer to a petition to set aside judgment ordering lands sold, the petitioner appeals. No error.

This is a petition, or written motion, in the above-entitled special proceeding for partition, to set aside the judgment rendered therein on February 6, 1900, by the clerk of the superior court, by which the lands were ordered to be sold. The sale was made to James A. Bryan, one of the defendants, and confirmed by the clerk.

The petition to set aside the judgment is entitled as of the original cause, but is addressed to the clerk of the superior court of Craven county, as follows:

"Your petitioner, R. E. Whitehurst, attorney at law and in fact for and in behalf of W. I. Hall and many others (naming them), heirs at law of John Haywood, deceased, and on behalf of all other persons having a like interest as heirs of John Haywood, deceased, respectfully petitions the court as follows:"

Then follows a statement of the facts upon which the motion is based, it being alleged, among other things, that the publication of the summons was defective, and that the judgment was not indexed and cross-indexed, as required by the statute, and the petitioners have had no notice of it until recently. It is then further alleged:

"That your petitioner, R. E. Whitehurst, is attorney at law and in fact for a portion of the heirs at law of John Haywood, owners of more than one-third ($\frac{1}{3}$) of the undivided interest in the estate of John Haywood, and that this petition is brought on their behalf as well as on the behalf of other persons having a like interest with them."

The defendant James A. Bryan demurred to this petition upon the grounds:

1. That said petition is deficient in law for that it appears on its face—

(a) It does not give any term of court or any court in the caption to which it is applicable.

(b) That it is not made or filed in the name of the real parties in interest, to wit, the heirs of John Haywood, deceased.

(c) For that it appears that it is filed by R. E. Whitehurst, an attorney at law and in fact, and that the said R. E. Whitehurst has no interest in the subject-matter and is not the real party in interest.

2. That it appears on the face of said complaint that it does not state facts sufficient to constitute the cause of action.

(1) For that it does not appear in any allegation of the complaint that R. E. Whitehurst, the petitioner, is the real party in interest.

(d) For that it does appear on the face of the complaint that R. E. Whitehurst, the

petitioner, is not the real party in interest and has no interest in the subject-matter.

(e) For that it does not appear in any of the allegations of the complaint that the real parties in interest are filing the petition or making the application.

(f) For that it is not alleged in any allegation of the complaint that the persons named in the paragraph immediately preceding the first allegation are the heirs at law of John Haywood, and the heirs at law of the particular John Haywood referred to in the title of the cause, or are in any other respect owners of the John Haywood interest in the lands referred to in the petition.

The clerk overruled the demurrer, and the defendant James A. Bryan appealed to the superior court, and in that court the judgment of the clerk was affirmed, and the same defendant appealed, and assigned the overruling of his demurrer as error.

O. R. Thomas and R. E. Whitehurst, both of Newbern, for appellant.

Ward & Ward, of Newbern, for appellees.

WALKER, J. (after stating the facts as above). [1] There are no terms of court where a proceeding is pending before the clerk. He has no stated terms or sessions, and each case has its own return day. The petition is therefore sufficiently entitled, if any defect of the kind indicated would be the subject of demurrer.

[2] We are of the opinion that there are sufficient allegations as to the real parties in interest and as to those who are named in the first paragraph of the petition, being the heirs of John Haywood. The specific allegation is that the petitioners for whom Mr. Whitehurst appeared as attorney at law and in fact are "the heirs at law of John Haywood, deceased," and also that he appeared "on behalf of all other persons having a like interest as heirs of John Haywood, deceased." Here is a clear statement that the said parties are heirs at law of John Haywood, and that they are the persons who are really interested in the special proceeding.

[3, 4] The objection that Mr. Whitehurst brings the suit in his own name, although for the parties named, and is not himself interested in the proceeding, is untenable, as he does not, in fact, sue for himself, or set up any interest in the property which is in dispute, but brings the suit only in behalf of those parties. It is substantially the same as if he had first named the parties, and then stated that they appeared by him as their attorney, which would have been the better form. The error, though, is formal only, and not at all material, as the true character of the proceeding appears with sufficient certainty.

A complaint will be sustained, as against a demurrer, as we have held, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874; *Bank v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Eddleman v. Lentz*, 158 N. C. 65, 66, 72 S. E. 1011; *Hendrix v. So. Ry. Co.*, 162 N. C. 9, 77 S. E. 1001. We said in *Bank v. Duffy*, *supra*, that a complaint will not be overthrown by demurrer unless it is wholly insufficient; that is, if from all its parts we can see that there is a cause of action and sufficient ground for relief in law or equity. But it must not be supposed, as was said in *Eddleman v. Lentz*, *supra*, that because pleadings are now under the Code construed favorably to the pleader, to effectuate the main purpose of having cases tried upon their real merits, it permits the pleader to disregard the ordinary and familiar rule requiring pleadings to be so drawn as to present clearly the issues in the case. The Code provides that the cause of action shall be plainly and concisely stated, but this does not mean that essential fullness of statement shall be sacrificed to conciseness, but that all the facts going to make up the cause of action must be stated as plainly and concisely as is consistent with perfect accuracy, and that no material allegation should be omitted. Looseness in pleading and inadequacy of allegation are as much condemned by the present Code of Procedure as they were under the former strict and exacting system of the common law. It is form and fiction that have been abolished, but the essential principles of good pleading have been retained. *Blackmore v. Winders*, *supra*, and *Bank v. Duffy*, *supra*.

We think the petition in this case is framed with such substantial accuracy as to disclose a good cause of action. *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102. But, while we sustain the judge in overruling the demurrer, we can well see that, if the petition had been drawn with more regard for the rules as to certainty and precision, the demurrer would not have been interposed, and this appeal would have been avoided. Consequently both parties were at fault, and for this reason, and in the exercise of our discretion, we divide the costs of this court. The plaintiff will pay one half, and the defendant James A. Bryan the other half thereof. The defendant will be allowed to answer, when issues can be framed and the case tried upon its merits. He will then have an opportunity to be heard upon all the facts, without prejudice from the overruling of the demurrer.

No error.

CLARK, C. J., did not sit.

(111 S. C. 493)

ADAMS et al. v. HARDIN MOTOR CO.
(No. 10168.)

(Supreme Court of South Carolina. Feb. 24, 1919.)

DAMAGES ⇨190—**SPECIAL DAMAGES—EVIDENCE.**

In action for actual and special damages for failure to repair automobile within time agreed upon, evidence held to show no basis upon which jury could estimate special damages as to loss of profits.

Appeal from Common Pleas Circuit Court of Richland County; M. S. Whalen, Judge.

Action by Jess Adams and another against the Hardin Motor Company. Judgment for plaintiffs, and defendant appeals. Reversed, and case sent back for entry of nonsuit.

J. Hughes Cooper and Wm. N. Graydon, both of Columbia, for appellant.

C. S. Monteith, of Columbia, for respondents.

FRASER, J. There is evidence in the record that one Lula Niles owned an automobile and left it with the defendant, in October, 1917; that the defendant agreed to do the work within a week or 10 days; that a few days thereafter the plaintiffs bought the automobile and went to see the defendant, and notified it that he had bought the car, and that the defendant's agent renewed the promise to do the work within the 10 days; that the defendant was notified that the automobile was to be used in the transfer business in the city of Columbia; that the defendant did not complete the repairs and deliver the car until the 23d January, 1918. This action is brought for "actual and special damages," for the failure to repair the said car in the time agreed upon.

There are eight exceptions, but appellant treats the first four together, and thus states the question:

I. "We submit that the motion for a nonsuit as to special damages ought to have been granted. In order to recover for special damages for the breach of a contract, it is necessary to allege and prove that the defendant had notice, at the time of making the contract, of the special circumstances from which the damages might reasonably be expected to result." It is true that the first contract was made with Lula Niles, but there is evidence from which the jury might have found that the plaintiffs and the defendant made a new contract, after the purchase, containing the same provisions. If the jury took that view of the evidence, then it was a new contract, and there was evidence that the defendant was notified of the special circumstances at the time of the making of the

new contract between the plaintiff and the defendant.

II. The second ground for a nonsuit was that there was no evidence as to special damages upon which to base a verdict. This exception must be sustained. The plaintiff said that he had "never run a transfer, and did not know what transfer people made." It is true he said he thought "that a car running in good order could clear \$10 or \$15 a day." That was a mere opinion, based on nothing. Joel Jackson, another witness for the plaintiff, who was in the "transfer" business, said that for three days he had rented his car to some drummers for \$15 per day. Those were exceptional days, and could form no basis from which the rental value of an automobile could be inferred. The record shows no basis from which the jury would have estimated the special damages.

The other questions need not be considered, as the judgment must be set aside.

The judgment is reversed, and the case is sent back to have a nonsuit entered.

HYDRICK and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(148 Ga. 733)

VICKSBURG, S. & P. RY. v. DE BOW.

DE BOW v. VICKSBURG, S. & P. RY.

(No. 859.)

(Supreme Court of Georgia. Feb. 13, 1919.)

(Syllabus by the Court.)

1. RAILROADS ⇨33(2) — **PERSONAL JUDGMENT AGAINST FOREIGN CORPORATION—DOING BUSINESS IN STATE.**

It is essential to the legal rendition of a personal judgment against a foreign corporation, otherwise than by its voluntary appearance, that the corporation be doing business within the state.

2. RAILROADS ⇨33(2) — **PERSONAL JUDGMENT AGAINST FOREIGN CORPORATION—"DOING BUSINESS" IN STATE.**

A foreign railroad corporation, which neither owns, leases, nor operates any line of road within the state of Georgia, is not "doing business" within the state, in the sense that liability to service is incurred, because it maintains an office and employs an agent, resident in the state, for the merely incidental business of soliciting freight, especially where the transitory cause of action did not grow out of, and had no connection with, business so initiated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR ⇨329—**CROSS-BILL OF EXCEPTIONS — PARTIES DEFENDANT — WAIVER.**

Motion to dismiss cross-bill of exceptions for want of necessary parties defendant in er-

ror, who were formal parties in trial court, will be denied, where leave to amend was asked and parties omitted consented in writing to be made parties, waived service, and agreed to hearing of case on merits.

4. CORPORATIONS \Leftrightarrow 665(1)—**SUIT AGAINST CORPORATION AGENT—JURISDICTION.**

A corporation can be found in any jurisdiction where it carries on business through agents resident or located therein, and suits may be maintained against it in that jurisdiction, if the laws thereof provide a method of perfecting service upon its agents.

5. CORPORATIONS \Leftrightarrow 642(4½) — **"DOING BUSINESS."**

The taking of orders by an agent, subject to approval of foreign corporation at its office outside the state, constitutes "doing business" within the state, so as to subject it to the jurisdiction of the state courts, in view of Civ. Code 1910, § 2258.

Certiorari from Court of Appeals.

Action by J. D. B. De Bow against the Vicksburg, Shreveport & Pacific Railway. Judgment for plaintiff, his motion for new trial overruled, and he excepts and brings error, and defendant filed a cross-bill of exceptions; and from a judgment of the Court of Appeals (21 Ga. App. 732, 95 S. E. 261), reversing upon the main bill of exceptions and affirming the judgment upon the cross-bill, the Supreme Court granted a writ of certiorari. Reversed and remanded.

J. D. B. De Bow, a citizen of the state of Tennessee, filed his suit in the superior court of Fulton county, Ga., against the Vicksburg, Shreveport & Pacific Railway, a nonresident corporation, as an initial carrier for hire, to recover \$20,000 alleged to be the value of a certain hog shipped by him in interstate commerce from Shreveport, La., to Montgomery, Ala. The plaintiff alleged that the defendant received the hog at Shreveport for transportation, and undertook faithfully to transport the hog to the plaintiff at Montgomery, and issued to the plaintiff its receipt and bill of lading in due form; that in the course of the transportation the special car, provided at the expense of the plaintiff, for the purpose of transporting valuable live stock, was delivered by the defendant to its connecting carrier at Meridian, Miss.; and that through the negligence of the connecting carrier the hog received an injury from which it died. One of the allegations of the petition was:

"The said defendant company has and maintains an office and place of business in the said county of Fulton, in said state of Georgia, and has an agent who therein transacts business for and on behalf of said defendant corporation."

A deputy sheriff made the following return:

"I have this day served the defendant by delivering a copy of the within petition and process to J. F. Hardin, the agent of the defend-

ant company, in person at Room 404 in the Equitable Building in the city of Atlanta, Fulton county, Georgia, the same being the place of transacting the usual and ordinary public business of said corporation within said county. This 7th day of May, 1910."

At the first term the defendant, without submitting itself to the jurisdiction of the court, filed a traverse to the return of service, and prayed that both the sheriff of Fulton county and the deputy sheriff making said return be made parties thereto, and that the return of service be quashed and the case be dismissed. The ground of the traverse was as follows:

"This defendant says that it has never been served with any notice or process in said suit; that J. F. Hardin is not its agent in the sense that service upon him would be served upon it; that it has never done and does not now do any business in the state of Georgia; that it has never owned or operated and does not now own or operate any line of railroad in said state; that it has never had and has not now within said state an agent for transacting its usual and ordinary public business; that it has never had and has not within said state a place of transacting its usual and ordinary public business; and that it has never had and has not within said state of Georgia an agency for the transaction of its usual and ordinary public business."

At said term the defendant, insisting upon its traverse to the return of service in said cause, made its special appearance for the purpose of pleading to the jurisdiction of the court. In its plea to the jurisdiction the ground contained in its traverse to the return of service, quoted above, was repeated, and in addition thereto the defendant alleged that it, in connection with two other named nonresident railroad corporations, maintains an office in the city of Atlanta "for the said John F. Hardin, and pays him a monthly salary for his services as a commercial agent only. As such the said Hardin has no authority on behalf of this defendant to issue bills of lading for it, nor make contracts of affreightment, nor sell passenger tickets, nor to make contracts of carriage with passengers; but he is solely a soliciting agent, and his duties and authority are to endeavor to have freight moving from or into the Southern territory pass over the lines of defendant, such lines being wholly without the state of Georgia," and that the attempt to bring this defendant into the jurisdiction of said court is in violation of that portion of the Fourteenth Amendment to the Constitution of the United States, which declares:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The traverse, plea in abatement, and plea to the jurisdiction were duly verified. The court, to whom the issues on the traverse and plea were submitted without the intervention of a jury, found against the traverse and against the plea, entering a judgment striking the traverse and plea, and ordering the cause to proceed. To this judgment the defendant excepted *pendente lite*. Not waiving its right to except to the judgment upon the traverse and plea to the jurisdiction, the defendant filed its answer to the petition, contending that upon the facts pleaded it was not an initial carrier, and that it was not liable for the full value of the plaintiff's hog, and, if liable at all, it was not liable in any sum in excess of \$10, the agreed value of the hog as stipulated in its bill of lading. The verdict in favor of the plaintiff was for that sum; the court having in effect so limited the recovery. The plaintiff filed his motion for new trial, which was overruled, and he excepted. The defendant filed a cross-bill of exceptions, and therein assigned error upon its exceptions *pendente lite*. Upon review the Court of Appeals of this state reversed the judgment of the lower court upon the main bill of exceptions, and affirmed the judgment upon the cross-bill. *De Bow v. Vicksburg, Shreveport & Pacific Railway*, 21 Ga. App. 732, 95 S. E. 261. Upon application of the railway company, the Supreme Court granted a writ of certiorari to review the judgment of the Court of Appeals.

Anderson, Rountree & Crenshaw, of Atlanta, for plaintiff in error.

Atkinson & Born, of Atlanta, for defendant in error.

GEORGE, J. (after stating the facts as above). [3] 1. A motion was made to dismiss the cross-bill of exceptions for want of necessary parties defendant in error, to wit, the sheriff and his deputy, who were formal parties in the trial court to the traverse of the return made by the deputy, as shown by the record. This motion was met by a motion to amend the cross-bill, so as to make the sheriff and his deputy defendants in error therein. The sheriff and his deputy consented in writing to be made parties, waived service, and agreed that the case be heard on its merits. This is sufficient, under the ruling in *Bullard v. Wynn*, 134 Ga. 636, 68 S. E. 439.

[1, 2] 2. In the view we take of this case, the traverse to the return of service should have been sustained, and the action dismissed. This conclusion renders it unnecessary to set forth the evidence contained in the record upon the merits of the case. It is proper to say that the trial court, in ruling upon the traverse to the return of service and plea to the jurisdiction, was controlled by the decision of the Court of Appeals in *Bell v. New Orleans, etc., Railroad Co.*, 2 Ga. App.

812, 59 S. E. 102. Doubtless the Court of Appeals recognized its former decision as binding upon it in the present case. The question has not been passed upon by this court; and we have with great hesitancy reached a conclusion contrary to that reached in the *Bell Case*. The formal reasons set forth in the report of the *Bell Case* required the judgment there rendered; and in this view of the matter the ruling there made upon the question here presented was perhaps unnecessary to the decision of the case. It is conceded, however, that the question was considered and directly passed upon in that case. We have not, therefore, in our consideration of the question, treated the ruling there made as *obiter dictum*. On the contrary, it is our duty and disposition to regard that case, reaffirmed as it is by the decision of the Court of Appeals in this case, as entitled to great weight and credit upon the question for decision. The facts in the *Bell Case* are not materially different from those in the instant case.

Hardin was the commercial agent of three nonresident railroad companies, including the defendant, with an office at 404 Equitable Building in the city of Atlanta, Fulton county, Ga. The expenses of the office were prorated by the three companies. The office was maintained in Atlanta as a matter of convenience. He was paid a monthly salary by each of the companies. His duties and authority were to solicit and to endeavor to have freight moving from or into the southern territory pass over the lines of the three companies represented by him, including the defendant company. He had no authority, and did not undertake on behalf of the company, to issue bills of lading, nor make contracts of *afreightment*, nor to sell passenger tickets, nor to make contracts with passengers; but he acted solely in the capacity of soliciting agent for the company, which neither owned, leased, nor operated any line of road within the state of Georgia. The agent kept no books or records in his office, not even a record of his office expenses. He did not solicit passenger business. All correspondence soliciting shipments of freight was sent out from the office in Atlanta. He did not name the rate, and was not in position to do so. He had nothing whatever to do with the issuing of bills of lading. So far as appears, he did not submit tentative agreements to the roads represented by him. The office furniture, consisting of a desk, typewriter, and chairs, was provided by the railroad companies.

[4] Section 2258 of the Civil Code provides that service of process necessary to the commencement of "any suit against any corporation in any court," with certain exceptions which are not material to this decision, "may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual and or-

inary public business of such corporation, if any such place of business then shall be within the jurisdiction of the court in which said suit may be commenced." It is now well settled that a corporation can be found in any jurisdiction where it carries on business through agents resident or located therein; and suits may be maintained against it in that jurisdiction, if the laws of the same provide a method of perfecting service upon its agents. 12 R. O. L. 108. It is equally well recognized that a valid personal judgment cannot be obtained against a foreign corporation, save upon voluntary appearance by it, unless the corporation is "doing business" within the state. A clear statement of the doctrine is found in *North Wisconsin Cattle Co. v. Oregon Short Line Railroad Co.*, 105 Minn. 198, 117 N. W. 391, 392:

"Whether such a corporation is doing business in the state is a question of jurisdiction, and in its last analysis it is one of due process of law, under the Constitution of the United States."

It was said by the Supreme Court of the United States in the case of *International Harvester Co. v. Kentucky*, 234 U. S. 579, 583, 34 Sup. Ct. 944, 945 (58 L. Ed. 1479):

"It has been frequently held by this court, and it can be no longer doubted, that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the state."

This court, in *Reeves v. Southern Railway Co.*, 121 Ga. 561, 565, 49 S. E. 674, 676 (70 L. R. A. 513), recognized the doctrine:

"A corporation is not always present where its officers are, but it is present in any place where its officers or agents transact business in behalf of the corporation under authority conferred by it. The weight of modern authority seems to support the proposition that a foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found, in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served."

We are clearly of the opinion that our statute makes it necessary that the foreign corporation be "doing business" in this state, before a valid personal judgment can be rendered against it in an action commenced by the service of process upon its agent located or resident within the state. As we conceive it, it is at all events the duty of the court to so construe the statute, because, as indicated above, the question is at last one of due process of law under the Constitution. What is meant exactly by the requirement "doing business" is not easily determined. As pointed out in *Kendall v. Orange Judd Co.*, 118 Minn. 1, 136 N. W. 291, the question

as to whether a foreign corporation is "doing business" in the state, so as to be subject to the jurisdiction of the courts of the state, is entirely distinct from the question as to whether such a corporation is "doing business" in the state within the purview of the act prescribing the conditions upon which such corporations may be allowed to do business within the state, and that it does not follow that business which, by reason of the interstate commerce law, does not bring the corporation within the latter statute, may not nevertheless bring it within the statute providing for the service of process. A long line of cases, from probably every state of the Union, might be cited, in which a foreign corporation has been held not to be doing business within the state, so as to subject it to the requirements imposed upon such corporations doing business within the state. Where the interstate commerce law is the basis of the decision, this fact must be kept in view. See *Auto Trading Co. v. Williams* (Okla.) 177 Pac. 583.

[5] There is some conflict of opinion as to whether the taking of orders by an agent, subject to the approval of the corporation at its office or place of business outside of the state, constitutes "doing business" within the state, so as to render the corporation liable to suit. The weight of judicial authority, state and federal, is to the effect that this is "doing business" within a state, so as to subject the foreign corporation to the jurisdiction of its courts. *International Harvester Co. v. Kentucky*, supra, affirming the decision of the Kentucky court in the same case in 147 Ky. 655, 145 S. W. 393. To the same effect, see *Ryerson v. Wayne*, 114 Mich. 352, 72 N. W. 131; *Toledo Computing Scale Co. v. Miller*, 38 App. D. C. 237; *McSwain v. Adams Grain, etc., Co.*, 93 S. C. 103, 56 S. E. 117, Ann. Cas. 1914D, 981. At least the service upon an officer or agent of a foreign corporation located or resident within the state is generally considered effectual as to suits growing out of contracts entered into or to be performed in whole or in part within the state, as in the case of trading or manufacturing corporations. Where a foreign trading or manufacturing corporation has a resident agent within this state, who through solicitation obtains an order from a person within the state, although such order is taken subject to the approval of the corporation at its foreign office or place of business, such corporation may be required to answer in this state to such person for a cause of action arising out of business or transactions so initiated. This is the effect of the ruling in *Armstrong v. New York & R. Co.*, 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335, and many other cases.

While a foreign corporation, with a soliciting agent within the state, may be required to answer here for a breach of contract or

duty arising out of business so procured, the mere solicitation of business within the state, "unaccompanied by a local performance of contract obligations," is not "doing business" within the state, so as to bring the corporation within the jurisdiction of the courts of the state. This view is supported by the clear preponderance of judicial authority, state and federal. "A railroad company which has no tracks within the district is not doing business therein, in the sense that liability for service is incurred, because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic." *Green v. Chicago, etc., R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. To the same effect see *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, and cases infra; *St. Louis, etc., R. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; *Philadelphia, etc., Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710. In the recent case of *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537, Mr. Justice Day, delivering the opinion, said:

"As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it."

The decisions in the lower federal courts accord with the view taken by the Supreme Court of the United States. *Wall v. C. & O. R. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Fairbanks v. Cincinnati R. Co.*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; *Maxwell v. Atchison, etc., R. Co.* (C. C.) 34 Fed. 286; *Boardman v. McClure Co.* (C. C.) 123 Fed. 614. We have not overlooked the fact that the cases cited above originated in the federal courts. However, in *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, supra, the Supreme Court of Minnesota decided (1908) that a railway company not having any line in the state is not, by reason of its employment of an agent whose business it is to solicit passenger and freight traffic and its maintenance of an office with clerical assistance for his use, doing business within the state and as such liable to suits therein. The Supreme Court of Tennessee, in *Atlantic Coast Line R. Co. v. Richardson*, 121 Tenn. 448, 117 S. W. 496, decided (1908) that a foreign railroad corporation having no line within the state is not brought within the jurisdiction of the local courts by service of process upon a traffic solicitor in a suit upon a cause of action not arising within the state, nor out of any transaction had in

whole or in part within the state. In *Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941, the Supreme Court of Rhode Island held (1906):

"A foreign railroad company having no transportation line within a state is not doing business there, within the meaning of a statute providing for service of process on foreign corporations doing business within the state by serving its agent, by maintaining within the state an agency to solicit shippers to direct the local carrier, to whom property is delivered for transportation, to bill it over the line of such foreign corporation."

The Constitution of the state of Alabama fixes the venue of suits against a foreign corporation in any county where it does business, by service of process upon an agent anywhere in the state, and a provision of the Alabama Code, in any county in which it does business by agent. The Supreme Court of that state, in *Abraham v. Southern Ry. Co.*, 149 Ala. 547, 42 South. 837, held (1906) "that the act of" a railroad company "in constituting agents, with no power or authority to bind it, but simply to solicit traffic for it, is not 'doing business,' within the constitutional or statutory provisions" noted above. The facts in the Alabama case, and indeed in all the cases cited, are not materially different from the facts in the instant case. For similar rulings, see, also, *Booz v. Texas, etc., R. Co.* (1911) 250 Ill. 376, 95 N. E. 460; *Marcus v. Nashville, etc., R. Co.* (1912) 174 Ill. App. 242; *Pennsylvania R. Co. v. Rogers* (1903) 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178. The Supreme Court of Washington, in *Macario v. Alaska Gastineau Mining Co.* (1917) 96 Wash. 453, 165 Pac. 73, L. R. A. 1917E, 1152, decided that a foreign mining corporation was not present within the state, so as to subject it to a suit for a transitory cause of action, although it maintained an office within the limits of the state for the purchase and forwarding of supplies to the mines, and "for such incidental transactions, as the purchase of transportation for corporate officers and caring for injured employes, as may be necessary." *Bell v. New Orleans, etc., R. Co.*, supra, was decided in 1907. That decision, upon exactly the question here presented, so far as our investigation has extended, is supported by the following cases: *Tuchband v. Chicago & Alton R. Co.*, 115 N. Y. 437, 22 N. E. 360; *Denver, etc., R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; *Bristol v. Brent* (1910) 38 Utah, 58, 110 Pac. 356.

The case of *Armstrong v. C. & H. R. Co.* (1915) 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E, 232, Ann. Cas. 1916E, 335, held that a foreign railroad corporation keeping and maintaining a soliciting agent within the state might be made answerable to a suit in the state brought by a citizen thereof on account of a breach of contract or duty arising out

of business so procured. To this extent that case accords with the Bell Case. In the Utah case, cited above, it will be observed that while the resident commercial agent of the company had no authority to issue bills of lading or sell passenger tickets, he nevertheless did take from prospective shippers "routing orders" which were signed by the shippers and by him sent to the nonresident corporation. In the federal case cited, the soliciting agent was clothed with the power and in fact issued bills of lading on behalf of the foreign corporation. In the New York case the facts are not fully set forth, but the decision is predicated upon the ground that the foreign corporation had an office within the state, "in which a substantial portion of its business" was transacted. The foreign corporation also had property in New York, and in the opinion we find that this property consisted of tickets and other articles in its office. But see *Doty v. Mich. Cent. R. Co.* (N. Y. Super. Ct. Spec. T.) 8 Abb. Prac. (N. Y.) 427.

Whether the facts of the cases noticed distinguish them from the instant case we do not decide. We think it may be conceded that the facts in the cases noted are similar to the facts in this case. The effort of the resident soliciting agent of the corporation to obtain business within this state to be done elsewhere was a mere incident of the corporation's business, important though it may be; and it cannot be affirmed that merely soliciting business within the state to be done wholly outside of the state is "doing business" within the state, so as to give the corporation a presence within the state for the purpose of service of process. Before we can yield to the suggestion that the view here taken is a narrow one, which can result only in the denial by this state of the right of the citizen to obtain personal judgments against foreign corporations in cases where resident soliciting agents can here be found, we must be prepared to accord full faith and credit to like judgments obtained upon such service by a citizen in the courts of another state against a corporation of this state. In determining this question we have, therefore, attempted to keep in view the broad principle of interstate comity. Both judicial decision and legislative act must be assumed to reflect that comity where the question of jurisdiction is involved. For a full discussion of the question involved, see note to *Okura v. Forsbacka Jernverks Aktiebolag*, 6 B. R. C. 792.

For error in affirming the judgment on the cross-bill of exceptions, the decision is reversed and the cause remanded for further proceeding in conformity with this opinion.

All the Justices concur, except ATKINSON, J., disqualified.

(148 Ga. 862.)
SAVANNAH ELECTRIC CO. v. KAUFF.
 (No. 873.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

DIVIDED COURT—AFFIRMANCE.

This case being for decision by a full bench of six Justices who are evenly divided in opinion, Hill, Gilbert, and George, JJ., favoring an affirmance, and Fish, C. J., Beck, P. J., and Atkinson, J., favoring a reversal, the judgment of the court below stands affirmed by operation of law.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action between the Savannah Electric Company and B. Kauff. Judgment for the latter, and the former brings error. Affirmed by operation of law by an evenly divided court.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error.

Oliver & Oliver, of Savannah, for defendant in error.

PER CURIAM. Judgment of court below stands affirmed by operation of law.

(23 Ga. App. 400)

HOLLIDAY v. STATE. (No. 10147.)

(Court of Appeals of Georgia, Division No. 2. Feb. 11, 1919.)

(Syllabus by the Court.)

1. BURGLARY \S 42(1), 46(7)—"PRESUMPTION OF FACT"—UNEXPLAINED POSSESSION OF STOLEN GOODS.

The unexplained, or the unsatisfactorily explained, possession of stolen goods—the fruits of a recent burglary—raises a presumption of guilt against their possessor. This presumption, however, is one of fact, and not of law. Accordingly, while it is error for the judge, in such a case, to charge the jury, in effect, that such possession raises a presumption of law of the defendant's guilt, it is not error to instruct them merely that such possession raises "a presumption of his guilt" (citing Words and Phrases, Second Series, Presumption of Fact).

2. CRIMINAL LAW \S 1064(1) — MOTION FOR NEW TRIAL—SUFFICIENCY.

Under repeated rulings of this court and of the Supreme Court, a special ground of a motion for a new trial must be complete within itself, and will not be considered when a reference to the brief of evidence, or to some other portion of the record, is necessary to enable this court to understand the assignment of error.

3. CRIMINAL LAW \S 824(4)—ALIBI—CHARGE.

It is only where the defense of alibi is sustained, or where the evidence is close on this

issue, that the trial judge is required to charge the law of alibi, in the absence of a request so to do.

4. CRIMINAL LAW §822(1)—GROUNDS—ERRONEOUS CHARGE.

Where excerpts from the charge of the court are subject to some slight criticism, a new trial will not be granted therefor if no error appears when they are considered in the light of the entire charge.

5. BURGLARY §42(4) — CRIMINAL LAW §1160—POSSESSION OF STOLEN GOODS—PRESUMPTION OF GUILT—CONVICTION.

Upon a trial for burglary, where the evidence shows that the accused was found in recent possession of stolen goods, the fruits of the burglary, and his explanation of his possession of the goods is not satisfactory to the jury, a presumption arises that he is guilty of the offense of burglary, and unless this presumption is overcome by other evidence, a verdict of guilty is authorized and cannot be set aside by this court if no error of law appears to have been committed upon the trial.

Stephens, J., dissenting.

Error from Superior Court, Muscogee County; G. H. Howard, Judge.

Homer Holliday was convicted of burglary, and brings error. Affirmed.

D. H. Riddle, of Talladega, Ala., and Frank D. Foley and Love & Fort, all of Columbus, for plaintiff in error.

C. F. McLaughlin, Sol., Gen., of Columbus, for the State.

BROYLES, P. J. The plaintiff in error was convicted of the offense of burglary. The undisputed evidence showed that, shortly after the commission of the burglary, the stolen goods—the fruits of the burglary—were found in the defendant's possession. The defendant made an explanation of his possession of the goods. It was entirely a question for the jury whether this explanation was satisfactory to them.

[1] 1. The following excerpt from the charge of the court was excepted to:

"Where a burglary has been committed, and property which was in the house at the time of the burglary is soon thereafter, or recently thereafter, found in the possession of one who is unable to account satisfactorily for his possession (of which explanation you are the sole judges), it raises a presumption of his guilt."

We do not think the judge erred in giving this instruction, especially when, immediately after the excerpt just quoted, he charged as follows:

"All of these matters are for the jury under all the facts and circumstances of the case, considering the nature of the property, the length of time which had elapsed after the alleged burglary, the explanation offered by the defendant,

if any, for his possession, if he was recently in possession of them, or any of the articles, if you should believe the property was stolen from the house at the time, and that a burglary was committed as charged in the indictment, as previously stated to you."

We concede that some confusion has arisen in the books on this subject. This confusion seems to have grown out of the fact that in some cases it has been held error to charge that the recent possession of stolen property, unexplained, raises a presumption of law of the defendant's guilt, while in other cases it has been held that possession raises "a presumption of his guilt," and that to so charge is not error. A careless reading of these cases, without noting the distinction between a presumption of law and a presumption of fact, might lead one into doubt as to the correct rule. There is, however, as can readily be seen, no conflict between these decisions when this distinction is kept in mind. The confusion is also partly caused by the fact that some of these decisions hold that the word "inference" should be used by the trial judge, instead of the word "presumption." A presumption of fact, however, is really nothing more than an inference.

"Presumptions are either of law or of fact. The former are conclusions and inferences which the law draws from given facts. The latter are exclusively questions for the jury, to be decided by the ordinary test of human experience." Pen. Code 1910, § 1014.

"Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases." 1 Phil. Ev. 436; Black's Law Dictionary, p. 933.

"Presumptions of fact," says Prof. Greenleaf, "are in truth but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered." 1 Greenleaf on Evidence, § 44.

In deciding the case of *Insurance Co. v. Welde*, 11 Wall. 438, 20 L. Ed. 197, the Supreme Court of the United States defined a "presumption" to be:

"An inference as to the existence of a fact not actually known, arising from its usual connection with another which is known."

In *Jones on Evidence* (2d Ed.), in section 10, it is said:

"Since these inferences, sometimes called presumptions of fact, are mere permissible deductions from the evidence, it has often been suggested that they are in fact not presumptions at all, but they are constantly recognized [as such] in the decisions, although often in a confused and inaccurate manner."

"Presumptions of fact' are but inferences drawn from other facts and circumstances in a case, and should be made upon the common principles of induction." 3 Words and Phrases, Second Series, p. 1167.

In *Tucker v. State*, 57 Ga. 505, it was held as follows:

"That part of the charge of the court to the jury, to wit, 'Whenever it is established that a larceny has been committed, and the stolen goods are immediately afterwards found in the possession of a person, that fact is presumptive evidence that the person is guilty of the larceny of the character charged to have been committed,' was unobjectionable."

In *McGruder v. State*, 71 Ga. 864, the Supreme Court approved the following charge:

"If the evidence satisfies the jury that the burglary was committed as alleged, and afterwards the stolen goods were found in the house and room occupied by the defendants, this would be *presumptive evidence of their guilt*, unless explained [italics ours]; and any statement made by either of them, explanatory of the goods being there at the time they were so found, and while they were there, must be duly considered, and may relieve the suspicious appearance."

In *Davis v. State*, 76 Ga. 16, it was said in the headnote that:

"Where a burglary has been committed, and a short time thereafter some of the property which was in the house broken open before and at the time of the burglary is found in the possession of the accused, if the possession of the property is not accounted for, this affords a *presumption of guilt*." (Italics ours.)

And in the opinion in that case Mr. Justice Blandford said:

"Certain exceptions are taken to the charge of the court, and specific assignments are made thereon. But a careful examination of the charge of the court fails to show any foundation for the exceptions. The charge is correct, as we understand the law. The whole charge and the part excepted to is free from any exception. The whole of it is, as we understand it, that where a burglary has been committed, and a short time thereafter some of the property, which was in the house before and at the time of the burglary, is found in the possession of

the accused, in such a case, if the possession of the property is not accounted for, this affords a *presumption of guilt*. This has been the law time out of mind. The decisions of the English courts, from whom we derived our law, and of all the courts in this country, fully establish this principle." (Italics ours.)

In *Lundy v. State*, 71 Ga. 360, the first headnote is as follows:

"Where a burglary has been committed, and money, goods, or other property which was in the house at the time of the burglary is soon thereafter found in the possession of a person who is unable to account for his possession, it raises a presumption of his guilt, and the jury would be authorized to find a verdict of guilty."

In *August v. State*, 11 Ga. App. 798, 76 S. E. 164, the fourth headnote is as follows:

"The following instruction was abstractly correct and warranted by the evidence: 'The exclusive and unexplained possession of stolen property recently after a burglary, in the commission of which a theft was perpetrated, may raise a presumption of fact that the party in possession is the burglar, where the burglary has been established beyond a reasonable doubt; and the burden would be upon the person in whose recent possession the goods, if stolen, were found to explain such possession. It is a presumption arising out of fact, and is therefore a matter for the jury—what would be recent possession is a matter for the jury, as is the satisfactoriness of the explanation. The presumption being one of fact, before it arises the state must have established the facts from which the inference is drawn, beyond a reasonable doubt; and whilst the burden is upon the defendant, if such facts have been established beyond a reasonable doubt, to explain the possession to the jury, such explanation may be drawn from any evidence in the case which demonstrates it, or from the statement of the defendant, if such statement satisfies the jury upon that point.'"

See, also, to the same effect, 1 Greenleaf on Evidence, § 34; *Jones on Evidence* (2d Ed.) §§ 9, 10; 12 Am. & Eng. Enc. Law, 845; *Griffin v. State*, 86 Ga. 257, 12 S. E. 409; *Falvey v. State*, 85 Ga. 157, 11 S. E. 607; *Jones v. State*, 105 Ga. 649, 650, 31 S. E. 574; *Lester v. State*, 106 Ga. 372, 32 S. E. 335; *Cuthbert v. State*, 3 Ga. App. 600, 60 S. E. 322; *Bryant v. State*, 4 Ga. App. 851, 62 S. E. 540.

The holding in *Gravitt v. State*, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. Rep. 63, is not only not contrary to the present ruling, but supports it. In that case it was held that the possession of stolen property, not satisfactorily explained, does not create a presumption of law against the accused, but Mr. Justice Lewis, who wrote the opinion, clearly stated that the presumption was one of fact, and not of law. The charge of the court in that case was held to be error because the court stated, in effect, that a presumption of law that the accused was guilty was created by the recent possession of stolen goods unaccounted for. This distinction between a

presumption of law and a presumption of fact is clearly set forth by Mr. Justice Cobb in *Lewis v. State*, 120 Ga. 508, 48 S. E. 227. In that case the following charge (which is substantially the charge complained of in the instant case) was approved:

"Where a burglary has been committed, and money, goods, or other property which was in the house at the time of the burglary is soon thereafter found in the possession of a person who is unable to account for his possession, it raises a presumption of his guilt, and the jury would be authorized to find a verdict of guilty."

Judge Cobb, in that case, like Judge Lewis in the *Gravitt* Case, distinctly held, in effect, that the recent possession of stolen property, unaccounted for, raises a presumption of guilt against the possessor of such property, but that this presumption is one of fact and not of law. We think, from the authorities cited above, we have conclusively shown that the charge complained of in the instant case was not erroneous.

[2] 2. The first two special grounds of the motion for a new trial are not complete within themselves. Before this court could understand the assignments of error made therein, a reference to the brief of evidence, or to other parts of the record, would be necessary. Therefore, under the ruling stated in the second headnote, these grounds cannot be considered.

[3] 3. It is only where the defense of alibi is sustained, or where the evidence is close on this issue, that the trial judge is required to charge the law of alibi, in the absence of a request so to do. *Moody v. State*, 114 Ga. 449, 40 S. E. 242; *Smith v. State*, 6 Ga. App. 577, 65 S. E. 300; *Throckmorton v. State*, 23 Ga. App. —, 97 S. E. 664. Under the evidence in this case the court did not err in failing to so charge.

[4] 4. The instructions of the court upon the subject of "reasonable doubt," and of circumstantial evidence, when taken in connection with the entire charge, were not erroneous.

[5] 5. Under the ruling stated in the fifth headnote, and the facts of this case, the finding of the jury, that the accused was guilty of burglary as charged in the indictment, was authorized by the evidence. It was entirely a matter for the jury to determine whether the explanation given by the accused, as to how he came into possession of the stolen goods, was satisfactory to them. They determined that it was not. The presumption then arose that the accused was guilty as charged. There was no other evidence in the case which overcame this presumption, and as the verdict has been approved by the trial judge, and no error of law appears to have been committed upon the trial, this court is without jurisdiction to set aside the verdict. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). There is not a particle of evidence in this case tending in any manner to connect the defendant with the alleged burglary other than an alleged recent possession by him of some of the goods stolen unsatisfactorily accounted for. His conviction is therefore dependent upon the rule of law that upon the trial of a defendant charged with burglary, when a breaking is shown and the defendant is found in recent possession of the goods stolen, the possession unexplained to the satisfaction of the jury, the jury is authorized to infer his guilt. The judge charged the jury as follows:

"Where a burglary has been committed, and property which was in the house at the time of the burglary is soon thereafter, or recently thereafter, found in the possession of one who is unable to account satisfactorily for its possession (of which explanation you are the sole judges), it raises a presumption of his guilt."

This portion of the charge instructed the jury that it was their duty as a matter of law to convict the defendant on such evidence. The charge in this respect was erroneous and contrary to law in that such evidence did not demand a conviction, but merely authorized the jury, in its discretion, to convict. This error was not cured by the judge immediately thereafter further stating in his charge that—

"All of these matters are for the jury under all the facts and circumstances of the case, considering the nature of the property, the length of time which had elapsed after the alleged burglary, the explanation offered by the defendant, if any, for his possession, if he was in recent possession of them, or any of the articles, if you should believe the property was stolen from the house at the time, and that a burglary was committed as charged in the indictment, as previously stated to you."

Since the defendant's guilt depended entirely upon a proper application of the rule of law which the judge attempted to give here in charge, the charge in this respect should have been clear and free from any ambiguity or misconstruction. The additional qualifying language was susceptible to the construction that if the jury were not satisfied with the explanation of recent possession offered by the defendant, then the jury should find him guilty, and it would be obligatory upon them to bring in a verdict to that effect, whereas the true rule is that under such circumstances the jury would only be authorized, in its discretion, to find the defendant guilty. The law is well settled that such prima facie evidence of guilt merely authorizes and does not demand a conviction. Such evidence is not of itself necessarily proof of guilt. It creates no presumption of law against the defendant, and does not, as a matter of law, require his conviction. In the case of *Gravitt v. State*, 114 Ga. 841, 40 S. E. 1003, 88 Am. St. Rep. 63, where the court below charged the jury that where under such a state of

facts, the accused failed to account for the alleged stolen property "to the satisfaction of the jury, the law presumes that he is the guilty party," this charge was held to be error. Mr. Justice Lewis, in that case, referring to this language, said:

"This charge states too broadly the rule applicable to recent possession of stolen property, and it was error manifestly prejudicial to the accused."

This language was identical in substance and effect with that portion of the charge referred to and excepted to in the instant case.

After all, it is purely a question of a construction of the judge's charge. Do we or do we not construe the language as submitting to the jury the proposition as a presumption of law, or as a presumption of fact? From an inspection of the original record in the Gravitt Case, cited supra, the language of the charge as a whole comes nearer submitting the proposition as a presumption of fact than does the charge in the case we are now called upon to decide. As I plant my dissent upon the authority of the Gravitt Case, I quote at length from the charge in that case:

"A rule of law is that when there has been a larceny, a breaking and entering and taking away the goods of another, and some party is found to be in the recent possession of these goods soon after they were stolen, soon after the burglary is committed, or larceny was committed, then if he fails satisfactorily to account for his possession to the satisfaction of the jury, the jury has the right to presume he is the guilty party, but if he shows satisfactorily to the jury that his possession is lawful, then nothing may be presumed against him as to his guilt. Now, in weighing the subject all that the defendant said is to be considered by the jury. What did he say? Did he make different statements? Did he say who he got them from, and always say the same, or was there a difference about it? Was there any reason for telling it different? Examine it all. If it is satisfactory to your minds, if he made satisfactory explanations, then possession would not be proof of his guilt, but if it is not satisfactory, then possession would be proof of his guilt, but if it is not satisfactorily explained, then the law authorizes you to presume that he is the guilty party, because if he got them lawfully he could account for their possession, and if he did not the law presumes he is the guilty party; what I mean to say is this, if he has the goods in his possession, then he must account for that possession, and when he does, when he accounts for it to the satisfaction of the jury, then there is no presumption against him that he was the guilty party, but if he fails to account for it to the satisfaction of the jury, the law presumes he is the guilty party."

Nota bene the following expressions in the charge in that case:

"If he fails satisfactorily to account for his possession to the satisfaction of the jury, the

jury has the right to presume he is the guilty party. * * * If it is satisfactory to your minds, if he made satisfactory explanations, then possession would not be proof of his guilt, but if it is not satisfactory, then possession would be proof of his guilt, but if it is not satisfactorily explained, then the law *authorizes* [italics mine] you to presume he is the guilty party."

I am willing to stand with Mr. Justice Lewis, the great jurist who wrote the opinion in that case. I feel that my position is well fortified when I can rely upon him as authority.

This rule is easily misunderstood, and in cases of this kind, where a conviction depends entirely upon its proper application, it should be clearly stated to the jury. There should be no language in the charge from which the jury might infer that, as a matter of law, such testimony would establish guilt, or would, in the language excepted to, "raise a presumption of guilt." The judge in his charge laid down an erroneous proposition of law, and in his subsequent language failed to correct it or so far explain it as to clearly deprive it of its erroneous meaning. This was highly prejudicial to the rights of the accused, and a new trial should for this reason be granted.

(23 Ga. App. 423)

KENNEDY v. McCOOK. (No. 9728.)

(Court of Appeals of Georgia, Division No. 2
Feb. 12, 1919. On Motion for Rehearing,
Feb. 28, 1919.)

(Syllabus by the Court.)

1. NEW TRIAL ⇐68—GROUNDS—INSUFFICIENCY OF EVIDENCE.

In the record there is no evidence authorizing the defendant to have, as against the plaintiff's claim sued on, a set-off for the rents on the lands in question for the years 1916 and 1917. The jury, by their verdict, having found that the defendant was entitled to have the rents for those years set off against the plaintiff's claim, the court erred in overruling the general grounds of the plaintiff's motion for a new trial.

2. MOTION FOR NEW TRIAL.

Under the foregoing ruling, it is unnecessary to consider the special grounds of the motion for a new trial.

. On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

3. PLEDGES ⇐28—TRANSFER OF LEASE CONTRACT AS SECURITY—OBLIGATION OF PAYEE.

Where lease contract was transferred as collateral for note in suit, the fact that holder of note agreed to collect rents every year did not bind him to keep the lands rented, but his only obligation was merely to collect and account for the rents.

Error from Superior Court, Pike County; W. E. H. Searcy, Jr., Judge.

Action by J. L. Kennedy against Mrs. M. E. McCook. Judgment for defendant, motion for new trial overruled, and plaintiff brings error. Judgment reversed.

E. F. Dupree, of Zebulon, and E. C. Armistead, of Barnesville, for plaintiff in error.

Redding & Lester, of Barnesville, for defendant in error.

BROYLES, P. J. Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

On Motion for Rehearing.

BROYLES, P. J. [3] The fact that the lease contract for certain lands was transferred by Mrs. McCook to Kennedy as collateral security for the note sued on, and that he agreed to collect the rents every year, does not show that it was his duty under the law, or that he obligated himself, to keep the lands rented. The undisputed evidence was that when the lease contract was transferred there was a tenant upon the lands; that he continued there during the years 1914 and 1915, and that Kennedy collected the rents for those years and accounted for them to Mrs. McCook; that the tenant left the lands at the end of the year 1915, and that they were not rented to any one for the two following years. There was no evidence which authorized a finding that Kennedy was responsible for the tenant leaving, or that it was his duty to secure another tenant and keep the lands rented. In our view of the case, his obligation was merely to collect the rents from any tenant that might be upon the lands and to account for such rents.

Rehearing denied.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 468)

ATLANTIC COAST LINE R. CO. v. NEVES.
(No. 9149.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 20, 1919.)

(Syllabus by the Court.)

NEW TRIAL ⇐ 158—REINSTATEMENT OF MOTION—EQUITABLE GROUNDS.

The motion to reinstate the motion for a new trial was properly overruled, as it showed no legal or equitable grounds authorizing the court to set aside the judgment dismissing the motion for a new trial.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by J. E. Neves, administrator, against the Atlantic Coast Line Railroad Company. Verdict for plaintiff, motion for new trial dismissed, demurrer to motion to reinstate motion for new trial sustained, and defendant brings error. Affirmed.

Pope & Bennet, of Albany, and A. H. Gray, of Blakely, for plaintiff in error.

Glessner & Collins, of Blakely, for defendant in error.

BLOODWORTH, J. This case was before this court at the March term, 1917, on exceptions to a judgment in the city court of Blakely sustaining a demurrer to the petition, which judgment was reversed. See *Bryant v. Atlantic Coast Line R. Co.*, 19 Ga. App. 536, 91 S. E. 1047, where the substance of the petition is set forth. Upon the trial of the main case there was a verdict for the plaintiff for \$500. The defendant made a motion for new trial, which was set for hearing on June 18, 1917. On June 16, 1917, John D. Pope, a member of the firm of Pope & Bennet, division counsel for the railroad, received from the court reporter a transcript of the record of the trial of the case. When the motion for new trial was called on June 18th, there was no appearance for movant, and the motion for new trial was dismissed. On the first day of the next term of the city court a motion to reinstate the motion for new trial was filed, in which it was alleged that John D. Pope, of counsel for the railroad, had entire control for the movant of the motion for a new trial; that at the time said motion for new trial was set for a hearing his partner, Bennet, was engaged in the Supreme Court, and that the local counsel, Gray, had then no connection with the case; and alleging further that because of certain reasons, stated in the petition and which need not be repeated here, the said Pope was in great distress of mind and his mental and physical efficiency was impaired, which neither Pope nor his partner realized, and on account of which his client was entitled to a continuance of the hearing of the motion for a new trial.

"By reason of the foregoing facts, and by reason of the great distress of mind under which he was suffering, the said Pope entirely overlooked the fact that said hearing was to be had on said 18th day of June, and therefore overlooked the fact that he should make a showing before the court and ask for a continuance of said hearing until he could complete said brief of evidence."

The petition was demurred to on the grounds: (a) The city court of Blakely was without jurisdiction to set aside the judgment. (b) The motion to reinstate set forth no legal or equitable grounds authorizing the court to set aside the judgment. (c) The attorneys for the railroad were chargeable with

lack of diligence in not prosecuting said motion for new trial at the June term of court, and in not then and there pressing their grounds for a continuance of the hearing of the motion. The demurrer was sustained, and petitioner excepted.

Granting that the motion to set aside the judgment dismissing the motion for a new trial was made in time, and that the city court of Blakely had jurisdiction to entertain said motion, we think the demurrer to the motion to reinstate was properly sustained on the second ground thereof, which alleges:

"Said motion to reinstate does not set forth any grounds, legal or equitable, authorizing the court to set aside its said judgment of dismissal, and to reinstate said motion for a new trial."

The most that can be said of the allegations in the petition is that, because of the "distress of mind and impaired physical condition of said Pope," he forgot—"overlooked"—the fact that the motion for a new trial was to be heard on the 18th of June, and—"overlooked the fact that he should make a showing before the court and ask for a continuance of said hearing until he could complete said brief of evidence." (Italics ours.)

There is no suggestion that at that time Pope was either mentally or physically unable to complete the brief of evidence, and, if able to do this, was he not able to prepare his motion for continuance? On Saturday, the 16th, Pope received from the court reporter the transcript of the evidence in the case, and was not this enough to have reminded him of the hearing set for the 18th? There is no evidence that his partner, Bennet, was not at home then, and no evidence of any sudden change in the mental or physical condition of Pope between Saturday and Monday. It is true that the petition alleges:

That "said distress of mind and impaired physical condition on the part of said Pope continued throughout said day on which said hearing was set to be had," and that "by reason of the foregoing circumstances, existing on the day when said hearing was set to be had, said Pope's condition of mind had become such that he was not at himself, or in condition to attend to business and remember business engagements, though neither he nor his partner realized this fact."

But according to the petition this condition of Pope had existed for some time, the two partners had discussed the troubles of Pope, and Bennet had insisted that Pope should go on with his work and thus keep his mind on business affairs—

"so as to keep it as much as possible from being distracted by thoughts of his son's circumstances; the said Bennet having no reason to suspect that said Pope's efficiency had been impaired to any extent by his said troubles."

If Bennet, consulting with his said partner, did not discover or suspect that Pope's "efficiency had been impaired," then how could this be shown on a motion to reinstate the hearing of the motion for new trial? There is no suggestion in the record that Pope's condition was known to any other person, nor that his condition could be proved in any way. The fact that Pope "overlooked" the engagement was not enough to show that he was not in such a condition mentally or physically that he could not have looked after this case.

"Error will not entitle a plaintiff in error to the reversal of an adverse judgment, unless he also shows that he was injured by it."

There is not even an allegation in the petition that the motion for new trial was a meritorious one. This case seems to be one in which the attorney simply forgot his engagement, and we have often heard it said that "there is no law against forgetting." To reinstate this case on the showing made would be for the court to "make a law in favor of forgetting."

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(28 Ga. App. 498)

HARDISON v. GUERRY, Judge.
(No. 10349.)

(Court of Appeals of Georgia, Division No. 2.
March 1, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1092(10), 1129(1)—APPEAL—DISMISSAL OF WRIT OF ERROR—CERTIFICATION OF BILL OF EXCEPTIONS—MERITS OF ASSIGNMENT OF ERROR.

"In passing upon an application for mandamus to compel a judge to certify a bill of exceptions which is presented in proper form, this court will not look into the merits of any assignment of error therein made; but mandamus will not lie to compel the trial judge to sign and certify a bill which is so defective in form as to necessitate a dismissal of the writ of error, in case it should be certified and brought to this court." *Sistrunk v. Pendleton*, 129 Ga. 255, 58 S. E. 712 (1).

(a) Where no sufficient assignment of error is contained in a bill of exceptions, the writ of error will be dismissed. *Fidelity & Deposit Co. v. Anderson*, 102 Ga. 551, 28 S. E. 382; *Kimball v. Williams*, 108 Ga. 812, 33 S. E. 994; *Peavy v. Atkinson*, 108 Ga. 167, 33 S. E. 956; *Wheeler v. Worley*, 110 Ga. 513, 35 S. E. 639; *Collins v. Carr*, 111 Ga. 867, 36 S. E. 959; *Carter v. Jackson*, 115 Ga. 676, 42 S. E. 46; *Patterson v. Beck*, 133 Ga. 701, 66 S. E. 911; *Willingham v. Cedartown Supply Co.*, 11 Ga. App. 464, 75 S. E. 823; *Joiner v. Stovall*, 12 Ga. App. 19, 76 S. E. 753.

2. CRIMINAL LAW \Leftrightarrow 1092(10) — CERTIFICATION OF BILL OF EXCEPTIONS—MANDAMUS—CONSIDERATION OF MERITS.

"There are three exceptions to the general rule that this court will not consider the merits of the bill of exceptions upon the application for mandamus: One is where an extraordinary motion for new trial has been made. Another is where all of the points made in the bill of exceptions have been passed upon by the appellate court, or where the bill of exceptions is so defective in form as to necessitate a dismissal of the writ of error, should it be certified. And the third is in that class of cases in which the reviewing court is without jurisdiction. In the latter case, of course, a dismissal necessarily results. * * * Barring three exceptions, * * * the appellate court, upon an application for mandamus, will not itself consider the merits of the bill of exceptions, though it will decline to make the mandamus absolute if the judge in his answer presents a sufficient reason for not having certified the bill of exceptions." *Pelham Manufacturing Co. v. Scaife*, 7 Ga. App. 446, 67 S. E. 111.

3. CRIMINAL LAW \Leftrightarrow 1092(10) — CERTIFICATION OF BILL OF EXCEPTIONS—MANDAMUS—DEFECTS IN BILL.

Under these rulings and the facts of the instant case, if the bill of exceptions tendered to the judge should be certified and brought to this court, a dismissal of the writ of error would result. This court, therefore, will not by mandamus compel the judge to certify the bill of exceptions.

Stephens, J., dissenting.

Petition for mandamus by R. G. Hardison against Dupont Guerry, Judge. Mandamus absolute denied.

Robt. W. Barnes, of Macon, for plaintiff in error.

BROYLES, P. J. The petition for mandamus alleged: That on January 13, 1919, a bill of exceptions which was in due and legal form, and which was true and correct, was tendered to the trial judge; that three days later, on January 16, 1919, the judge returned to counsel for petitioner the bill of exceptions uncertified, together with the following written statement:

"Being of the opinion, after consideration, that I have neither the legal authority nor legal right to certify it, I hereby respectfully decline to do so. Dupont Guerry, J. C. C. M."

The bill of exceptions, as set forth in the petition, was as follows:

"Georgia, Bibb County. R. G. Hardison, Plaintiff in Error, v. The State of Georgia. In the Court of Appeals of Georgia, January, 1919. Error from the City Court of Macon. Accusation for Violation of the Prohibition Law, and Plea of Guilty.

"(1) Be it remembered that on the 11th day of January, 1919, the regular the December term, 1918, of the city court of Macon, before

the Honorable Dupont Guerry, judge presiding, there came on to be heard the case of the State v. R. G. Hardison, the same being an accusation charging the defendant with a violation of the prohibition laws of said state.

"(2) The defendant waived arraignment and entered a plea of guilty to the accusation, whereupon the court imposed a sentence of eight (8) months' imprisonment in the state farm, four (4) months of which he might be relieved upon the payment of a fine of \$200.00.

"(3) Judgment of the court was entered accordingly.

"(4) To this sentence and judgment of the court, the defendant excepted, and now excepts, and assigns error on the same, upon the ground that the same was contrary to law; was cruel and unusual; was in violation of article 1, paragraph 9, of the Constitution of Georgia, prohibiting cruel and unusual punishment; and upon the ground that the penalty attached to and provided in said law is contrary to law, in that the same is cruel and unusual, and in violation of article 1, paragraph 9, of the Constitution of Georgia, prohibiting cruel and unusual punishments.

"(5) Plaintiff in error specifies as material to a clear understanding of the errors complained of the following portions of the record in said case, to wit: (1) Affidavit and accusation. (2) Plea of guilty. (3) Sentence and judgment of the court.

"And now comes the plaintiff in error, within the period allowed by law, and presents this his bill of exceptions, and prays that the same may be signed and certified, in order that the errors complained of may be considered and corrected.

"This 13th day of January, 1919."

The answer of the trial judge to the mandamus nisi was as follows:

"To the Honorable Court of Appeals of the State of Georgia:

"In answer to the order to show cause before the honorable court why I should not be required to sign and certify the bill of exceptions in the above-stated case, I most respectfully submit the following statement of facts and reasons, which I then believed and now believe legal and sufficient:

"The bill of exceptions was true in its recitations of fact, except the usual recitation in paragraph 4 of the bill of exceptions, that 'the defendant excepted'; the first and only exceptions being those contained in the bill of exceptions. The statement in paragraph 4 of the petition, that 'to this sentence and judgment of the court, your petitioner did then and there except and object to upon certain named grounds and reasons, set forth in his bill of exceptions to said sentence and judgment, which was in due and legal form tendered to said court, the Honorable Dupont Guerry,' is denied.

"The plea of guilty was entered on January 11th to an accusation containing two counts for violations of the prohibition law, one for 'selling' and the other for 'possession,' and the court thereupon asked Mr. Barnes, counsel for defendant, if he desired to say anything in reference to the sentence, and he responded in an appeal for clemency, and was joined therein

by the defendant and two others, who said the defendant was a man of good character. The court thereupon sentenced the defendant as set forth in the bill of exceptions, and no question of constitutionality or other question was raised or mentioned before the sentence was pronounced or upon its being pronounced. An hour or more after that, and on the same day, January 11th, while the court was in recess, 'the defendant, being dissatisfied with the verdict (when there was no verdict) and the judgment of the court,' tendered a motion for a new trial (when there had been no trial), on the sole ground, 'Because the judgment and sentence of the court is cruel and unusual punishment and in violation of article 1, par. 9, of the Constitution of Georgia, in that the sentence and judgment of the court is cruel and unusual, and that the penalty attached to and provided in said law, which petitioner is charged with violating, is cruel and unusual.' A full copy of said motion is as follows: 'And now comes the defendant in the above-stated case, through his attorney of record, and, being dissatisfied with the verdict and judgment of the court, moves for a new trial, on the following grounds, to wit: (1) Because the judgment and sentence of the court is a cruel and unusual punishment, and in violation of article 1, par. 9, of the Constitution of Georgia, in that the said sentence and judgment of the court is cruel and unusual, and that the penalty attached to and provided in said law, which petitioner is charged with violating, is cruel and unusual. Wherefore the defendant asks that these, his grounds for a motion for new trial, be inquired into, and prays a new trial may be granted to him.' The court refused to recognize the same, on the ground that a motion for a new trial could not be made in a case in which the defendant had pleaded guilty, and because the ground alleged therein was not a ground for a new trial.

"On January 13th the bill of exceptions was tendered as alleged, and, after such consideration as was practicable (the court being at the time engaged in court matters), I refused to sign and certify the same on February [January?] 16th, for the reason then given in writing, as follows: 'Being of the opinion, after consideration, that I have neither the legal authority nor legal right to certify it, I hereby respectfully decline to do so.' Upon such refusal the court on the same day returned the bill to Mr. Barnes, notifying him of such refusal. Eight days after this, on 24th of January, Mr. C. A. Glawson, attorney for the defendant, presented an application for a modification of the sentence, and the court, by written order, refused the same, for the reason that it regarded the sentence a moderate one, and because the defendant had on the 21st of January been taken to the state farm, where he was serving his sentence, and the court had no power to modify the same. Since then the defendant has filed an application for executive clemency with the prison commission, and I have been requested by the same to say whether there was any reason why the same should or should not be granted, and on the 3d inst. I responded, giving reasons in the negative. So far as I am informed or believe, that application is still pending in the executive department of the state. For one offense under each count the defendant was

punishable under the law by sentence to the state farm or the chain gang 12 months, by imprisonment in jail 6 months, and by fine \$1,000, so that for the two offenses he was punishable by 24 months to the state farm or the chain gang, 12 months in jail, and by fine of \$2,000. He was sentenced to 8 months, with the privilege of paying a fine of \$200 and being thereupon relieved of 4 months. Should he pay the fine, it would be only one-tenth of the full amount in which he was finable for the two offenses, and the remaining 4 months would be only one-sixth of the time he could have been sentenced, and he would suffer no jail imprisonment. If he should not pay the \$200 fine, the 8 months' sentence to the state farm would be only one-third of the period for which he could have been sentenced for the two offenses, and he would not pay any fine or suffer any jail imprisonment. When the difference in hardship and disgrace between state farm sentence and a chain gang sentence is considered, it may be safely said that his sentence is not more than one-tenth of the full measure of punishment provided by law.

"Of course, any defendant in any criminal proceeding in the city court of Macon may except to any sentence pronounced by that court; but, as I understand, he must except in accordance with law, and his exceptions must be to some decision made by the court below, and upon some question that the reviewing court has jurisdiction to review. With neither of these requirements did the bill of exceptions comply. The first assignment is that 'the sentence is contrary to law,' and, in view of the contents of the bill of exceptions, this is of itself no assignment at all, because there is no distinct specification of a point on which error is assigned, and no error is plainly and specifically set forth. It is not a case in which a general exception to a final judgment is sufficient, because error is assigned on previous controlling rulings, or on any rulings at all. General and vague exceptions make no issue of law that can be passed on by the reviewing court. Neither in this exception, nor in any other exception in the bill, is there any allegation that the court erred in any decision or ruling, or that the court made any decision or ruling.

"The second assignment is that the sentence was cruel and unusual. The sentence of the court shows that the punishment was neither cruel nor unusual, but quite to the contrary, and there is no specification as to how or why or wherein it is cruel and unusual. Giving the phrase used its constitutional signification, the very mild punishment imposed is clearly excluded therefrom. If, however, these views are incorrect, how can the honorable Court of Appeals pass upon whether the sentence is cruel and unusual or not? Upon what data could it act in declaring that the same is cruel and unusual? If the honorable court should decide that the punishment is cruel and unusual, how could the court decide to what extent the same is cruel and unusual? What could it do or direct to be done? What jurisdiction would it have to do anything, or direct anything to be done?

"The third and fourth assignments are as follows: The sentence was in violation of article 1, par. 9, of the Constitution of Georgia, prohibiting cruel and unusual punishments, and

the penalty attached to and provided in said law is contrary to law, in that the same is cruel and unusual, and in violation of article 1, par. 9, of the Constitution of Georgia, prohibiting cruel and unusual punishments. These two assignments have the infirmities of their two predecessors, and other infirmities. The Supreme Court of Georgia holds that, if the question of constitutionality is not made in the lower court, it will not be passed upon by the appellate court; also that, if the question of constitutionality of a statute is not presented in the lower court, it will not be considered by the Supreme Court. This honorable court has held that it will not certify a constitutional question to the Supreme Court, unless raised in a lower court. As has already been stated, no constitutional question was ever mentioned in the city court before or upon sentence. Before pleading guilty the defendant had opportunity to raise such question. If he could have raised it after plea, and before or upon sentence when orally pronounced, or before it was reduced to writing and signed, he did neither. Afterwards, during the recess, he sought to raise such question by a motion for new trial, and the court refused to recognize the same as before stated, and the defendant 2 days afterwards tendered his bill of exceptions, in which he makes no exception to such refusal. Assuming that the exceptions in the bill of exceptions would be valid in a case in which they could be legally taken, they are legally impossible in the instant case, because there is nothing to which the defendant can legally except in a bill of exceptions. It may be said that the city court of Macon, in sentencing the defendant, decided by implication that the law under which the sentence was imposed was constitutional; but the defendant makes no assignment of error on such decision. If such decision by implication in a criminal case can be excepted to, and the judge of the court below must certify the bill of exceptions and thereupon grant a supersedeas, the end of litigation in criminal cases would certainly be made more remote. The rule would apply to sentences in all criminal cases, from murder down to the most trivial misdemeanor, and upon verdicts, as well as upon pleas of guilty. A fair and reasonable presumption is that the defendant is seeking a reduction of the punishment imposed on account of its severity, but this court and the Supreme Court have both held that they have no jurisdiction to act on such a subject-matter by review. Such a question, it is manifest, appertains to the executive department, under the Constitution.

"I assume the case will turn on the bill of exceptions I refused to certify, and not on allegations in the application which are denied. My view was that I had no authority to sign the bill of exceptions, because it was not a bill of exceptions, because it contained no exceptions, and the recitations therein showed that there was no decision or ruling excepted to or that could be excepted to; and, separating (perhaps illogically) the question into two questions, that of authority and that of right, I believed I had no right to certify the bill of exceptions presented and cause it to be transmitted to the honorable court. The judge of the lower court cannot exercise any discretion, either in certifying a bill of exceptions or in refusing to do so, and under my conviction as to the law it was

my duty to the honorable court as well as otherwise, to refuse.

"Most respectfully, Dupont Guerry,
"Judge of the City Court of Macon."

[1-3] We think the answer of our learned brother of the trial bench, even when shorn of those paragraphs which may bear upon the merits of the assignments of error in the bill of exceptions, gives several sufficient reasons (and one is enough) why he should not be required to certify the bill of exceptions which was tendered him.

When properly construed, the bill of exceptions contains but a single assignment of error, in effect as follows: The judgment and sentence of the court, and the penalty attached to and provided in the prohibition law of the state, are contrary to law, in that the same are in violation of article 1, § 1, par. 9, of the Constitution of Georgia, prohibiting cruel and unusual punishments. This exception attempts to raise a constitutional question. If the question were raised, this court would have no jurisdiction to entertain the bill of exceptions, but would transfer it to the Supreme Court. It is obvious, however, that no constitutional question is raised, and therefore, there being no other assignment of error, the bill of exceptions presents no question for determination by this court, and, if it were certified and brought up, the writ of error would necessarily be dismissed. This ruling is not in conflict with the decision in *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917, and the other numerous decisions of the Supreme Court and of this court, which hold that in passing upon a petition for mandamus the reviewing court will not consider the merits of the questions presented by the bill of exceptions. As was said by Mr. Justice Candler in *Willis v. Felton*, 119 Ga. 634, 46 S. E. 857:

"This case is, of course, clearly distinguishable from those where this court has held that it will, without inquiring into the merits of the case, issue a mandamus absolute to require a trial judge to certify the truth of a bill of exceptions complaining of the *overruling of a motion for a new trial or of any ruling which necessarily controlled the verdict of the jury*. It belongs rather to that class of cases where the merits of the questions sought to be reviewed have already been determined, and a further consideration of them would be futile." (*Italics ours.*)

Furthermore, we do not think that any of those decisions ever conceived of a bill of exceptions so wholly without even the shadow of a meritorious assignment of error as the one now under consideration. As was said by Mr. Justice Cobb in *Rawlins v. Mitchell*, 127 Ga. 24, 55 S. E. 958, in referring to the decision in *Taylor v. Reese*, *supra*:

"While in the case just cited some very broad language is used by Mr. Presiding Justice Lumpkin in the opinion, the case that he was then

dealing with must be kept in mind, and it was a case where the first bill of exceptions *after a trial and verdict* was tendered to the judge. It is worthy of remark, in passing, that it afterwards developed that the bill of exceptions presented a *meritorious* case, the judgment being reversed when the case was finally passed upon by this court. See *Taylor v. State*, 108 Ga. 384 [34 S. E. 2]. * * * While no party will be deprived of a hearing on the merits of his case, no matter what may be its character, whether an extraordinary motion for a new trial, motion to set aside a judgment, or other proceeding after verdict, the judge of the superior court will not be compelled to certify a bill of exceptions in such proceeding, unless it is made to appear to this court that the applicant has been denied some right guaranteed to him by law. * * * But the case will not be prolonged by requiring the bill of exceptions to be certified, when it is apparent from the averments of the petition for mandamus and the bill of exceptions that an affirmance of the judgment complained of would in any event be the inevitable result. * * * The ruling now made is in line with the view of the majority of the court in *Willis v. Felton*, 119 Ga. 634 [46 S. E. 857]. The writer dissented in that case on the idea that the case of *Taylor v. Reese*, supra, was controlling; but upon further reflection and investigation he is of the opinion that that case did not go to the extent then contended for, and he is therefore prepared to concur in the view above set forth [italics ours]."

In the same case (*Rawlins v. Mitchell*) in a concurring opinion, Justices Evans, Lumpkin, and Atkinson said:

"We concur in the ruling in this case, and the result reached. We think, however, that, while generally a first bill of exceptions which is true and duly prepared and presented in accordance with law, and which assigns error on a final judgment, should be signed, yet it is not an arbitrary and invariable rule that this court will by mandamus compel the signing even of a first bill of exceptions, wholly regardless of what it contains."

It has often been said by law-writers, and quoted approvingly in numerous decisions of both of the reviewing courts of this state, that "the law does not require the doing of a vain thing." The bill of exceptions in the present case is upon its face so absolutely and utterly devoid of any merit whatsoever that to require it to be certified and brought to this court would be merely a waste of time and "an idle and useless ceremony."

Mandamus absolute denied.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). "Either party in any civil cause, and the defendant in any criminal proceeding, * * * may except to any *sentence*, judgment, or decision. * * * Such bill of exceptions shall specify plainly the decision complained of, and the alleged error. * * *" [Italics mine.] Civ. Code. § 6139.

If the bill of exceptions be true, and contain a valid assignment of error presenting a question within the jurisdiction of this court, and does not fall within the exceptions mentioned in *Pelham Mfg. Co. v. Scaife*, cited and referred to in headnote 2, and if it be the first bill of exceptions presented to the trial judge after the rendition of the judgment or sentence complained of, the trial judge should by mandamus absolute be ordered to certify to the bill of exceptions, in order that the merits of the questions presented in the valid assignment of error may be determined by this court in the manner regularly provided by law.

The bill of exceptions before us assigns error upon the sentence upon the ground that it "was contrary to law, was cruel and unusual, and was in violation of article 1, § 1, par. 9, of the Constitution of Georgia, prohibiting cruel and unusual punishment." Whatever may be the merits of the question here raised, the assignment of error is good and presents a question for determination. It is well settled that this court will entertain a direct bill of exceptions to a final judgment, even though no objection was made to its rendition in the court below. *Epping v. Columbus*, 117 Ga. 264, 43 S. E. 803 (10); *Kelly v. Strouse*, 116 Ga. 874, 43 S. E. 280 (8c); *Wyly v. Burnett*, 43 Ga. 438 (2).

The constitutional amendment of 1916 fixing the jurisdiction of this court provides that the Court of Appeals shall have certain jurisdiction, except in "cases that involve the construction of the Constitution of the state of Georgia or of the United States, or treaties between the United States and foreign governments; [and] cases in which the constitutionality of any law of the state of Georgia or of the United States is drawn in question." So far as this assignment of error is concerned, the applicant does not seek to raise any question as to the constitutionality of any law of the state of Georgia or of the United States, nor does he raise a question that involves the construction of the Constitution of this state in the sense in which the expression "construction of the Constitution" is here used. Under the constitutional amendment of 1906 creating the Court of Appeals, which was in this respect substantially the same as the above-quoted language from the amendment of 1916 now fixing the jurisdiction of this court, this provision was construed by this court in the case of *Fews v. State*, 1 Ga. App. 122, 58 S. E. 64, where the following language was used by Judge Powell:

"The constitutional amendment creating this court provides that 'where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the

question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court, and thereupon a transcript of the record shall be transmitted to the Supreme Court, which, after having afforded to the parties an opportunity to be heard thereon, shall instruct the Court of Appeals on the question so certified, and the Court of Appeals shall be bound by the instruction so given.' Acts 1906, p. 26. It will be seen from the above that, since the question presented in this case does not involve the constitutionality of an act of the General Assembly, it must appear that it raises a question as to the construction of a provision of the Constitution, before this court is required to certify it to the Supreme Court. A case that involves merely the applicability of a concededly unambiguous clause of the Constitution to a given state of facts raises no question of construction. Likewise, where a clause in the Constitution has been construed by the Supreme Court as having a certain meaning and intentment, and such fixed judicial construction is unchallenged, there is still no question raised as to the construction of a clause of the Constitution. The excerpt from the constitutional amendment creating this court, quoted above, is also to be construed in pari materia with another provision in the same law, that 'the decisions of the Supreme Court shall bind the Court of Appeals as precedents.' Therefore, if the identical question of construction has been before the Supreme Court, and that court has judicially given a construction to the clause in question, it is unnecessary to certify and to continue to certify such a question to the Supreme Court every time a party may seek to raise it."

See *Cox v. State*, 19 Ga. App. 289, 91 S. E. 422; *Atkins v. State*, 7 Ga. App. 202, 66 S. E. 479; *Tilton v. State*, 5 Ga. App. 60, 62 S. E. 651.

The section of the Constitution of this state, which the applicant in his assignment of error refers to, has been construed by the Supreme Court of Georgia as being a limitation upon legislative authority. See *Whitten v. State*, 47 Ga. 301; *Plain v. State*, 60 Ga. 284; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; *Allen v. Jennings*, 134 Ga. 338, 67 S. E. 883. This clause of the Constitution having "been construed by the Supreme Court as having a certain meaning and intentment, and such fixed judicial construction is unchallenged, [and as] there is still no question raised as to the construction of a clause of the Constitution," a question is presented in the bill of exceptions for determination by this court. That this court would be compelled, upon an inquiry into the merits of the question presented by this assignment of error, to decide against the applicant's contention, does not affect his right, under the repeated rulings of the Supreme Court and of this court, to have his bill of exceptions certified and the case brought regularly to this court, where the question can be decided upon the bill of exceptions after a hearing, rather than upon an appli-

cation for mandamus without an opportunity to be heard.

The cases of *Willis v. Felton*, 119 Ga. 634, 46 S. E. 857, and *Rawlins v. Mitchell*, 127 Ga. 24, 55 S. E. 958, relied upon in the majority opinion, relate to a bill of exceptions presented to the trial judge after the case had already been once reviewed in the appellate court upon a former bill of exceptions. Such cases have always been regarded as exceptions to the general rule requiring a mandamus to compel the trial judge to certify to a first bill of exceptions, when it speaks the truth and contains a valid assignment of error. The question seems to me to be settled by *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917, where it was held that upon a presentation to the trial judge of a first bill of exceptions, which was true and contained a valid assignment of error, the court, without inquiring into the merits of the question presented by the bill of exceptions, would by mandamus absolute compel the trial judge to certify the same. This case has never been overruled. It was commented on by the Supreme Court in the opinion rendered by Mr. Justice Cobb in *Rawlins v. Mitchell*, supra. Justice Cobb there said:

"When a case has been tried in the superior court and a verdict rendered therein, the losing party is entitled to make a motion for a new trial, and to bring to this court for review the decision of the judge overruling the motion. * * * When a bill of exceptions, in such cases, is tendered to the judge, and the averments therein are true, it is the duty of the judge to certify the same, in order that the case may be brought to this court, according to the usual practice governing such matters. When in such a case the judge refuses to certify the bill of exceptions, and an application for mandamus is made to this court to compel him to certify the same, the only question that will be determined on such application is whether the bill of exceptions is in due form and it is shown by the petition for mandamus that the averments therein are true. The merits of the assignments of error therein will not be dealt with. In such cases it is immaterial whether the assignments of error are meritorious. The case must reach the Supreme Court in the ordinary way. * * * It will be seen that there are two classes of cases relating to the duty and authority of this court upon an application for mandamus to compel the judge to certify to a bill of exceptions. If it is the first bill of exceptions after verdict, the merits of the case will not be considered upon the application for mandamus. * * * The case now under consideration is not a case of the first bill of exceptions after verdict. * * * But it is to a ruling relating to a motion to set aside a judgment made after the term at which the judgment was rendered, but within three years from the date of the judgment. Shall a case of this character be classed with those which are embraced in the rule in *Taylor v. Reese*, supra, or shall it be classed with those embraced in the rule laid down in *Malone v. Hopkins*, supra [49 Ga. 221], and the numerous cases following it? The reason at the foundation of the latter class of cases

is undoubtedly that there must be a termination of a criminal case; and while no party will be deprived of a hearing on the merits of his case, no matter what may be its character, whether an extraordinary motion for new trial, motion to set aside judgment, or other proceeding after verdict, the judge of the superior court will not be compelled to certify a bill of exceptions in such proceeding, unless it is made to appear to this court that the applicant has been denied some right guaranteed to him by law."

The case of *Malone v. Hopkins*, 49 Ga. 221, was a case where the trial judge refused to certify to a bill of exceptions complaining of a ruling upon an extraordinary motion for new trial. When brought to the Supreme Court upon application for mandamus, a mandamus was refused. In the case of *Rawlins v. Mitchell*, supra, just quoted from, three of the Justices, while concurring, stated obiter that in their opinion:

"It is not an arbitrary and invariable rule that this court will by mandamus compel the signing even of a first bill of exceptions."

Be that as it may, the doctrine of *Taylor v. Reese*, as above stated, has not been overruled. In my opinion the doctrine there laid down controls the case now before us.

Whether or not there appears to be any merit in the questions raised in the bill of exceptions exhibited to us in this case, I do not think that we should close the door of this court in the face of the applicant, and deny to him the privilege of at least one hearing on the merits of the questions presented in his bill of exceptions, after a proper certification thereof, and upon its being regularly submitted to this court. The doors of courts are supposed to be open, not barred.

Even though, under the law as at present announced, the contention of the applicant may not be meritorious, he unquestionably has the right to a hearing, wherein he can seek to have overruled the decisions which confront him. The latter can be accomplished only upon a review on a bill of exceptions regularly bringing the case up. It cannot be done on an application for a mandamus to compel the signing of the bill of exceptions.

While it would be a great relief to this court, could we refuse to grant a mandamus absolute in any case where the questions raised in the bill of exceptions were palpably without merit, yet under the liberal practice obtaining in this state, allowing an appeal to this court as a matter of right to every litigant cast in the court below, it would seem that we should not refuse, except in extraordinary cases, to allow a losing party, upon his first complaint of a decision of the court below, the right to regularly come to this court and have his case here once reviewed. Such relief should be granted by legislation, rather than by a re-

fusal on our part to issue a mandamus for the purpose of having certified a bill of exceptions which presents no meritorious question for our review.

For the above reasons I feel constrained to hold that a mandamus absolute should be granted, and therefore must dissent from the judgment denying it.

(23 Ga. App. 463)

MCCORKEL v. FIRST NAT. BANK OF STATESBORO et al.

FIRST NAT. BANK OF STATESBORO et al. v. MCCORKEL.

(Nos. 9817, 9821.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919. Rehearing Denied
Feb. 27, 1919.)

(Syllabus by the Court.)

1. CHARGE OF COURT—TRIAL—INSTRUCTION—REQUEST.

None of the excerpts from the charge, when considered in the light of the evidence and the entire charge, are erroneous for any of the reasons assigned.

2. NEW TRIAL ~~6~~40(4)—GROUNDS—REFUSAL OF INSTRUCTION—REQUEST.

The ground of the motion for a new trial, which excepts to the failure of the court to give certain specific instructions to the jury, is without merit. The charge given covered the particular issue, and, if more specific instructions were desired thereon, a proper and timely written request therefor should have been made.

3. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

Error from City Court of Statesboro; Remer Proctor, Judge.

Action between A. C. McCorkel and the First National Bank of Statesboro and others. From the judgment, the former excepts and brings error, and the latter takes a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill of exceptions dismissed.

Johnston & Cone, of Statesboro, for plaintiff in error.

Brannen & Booth, Anderson & Jones, Deal & Renfro, and Hunter & Jones, all of Statesboro, for defendants in error.

BLOODWORTH, J. Judgment affirmed on the main bill of exceptions. Cross-bill dismissed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 421)

METROPOLITAN LIFE INS. CO. v. THOMPSON. (No. 9710.)(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919.)*(Syllabus by the Court.)***1. WITNESSES** \Leftrightarrow 148—**COMPETENCY—TRANS-ACTION WITH DECEDENT.**

Plaintiff's suit not having been instituted by an indorsee, assignee, transferee, or the personal representative, of a deceased person, it was error to exclude the testimony of a witness for the defendant upon the ground that his testimony purported to be as to transactions or communications with a deceased person. *Cody v. First National Bank*, 108 Ga. 789, 30 S. E. 281 (3). It was also error to exclude this testimony on the other grounds interposed.

2. EXCLUSION OF EVIDENCE—DIRECTED VERDICT.

The testimony offered by the defendant was relevant to the issue, and the court erred in excluding it and directing a verdict for the plaintiff.

3. LAW OF CASE.

The law of this case was settled by this court when the case was here before. *Metropolitan Life Ins. Co. v. Thompson*, 20 Ga. App. 706, 93 S. E. 299.

Error from City Court of Waycross; J. L. Crawley, Judge.

Action by Mrs. H. M. Thompson against the Metropolitan Life Insurance Company. Judgment for plaintiff upon a directed verdict, and defendant brings error. Reversed.

See, also, 20 Ga. App. 706, 93 S. E. 299.

Parks & Reed, of Waycross, for plaintiff in error.

Parker & Parker, of Waycross, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 453)

MEANS v. AMERICAN BONDING CO. OF BALTIMORE. (No. 9738.)(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)*(Syllabus by the Court.)***1. GUARDIAN AND WARD** \Leftrightarrow 177—**BOND—SURETY'S PETITION FOR DISCHARGE—SUFFICIENCY.**

The court did not err in overruling the demurrer, or in failing to instruct the jury as requested by counsel for the defendant, or in thereafter directing a verdict for the plaintiff.

*(Additional Syllabus by Editorial Staff.)***2. GUARDIAN AND WARD** \Leftrightarrow 177—**BOND—DISCHARGE OF SURETY—"ANY MISCONDUCT OF HIS PRINCIPAL IN THE DISCHARGE OF HIS TRUST"—"FOR ANY OTHER REASON TO SHOW HIS DESIRE TO BE RELIEVED."**

Under Civ. Code 1910, § 3052, permitting surety on guardian's bond to be discharged on complaint of "any misconduct of his principal in the discharge of his trust," or "for any other reason show his desire to be relieved," former term exhausts all mismanagement of estate or nonperformance of duties, and following term relates to some other ground of relief, not ejusdem generis.

Error from Superior Court, Houston County; E. D. Graham, Judge.

Petition by the American Bonding Company of Baltimore for its discharge from liability on the bond of L. M. Means, guardian, opposed by the guardian. Guardian's demurrer to petition overruled, pending case on appeal from court of ordinary to superior court. From a directed verdict for plaintiff, defendant excepts and brings error. Affirmed.

The American Bonding Company presented a petition in the court of ordinary of Houston county, alleging:

"That heretofore, to wit, on the 9th day of November, 1912, it became surety upon a bond in the penal sum of ten thousand (\$10,000) dollars, given by Lilla Mae Means, as guardian of the estate of Sallie Mae Means, a minor, and conditioned as required by law for the faithful performance of her duties as guardian. And whereas, your said petitioner desires to be released from further liability by reason of having executed the above-mentioned bond, as it is advised that the said guardian has personally borrowed the funds of the estate, and although the said guardian has offered to secure said loan by executing a real estate mortgage, your said petitioner does not believe this is a proper investment for trust funds."

The petition was amended as follows:

"That said Mrs. Lilla Mae Means used her ward's money in paying the purchase price of certain lands, the title to which she took in her own name, and not in the name of her said ward, and that said Lilla Mae Means appropriated to her own use the funds of her said ward."

To the petition a demurrer was filed as follows:

"Because said petition does not allege any misconduct of respondent as guardian in the discharge of her duties, nor set forth any other reason which in law entitles petitioner to be relieved as surety on respondent's bond as guardian. Because it is not alleged that respondent has mismanaged or wasted the estate of her said ward, nor is it alleged that respondent is not amply solvent, nor is it alleged that the estate of said ward is in jeopardy or at all liable to be

wasted, depreciated, or diminished by any act or conduct on the part of respondent."

While the case was pending in the superior court on appeal, the judge presiding overruled the demurrer to the petition.

The answer of defendant contained the following:

"Respondent admits that she has personally borrowed the funds of the estate of her said ward, and has secured the payment of said loan by executing to herself as guardian a promissory note, secured by a mortgage on real estate situated in said county, of the market value sufficient to amply secure said loan, and she says that under all the circumstances said investment is safe and to the best interest of her said ward. For further answer respondent says that the estate of her said ward was in cash money, and by depositing the same in a savings bank, or making a time deposit thereof in a bank on a certificate of deposit, she was unable to earn for her said ward more than 4 per cent. per annum, and that very little, if any, more than such per cent. could be obtained for said money when invested in bonds specified in the Code of Georgia for investment of trust funds. That respondent is a widow, and her said ward is her only child and sole heir at law. Respondent owns in her own right 698 acres of farm lands in said Houston county, Ga., of the fair market value of fifteen or twenty thousand dollars. She likewise owns two houses and lots in Elko, said county, of the value of \$3,000, and a storehouse and lot in Elko, of the value of \$500, and six town lots in the town of Elko, of the value of \$150. That respondent owns personal property of greater value than all of her debts and liabilities, except her debt and liability to her said ward. That there was a balance due of \$5,000 on the purchase price of her farm lands, and it was greatly to her interest and to the interest of her ward, as her sole heir at law, that she keep and hold said farm lands, which have greatly increased in value since she purchased them, and which lands will continue to increase in value in respondent's judgment and belief. Respondent deemed it to the best interest of her said ward, considering the estate of the ward only, and also considering the interest of her said ward as respondent's sole heir at law, to use her ward's money in payment of the balance of the purchase price of said farm lands, and she did use the same for said purpose, and thereby became indebted and liable to her said ward for said money, for the use of which respondent has paid to said ward interest at the rate of 7 per cent. per annum, thereby greatly increasing the income of her said ward and preserving an estate in realty of large value for the benefit of said ward as respondent's sole heir at law. Although respondent is amply solvent, owning realty of the value of at least twenty thousand dollars, respondent as an individual has executed to herself as guardian of her said ward a mortgage on a lot of land containing two hundred seven and one-tenth (207.1) acres, being part of the lands in said Houston county, to secure the estate of her said ward; said lands so mortgaged being of greater value than the estate of her said ward. Save and except the mortgage to secure the estate of her said ward, as aforesaid, respondent's individual estate in the lands and tenements aforesaid is absolutely

free and unincumbered. Respondent further says that she has not been guilty of any misconduct in the discharge of her duties as guardian; that she has not wasted, nor mismanaged the estate of her ward; has kept and is now keeping and will keep the estate of her said ward safely and account for the same according to law and as in duty bound; and that there is no lawful reason authorizing her surety to desire to be relieved, or authorizing her surety to be relieved, as surety on her bond as guardian."

The bill of exceptions shows that upon the trial of the case—

"the plaintiff put in evidence the defendant's answer to said petition, which said answer is a part of the record in said case, and then and there admitted in *judicio* in open court the truth of all of the facts set forth in the defendant's said answer, and waived proof of the facts alleged by the defendant in her said answer, and said case was submitted to the court and jury on the pleadings and the admission in *judicio* aforesaid. Thereupon the plaintiff moved the court to direct a verdict in its behalf, and the defendant submitted to the court in writing certain requests to charge the jury as hereinafter set out."

The trial judge refused to submit the case, to the jury and give in charge the requests to charge as made by defendant, and directed a verdict for the plaintiff, and defendant excepted.

John P. Ross, of Macon, and M. Kunz, of Perry, for plaintiff in error.

Hardeman, Jones, Park & Johnston and R. Curd, all of Macon, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [1] The court neither erred in overruling the demurrer, nor in failing to submit the case to the jury and give instructions to them requested by counsel for defendant, nor in directing a verdict for the plaintiff. Section 3052 of the Civil Code (1910) is in part as follows:

"The surety of any guardian on his bond, or, if dead, his representative, may at any time make complaint to the ordinary of any misconduct of his principal in the discharge of his trust, or for any other reason show his desire to be relieved as surety; thereupon the ordinary shall cite the guardian to appear at a regular term of the court, and show cause why such surety shall not be discharged; and upon hearing the parties and their evidence, the ordinary may, at his discretion, pass an order discharging such surety from all future liability, and requiring such guardian to give new and sufficient security or be discharged from his trust; such new sureties shall be liable for past as well as future waste or misconduct of the guardian. And such discharged surety shall be relieved only from the time the new security shall be given."

[2] Under the above statute, it will be seen that a surety on a guardian's bond can obtain relief in two distinct contingencies: First, in case of misconduct of the guardian in the discharge of his trust; second, when

for any other reason the surety desires to be relieved. In *National Surety Co. v. Morris*, 111 Ga. 307, 36 S. E. 690, presiding Justice Samuel Lumpkin, said:

"The words, 'any misconduct of his principal in the discharge of his trust,' are obviously exhaustive of all acts, whether of commission or omission, which pertain to the guardian's mismanagement of the estate or the nonperformance of any of the duties devolving upon him in his office. It follows that the words, 'any other reason,' which the surety may allege as constituting the basis of 'his desire to be relieved' from the bond, must relate to some ground or grounds of relief not ejusdem generis with those which arise from the guardian's official misconduct. Want of personal integrity, lack of business capacity, extravagant or reckless living, indulgence in vicious or immoral habits, criminality, and scores of other things which might be suggested, would certainly afford good reasons for 'a desire to be relieved as surety.'"

Granting that the estate of her ward had not suffered by her conduct in its management, still we think her conduct as shown by the record was embraced in the "scores of other things" which Presiding Justice Lumpkin says "would certainly afford good reasons for a desire to be relieved as surety." In *Rogers v. Dickey*, Guardian, 117 Ga. 819, 45 S. E. 71, the third headnote is as follows:

"Even for the benefit of the beneficiaries, a fiduciary cannot hazard the trust fund in speculation, business, or any form of investment not authorized by the deed of trust, the statute, or an order of a court of competent jurisdiction."

See, also, *Venable v. Howard*, 68 Ga. 167; *Crawford v. Tribble*, 69 Ga. 519.

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 464)

HALL v. HILLSIDE COTTON MILLS et al.
(No. 9822.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(Syllabus by the Court.)

NEGLIGENCE §111(3)—CAUSE OF INJURY—
PETITION—DISMISSAL.

The plaintiff's petition, failing to show that the negligence of the defendants, as charged therein, was the cause of the injury sued for, set forth no cause of action, and was properly dismissed on demurrer.

Error from City Court of La Grange; E. T. Moon, Judge.

Action by W. G. Hall against the Hillside Cotton Mills and others. From judgment dismissing the action on demurrer to the petition, plaintiff brings error. Affirmed.

E. A. Jones, of La Grange, for plaintiff in error.

Hatton Lovejoy and A. H. Thompson, both of La Grange, and Frank U. Garrard and A. S. Bradley, both of Columbus, for defendants in error.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 480)

CORLEY v. STATE. (No. 9882.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 26, 1919.)

1. INTOXICATING LIQUORS §173—OFFENSES
—KEEPING LIQUOR FOR SALE.

Under the present prohibition laws of this state there is no independent crime of keeping for sale intoxicating liquors, as separate and distinct from the crime of having, controlling, and possessing such liquors.

2. CRIMINAL LAW §395—EVIDENCE OBTAINED BY UNLAWFUL SEIZURE—ADMISSIBILITY.

"Articles taken from the person or premises of the accused, tending to establish his guilt of the offense of which he is charged, are admissible in evidence against him, notwithstanding the articles were discovered by an unlawful search and seizure."

Error from Superior Court, Crawford County; H. A. Mathews, Judge.

C. E. Corley was convicted of an offense under the prohibitory law, and brings error. Affirmed with directions.

Jno. R. Cooper, of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. 1. Defendant was tried under an indictment containing two counts. The charge of the court restricted the jury to the consideration of the first count, which alleged that the defendant did "have, control, and possess intoxicating liquors," and that portion of the second count which alleged that he did "keep for sale alcoholic liquors." Section 1 of the act of the General Assembly passed at the extraordinary session in 1917 (Acts Ex. Sess. March, 1917, p. 8) names the following liquors:

"Any spirituous, vinous, malted, fermented or intoxicating liquors, or any of the prohibited liquors or beverages, as are defined in the act approved November 17, 1915, being 'An act to make clearer and more certain' the prohibition laws of this state, etc., or any alcoholic compound or malt or liquors whether intended for

beverage purposes or not, but which can be diluted, and when so diluted may be used as a beverage and will produce intoxication"

—and then provides that:

"It shall be unlawful for any corporation, firm, person or individual * * * to have, control or possess, in this state, any of said enumerated liquors or beverages whether intended for personal use or otherwise."

[1] The words, "whether intended for personal use or otherwise," are exclusive, and, no matter for what purpose intended, it is unlawful for any person to "have, control or possess" any of the liquors enumerated in said section; and, where an indictment charges that such liquors were kept for sale, the words "for sale" may be stricken as immaterial, as they are not "descriptive of the identity of that which is legally essential to the claim or charge." This being true, the two counts of the indictment were practically the same. Under the present prohibition laws of this state there is no independent crime of keeping for sale intoxicating liquors, as separate and distinct from the crime of having, controlling, and possessing such liquors. From the above it will be seen that the two counts under which the defendant was tried charged the commission of one offense in two different ways. Section 1 of the act of 1917, *supra*, making it a misdemeanor to have, control, or possess intoxicating liquors, is so general in its terms that it embraces the crime of keeping for sale, as provided by section 2 of the act passed at the extraordinary session of 1915. See Acts Ex. Sess. 1915, p. 80, § 2. Although the judge told the jury that the charge in one of these counts embraced the charge in the other, he also told them that they could convict on both counts of the indictment, and they returned a general verdict of guilty; and, while the judge imposed only one sentence, in imposing it he may have taken into consideration the fact that the verdict was on both counts, and made the sentence heavier for that reason. Though convicted on two counts, he was convicted of but one crime. The defendant made no statement, and the evidence for the state absolutely demanded a verdict of guilty of "having, possessing and controlling intoxicating liquors." It is therefore ordered that the judgment be affirmed, with the direction that the trial judge may, in his discretion, re-sentence the defendant as having been convicted under the first count only of the indictment.

[2] 2. The court did not err in allowing evidence as to the whisky found at the home of the defendant, the objection to the introduction of the said evidence being that the same "was the fruits of an illegal search and seizure," and on the ground that the witness had not seen the defendant commit any

crime in his presence, and he had no search warrant to search his home, and it is in contravention of both the state and federal Constitutions." "Articles taken from the person or premises of the accused, tending to establish his guilt of the offense of which he is charged, are admissible in evidence against him, notwithstanding the articles were discovered by an unlawful search and seizure; and this rule of evidence is not violative of the constitutional prohibition of unreasonable searches and seizures. The ruling in the case of *Williams v. State*, 100 Ga. 511 [28 S. E. 624, 89 L. R. A. 269], does not conflict with that of *Evans v. State*, 106 Ga. 519 [32 S. E. 659, 71 Am. St. Rep. 276], as is clearly pointed out in *Duren v. Thomasville*, 125 Ga. 1 [53 S. E. 814]."
Calhoun v. State, 144 Ga. 679, 87 S. E. 893 (2). See, also, *Calhoun v. State*, 17 Ga. App. 705, 88 S. E. 586; *Smith v. State*, 17 Ga. App. 693, 88 S. E. 42.

Judgment affirmed, with direction.

BROYLES, P. J., and STEPHENS, J.,
concur.

(23 Ga. App. 441)

FIRST NAT. BANK OF COLQUITT v.
MILLER. (No. 9637.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. EVIDENCE ⚡34—PLEADING ⚡193(5)—
JUDICIAL NOTICE—DEMURRER.

"As courts must take judicial notice of general laws of the United States, defendant's claim, depending on such a law, as the complaint does not set out a cause of action, is properly raised by demurrer."

2. BANKS AND BANKING ⚡251, 253—CASHIER OF NATIONAL BANK—TERM OF OFFICE—SALARY—DISMISSAL.

Under the National Bank Act, cashiers of national banks hold their office subject to dismissal at the pleasure of the board of directors.

(a) Where the cashier of a national bank is elected for a fixed time, and is dismissed prior to the expiration of the period for which he was employed, he cannot recover his wages for the unexpired period, even though dismissed without a cause.

Error from City Court of Miller County;
Ben M. Turnipseed, Judge.

Suit by J. M. Miller against the First National Bank of Colquitt. General demurrer to petition overruled, and defendant excepts and brings error. Reversed.

N. L. Stapleton and P. D. Rich, both of Colquitt, for plaintiff in error.

B. B. Bush, of Tucson, Ariz., and B. W. Fortson, of Arlington, for defendant in error.

BLOODWORTH, J. Plaintiff sued the First National Bank of Colquitt, alleging:

That it "is a corporation organized under and by virtue of the laws of the United States"; that plaintiff was "employed by said bank by and through its board of directors to serve them in the capacity of cashier for the year 1917"; that "he served as such cashier and performed all the duties of such cashier, as he was employed to do, until a few days before June 1, 1917, at which time he was discharged by said bank without any legal cause or right, but that said bank paid your petitioner for services rendered up to June 1, 1917"; that "since June 1, 1917, and up to October 1, 1917, he has made continuing tender of his services to said bank"; that "during said four months he has been out of employment through no fault of his, but on account of the illegal breaking of the contract by said bank."

Plaintiff prayed for judgment for the amount of his services for four months. A general demurrer to the petition was overruled, and the defendant excepted.

[1] 1. Defendant in error insists that the question at issue should have been raised by special plea and not by demurrer. This contention is without merit. In *Case v. First National Bank of the City of Brooklyn*, 59 Misc. Rep. 269, 109 N. Y. Supp. 1119, where practically the same question was at issue, the first headnote is as follows:

"As courts must take judicial notice of general laws of the United States, defendant's claim, depending on such a law, as the complaint does not state a cause of action, is properly raised by demurrer."

[2] 2. Under the pleadings in this case, the question to be determined is whether a cashier of a national bank, who is employed for a year and discharged before the expiration thereof, can recover this salary from the date of his discharge to the end of the year, or until he obtains employment prior thereto? The determination of this question turns upon the construction of the following section of the United States Revised Statutes, to wit:

"Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." Act June 8, 1864, c. 106, § 8, 13 Stat. p. 101; Rev. St. U. S. p. 998, § 5136 (U. S. Comp. St. 1901, pp. 8455, 8456; U. S. Comp. St. § 9661).

From this section it is clear that a cashier of a national bank is an "officer" thereof. In *Harrington v. First National Bank of Chittenango*, 1 Thomp. & C. (N. Y.) 361, the headnote says:

"A national bank cannot hire one of its officers for a specified time."

In *Westervelt v. Mohrenstecher*, 76 Fed. 118, 22 C. C. A. 93 (34 L. R. A. 477), the first and second headnotes are as follows:

"The office of cashier of a national bank is not an annual office, but the term of the incumbent continues until he resigns or until he is removed or a successor is appointed by the board of directors of the bank.

"Since the national bank act expressly provides that the cashier of a national bank shall hold his office subject to the pleasure of the board of directors, a by-law providing that a cashier shall hold his office for one year, and shall be elected annually, is nugatory, as is a reappointment in accordance with such by-law at the beginning of each year."

In the decision in that case Circuit Judge Sanborn said:

"The act of Congress under which this bank was organized provided that its board of directors might appoint a cashier, require bonds of him, and fix the penalty thereof, and dismiss him at pleasure, and appoint another to fill his place. Its articles of association provided that the board might appoint a cashier, fix his salary, and continue him in office, or dismiss him, as in the opinion of a majority of the board the interests of the association might require. It is plain that, in the absence of any other regulations, a cashier once appointed under this act of Congress and these articles of association would hold his office until he resigned, or until the board of directors * * * dismissed him. A subsequent appointment of the same man to the same office would have no more effect upon him, or upon the term of his office, than a second deed to the same property by one who had already conveyed it to the same grantee would have. The only act of the board of directors that could affect the tenure of his office, under the act of Congress, would be his dismissal. It is, however, contended that the by-laws (which provided that the cashier should be elected at the annual meeting in January in each year, should give a bond in the sum of \$10,000, and should hold his office for one year, and until his successor was elected and qualified) made this an annual office, and limited the term of the office of this cashier to the unexpired portion of the year for which his predecessor, Vieths, was elected. But how could the by-laws of this bank repeal or modify the act of Congress and the articles of association under which they were enacted? The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers 'or any of them at pleasure and appoint others to fill their places.' It provided that this cashier should always hold his office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this provision of the National Bank Act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High

credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success—to the very existence—of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, *ex industria*, to provide for this very contingency. In any event, it is there, and it clearly provides that the cashier of a national bank may be dismissed at the pleasure of the board of directors, and that it may appoint, not the same man again, but another in his place. National banks are the creatures of the act of Congress. Under familiar principles they have no powers beyond those expressly granted, and those fairly incidental thereto. The Omaha Bridge Cases, 10 U. S. App. 98, 174, 2 O. C. A. 174, 51 Fed. 309; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 2 C. C. A. 174, 230, 51 Fed. 309, 316. It follows from this principle that, since the act of Congress expressly provides that the cashiers of national banks should hold their offices subject to the pleasure of the board of directors, neither the bank nor its board can make time contracts or appointments in violation of that provision. *Harrington v. Bank*, 1 Thomp. & C. [N. Y.] 361; *Boone, Banking*, § 353; *Ball, Banks*, 65. What, then, is the effect of these established rules upon the by-laws of this bank? It is that that part of these by-laws which provides that the cashier shall hold his office for one year, and that he shall be elected annually, must fall, and the cashier of the bank must hold his office under the act of Congress, subject to immediate removal at the pleasure of the board of directors, until he resigns or is removed."

In the above quotation it is distinctly stated that:

"It is plain that, in the absence of any other regulations, a cashier once appointed under this act of Congress and these articles of association would hold his office until he resigned, or until the board of directors of the bank dismissed him. * * * The only act of the board of directors that could affect the tenure of his office, under the act of Congress, would be dismissal. * * * But how could the by-laws of this bank repeal or modify the act of Congress and the articles of association under which they were enacted? The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers 'or any of them at pleasure and appoint others to fill their places.' It provided that this cashier should always hold his office subject to *instantaneous removal at the*

pleasure of the board of directors." (Italics ours.)

The first headnote in *London v. City of Franklin*, 118 Ky. 105 (80 S. W. 514), is as follows:

"Ky. St. 1903, § 3619, providing that the marshal and certain other city officers shall be appointed for a term of two years by the city council, but may be removed at the pleasure of the city council, does not limit the power of such council to removals for cause only."

In the opinion of the court which was written by Judge Hobson, is the following (118 Ky. 108, 80 S. W. 514):

"It is insisted for appellant that under the constitutional provision officers of cities and towns may be only removed for cause, and that section 3619 of the statute, above quoted, must be construed to refer only to removals for cause, or, if not so construed, is unconstitutional. The language of the statute is that the officers named may be removed at the pleasure of the city council. These words have a well-defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning. This cannot be done."

See, also, *Rogers v. Congleton* (Ky.) 84 S. W. 521; *Stebbins v. Police Commissioners of City of Springfield*, 196 Mass. 365, 82 N. E. 42; *Commonwealth v. McGann* and another, 213 Mass. 213, 100 N. E. 355.

Applying the principles announced in the foregoing cases, it is apparent that the National Banking Law gives to the directors of national banks the authority "at pleasure" and without cause to dismiss cashiers and other officers, and all resolutions and by-laws of the directors in conflict with this law are void. There is no conflict in the decisions above referred to and the decision in *Rankin v. Tygard*, 198 Fed. 795, 799, 119 C. C. A. 591, 595. In the opinion in that case *Sanborn*, Circuit Judge, said:

"An election or appointment to an official position for a fixed term is, it is true, inconsistent with a removal during the term without cause, in the absence of a precedent reservation of the right to make such a removal during the term. But an election or appointment to the office for a specified term, subject to the precedent expressed condition that the elective or appointive power may remove at will at any time during the term, is consistent with such a removal without cause, and it is as much an election or appointment for a legal term as an election or appointment without such a reservation. It is an election or appointment for a fixed term, subject to recall, and the legal term is the time the person elected or appointed will hold his office if the power to recall is not exercised."

Indeed, instead of being in conflict with the decisions referred to above, it supports them, and is in thorough accord with what is decided in the instant case. The board of

directors of the First National Bank of Colquitt having no authority to employ a cashier for any fixed term, and the law providing that they could dismiss the cashier "at pleasure," the petition set out no cause of action, and the court erred in overruling the demurrer thereto.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 426)

ROBINSON v. WOODRUFF MACHINERY MFG. CO. (No. 9735.)

(Court of Appeals of Georgia, Division No. 2. Feb. 12, 1919.)

(Syllabus by the Court.)

1. SALES \S 429—NOTICE OF DEFECT—CONDITIONS—RIGHT OF ACTION.

J. M. Robinson gave to Woodruff Machinery Manufacturing Company three notes for the purchase price of certain machinery. Title to the property was reserved in the vendor. Robinson signed a separate agreement, of even date with the notes, containing the terms and conditions of the sale, one clause of which is as follows: "It is hereby agreed and understood by both lessor and lessee that no complaint shall be made by the lessee after he has been in the possession of the machinery 30 days." Robinson having failed to pay the notes, an attachment against him was issued and levied on the property, and a declaration in attachment filed. Robinson filed a plea in which he admitted signing the notes, but denied indebtedness, and alleged fraud and failure of consideration. The case proceeded to trial, and a verdict in favor of plaintiff was directed by the court. The bill of exceptions assigns error upon the direction of the verdict, and upon the overruling of a motion for new trial, which was based on the general grounds. There was no plea and no evidence that Robinson made complaint of any kind in reference to the machinery prior to having been in possession thereof for 30 days. Under numerous decisions of our courts of last resort, under the clause of the contract above quoted, notice before the expiration of the 30 days was a condition precedent to recovery by the defendant, and the trial judge properly directed the verdict and overruled the motion for new trial. See *Ducros v. People's Drug Store*, 21 Ga. App. 636 (b), 94 S. E. 897; *City of Moultrie v. Scofield's Sons*, 6 Ga. App. 464, 65 S. E. 315 (4); *Brooks Bros. Lbr. Co. v. Case Threshing Machine Co.*, 186 Ga. 754, 72 S. E. 40 (2); *Walker & Rogers v. Malsby Co.*, 134 Ga. 399, 67 S. E. 1039 (1); *Fay & Eagan Co. v. Dudley & Sons*, 129 Ga. 314, 58 S. E. 826; *International Harvester Co. v. Dillon*, 126 Ga. 672, 55 S. E. 1034; *Beasley, Hallett & Co. v. Huyett & Smith Mfg. Co.*, 92 Ga. 273, 18 S. E. 420.

2. COSTS \S 261—APPEAL—DELAY—DOUBT.

Not being fully convinced that this case was appealed for delay only, the request to tax plain-

tiff in error 10 per cent. damages, as provided by section 6213 of the Civil Code of 1910, is denied.

Error from City Court of Nashville; C. A. Christian, Judge.

Suit by the Woodruff Machinery Manufacturing Company against J. M. Robinson, with attachment. Judgment for plaintiff on a directed verdict, motion for new trial overruled, and defendant excepts and brings error. Affirmed.

J. W. Powell, of Nashville, for plaintiff in error.

W. R. Smith, of Nashville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, JJ., concur.

(23 Ga. App. 479)

WARD v. JOHNSON. (No. 9803.)

(Court of Appeals of Georgia, Division No. 2. Feb. 26, 1919.)

(Syllabus by the Court.)

1. LIABILITY OF HUSBAND—STATUTES.

"The husband is bound to support and maintain his wife, and his consent shall be presumed to her agency in all purchases of necessities suitable to her condition and habits of life, made for the use of herself and the family. This presumption may be rebutted by proof." Civ. Code 1910, § 2906. "The husband is bound for necessities furnished to the wife when separated from him, subject to the limitations hereinbefore provided. If the wife be living in adultery with another man, the husband is not liable; but notice by the husband shall not relieve him from liability, if his wife is separated from him by reason of his own misconduct; if she voluntarily abandons him without sufficient provocation, notice by the husband shall relieve him of all liability for necessities furnished to her." Civ. Code 1910, § 2907.

2. HUSBAND AND WIFE \S 235(2)—LIABILITY FOR MEDICAL SERVICES—SEPARATION—STATUTE.

Upon the trial of a suit against a husband for medical services rendered by plaintiff to defendant's wife, evidence that before the date of the rendition of the services by plaintiff, defendant left the state as a fugitive from justice, carried his wife with him, and that she later returned to the former community and lived upon land belonging to the husband, the husband still remaining away, does not necessarily demand the inference that the parties were living in a state of separation as husband and wife under such circumstances that the husband would not be liable for necessities, such as medical services furnish by plaintiff to the wife.

3. APPEAL AND ERROR ⇨728(3)—ASSIGNMENT OF ERROR—EXCLUSION OF EVIDENCE.

The assignment of error complaining of the court's refusal to allow plaintiff, while on the witness stand, to testify along certain lines set out in the assignment is too indefinite and defective to raise any question for the consideration of this court, it not being shown therein that any pertinent question was asked, and that the answer was ruled out, or that the court was informed at the time what the answer would be, or that the testimony would have benefited the plaintiff in error. *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712 (2); *McKee v. Hurst & Co.*, 21 Ga. App. 571, 94 S. E. 886 (1), and cases there cited.

4. HUSBAND AND WIFE ⇨235(2)—MEDICAL SERVICES TO WIFE—EXTENSION OF CREDIT—SEPARATION—QUESTIONS FOR JURY.

Whether credit was extended to the husband or to the wife, and whether the parties were living in a state of separation as husband and wife and under such circumstances as would make him liable for necessities furnished her, were questions for the jury.

5. ERRONEOUS GRANTING OF NONSUIT.

The court erred in granting a nonsuit.

Error from City Court of Quitman; W. H. Long, Judge.

Suit by J. A. Ward against Joe Johnson. Judgment of nonsuit, and plaintiff brings error. Reversed.

Bennet & Harrell, of Quitman, for plaintiff in error.

Branch & Snow, of Quitman, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 433)

CENTRAL OF GEORGIA RY. CO. v. MACON RY. & LIGHT CO. (No. 9654.)

(Court of Appeals of Georgia, Division No. 2. Feb. 27, 1919.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇨1099(7)—FORMER DECISION—LAW OF CASE—NONSUIT.

The award of a nonsuit was not error.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Central of Georgia Railway Company against the Macon Railway & Light Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

R. C. Jordan, of Macon, for plaintiff in error.

John R. L. Smith and Hatcher & Smith, all of Macon, for defendant in error.

BROYLES, P. J. Upon the previous appearance here of this case this court affirmed a judgment of nonsuit. *Central of Georgia Ry. Co. v. Macon Railway & Light Co.*, 9 Ga. App. 628, 71 S. E. 1076. That decision became the law of the case, so far as concerned the case laid and the case made upon the trial then under review. Upon the trial now under review a nonsuit was again awarded. If the two petitions and the evidence upon both trials were in all material respects substantially the same, a judgment of nonsuit was the only legal one possible. We have carefully compared the two petitions and the evidence adduced upon both trials. We find that upon the first trial the evidence was much stronger in favor of a recovery by the plaintiff than it was upon the last trial. As to the two petitions, both charged the defendant with not only negative negligence but with positive acts of negligence, and they are substantially the same in all material respects, except that the last petition contains an additional allegation of an act of positive negligence by the defendant which was not in the first petition. This does not help the plaintiff, however, or change the relative circumstances between the two petitions and the evidence adduced in their support, since the evidence upon the last trial failed to sustain this averment of the petition. On the contrary, the evidence clearly showed that when the electric apparatus was installed it was in a safe condition, and that the damage was not the result of any positive act of negligence on the part of the defendant, but resulted from the passive joint negligence of both the defendant and the plaintiff in failing to properly inspect the apparatus and to maintain it in a safe condition.

This ruling is not in conflict with the decision of the Supreme Court in this case (*Central of Georgia Ry. Co. v. Macon Ry. & Light Co.*, 140 Ga. 309, 78 S. E. 931). That decision held, in substance, that although "as a general rule one of two or more joint tort-feasors has no right of action over against those connected with him in the tort, for either contribution or indemnity, where he alone has been compelled to satisfy the damages resulting from the tort," yet the facts alleged in the petition were sufficient to show an exception to the general rule, viz. that "in some cases one who is liable as a tort-feasor because he has failed to exercise due diligence to discover a defect or danger in machinery, appliances, or place where the injured person is required to work, and has been compelled to pay damages for injuries growing out of the tort, may have a right to recover over against another whose

negligence produced or brought about the defect or dangerous condition in the machinery, appliances, or place, which defect was the proximate cause of the injury." In other words, the Supreme Court merely held that the facts as alleged in the declaration made a case within the exception to the general rule. Upon the last trial, however, the evidence failed to sustain these allegations of fact in the petition, but, on the contrary, showed a case within the general rule. In our opinion the judgment of nonsuit was proper.

Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 473)

UNITED STATES PRINTING & LITHOGRAPHING CO. v. STOVALL JONES CO. (No. 9709.)

(Court of Appeals of Georgia, Division No. 2. Feb. 20, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES ~~§~~517, 537(2)—CORPORATIONS ~~§~~414(6), 432(12)—NOTE SIGNED BY OFFICER—PLEA OF NON EST FACTUM—QUESTION FOR JURY.

Without authority to do so, the manager of a corporation engaged in the wholesale grocery business, and who is "the purchasing agent for the company," and secretary and treasurer thereof, cannot bind the corporation by signing notes for stock in another corporation. Where such a note was signed and given in the name of a corporation by the manager thereof, and a plea of non est factum was filed, and it was not shown either that there was a course of dealing from which authority to sign the notes could be implied, or that the seal of the corporation was affixed to the note, or that the act was ratified by the corporation, or that express authority to sign the note was given to the manager, but, on the contrary, he testified that: "This transaction was not discussed with our directors, I have never advised them anything of it. * * * I do not hold anything at all representing the stock we got from the Lewis Bear Drug Company at the time this note was executed"—the note was properly rejected as evidence upon objection that the execution thereof was not proved, and that it was not shown that the manager had authority to sign it. In addition to the above, while slight evidence is sufficient to lay the foundation for the admission of a note, the execution of which is denied by a plea of non est factum, still the sufficiency of this evidence is for determination by the court. *Patton v. Bank of La Fayette*, 124 Ga. 965, 53 S. E. 664 (5).

2. INVOLUNTARY NONSUIT.

The note sued on having been rejected as above stated, and the plaintiff offering no further evidence, the court did not err in granting a nonsuit.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Action by the United States Printing & Lithographing Company against the Stovall Jones Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Eldridge Cutts and McDonald & Bennett, all of Fitzgerald, for plaintiff in error.

Wall & Grantham and Otis H. Elkins, all of Fitzgerald, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 479)

COLE v. WESTERN UNION TELEGRAPH CO. (No. 9628.)

(Court of Appeals of Georgia, Division No. 2. Feb. 26, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ~~§~~662(2) — BILL OF EXCEPTIONS—PRESENTATION.

Where a bill of exceptions, duly certified as true by the presiding judge, recites that it was tendered within the time allowed by law, and there is nothing in the bill of exceptions or certificate of the trial judge in denial of such averment, this court must conclude that the bill of exceptions was tendered and presented within the time allowed by law, although the date on which the bill of exceptions purports to have been certified was beyond the statutory period allowed by law for tendering and presenting a bill of exceptions. *Civ. Code 1910, § 6187; Jones v. State*, 100 Ga. 579, 23 S. E. 396; *Pennington v. Sparta*, 15 Ga. App. 287, 82 S. E. 828(1). In this case it also affirmatively appears from the certificate of the presiding judge to the bill of exceptions that the failure on his part to sign and certify the same within the time prescribed by law was, not caused by any act of plaintiff in error or her counsel.

2. TELEGRAPHS AND TELEPHONES ~~§~~68(2)—MENTAL PAIN AND SUFFERING—FAILURE TO DELIVER TELEGRAM—DAMAGES.

A telegraph company is not liable in damages for mental pain and suffering caused by negligent failure to deliver a telegraphic message, in the absence of any physical damage or pecuniary loss.

3. TELEGRAPHS AND TELEPHONES ~~§~~69—DELAY IN DELIVERING TELEGRAM—PUNITIVE DAMAGES.

The only reasonable legal construction of the allegations set forth in the petition of the plaintiff is that the damages complained of resulted from a grossly negligent failure on the part of the defendant's servants in the performance of their ordinary public duties owing to plaintiff. There is nothing in the petition which will authorize a recovery for punitive or exemplary damages growing out of "willful misconduct, malice, fraud, wantonness, or op-

pression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Southern Railway Co. v. O'Bryan*, 119 Ga. 147, 45 S. E. 1000.

4. DAMAGES — DELAY IN DELIVERING TELEGRAM—GENERAL DEMURRER.

The petition sets forth no grounds to warrant recovery of special damages. It sets forth, however, a breach of public duty owing by the defendant company to the plaintiff, and since the plaintiff therein prays for nominal damages, it was error to dismiss the action on general demurrer. Civ. Code 1910, § 4397; *Gurr v. Western Union Telegraph Co.*, 8 Ga. App. 556, 69 S. E. 1085; *Glenn v. Western Union Telegraph Co.*, 1 Ga. App. 821, 58 S. E. 83.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Emily Colé against the Western Union Telegraph Company. General demurrer to petition sustained, action dismissed, and plaintiff brings error. Reversed.

Payne & Jones, of Atlanta, for plaintiff in error.

Brewster, Howell & Heyman and Mark Bolding, all of Atlanta, for defendant in error.

STEPHENS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(23 Ga. App. 476.)

SOUTHERN COTTON OIL CO. v. SHIELDS. (No. 9643.)

(Court of Appeals of Georgia, Division No. 2. Feb. 21, 1919. On Motion for Rehearing, March 1, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — 96(1), 97(2) — INJURY TO SERVANT—LIABILITY—NATURAL AND PROBABLE CONSEQUENCE.

While a master may be liable for an injury to his servant resulting from the master's negligence, although the master, in the exercise of ordinary care, could not have foreseen that his negligence would result in an injury of the particular kind produced, or in the particular servant being injured, yet he cannot be held liable unless the injury sued for was the natural and probable result of his negligence. He is not liable unless, by the exercise of ordinary care and diligence, he could have reasonably apprehended that his negligence would or might result in injury to some one of his servants. *Mitchell v. Schofield's Sons Co.*, 16 Ga. App. 686, 85 S. E. 978.

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR — 1099(6)—DECISION ON FORMER APPEAL—LAW OF THE CASE.

The former ruling of the Court of Appeals in the same case that plaintiff's petition was

not subject to demurrer is the law of the case binding upon that court on a subsequent appeal.

3. COURTS — 99(2)—LAW OF THE CASE.

Where petition in servant's action for injury from a new lever so long that it was easily struck so as to force steam into a "cake former" was not wholly sustained by the evidence, a ruling that under the evidence plaintiff could not recover did not conflict with former ruling that petition was not subject to demurrer.

4. MASTER AND SERVANT — 276(1)—ACTION FOR INJURY — VERDICT — SUFFICIENCY OF EVIDENCE.

In servant's action for injury, where he offered no other witness than himself, and where his testimony was so self-contradictory and improbable as to require its construction in light most unfavorable to him, and where defendant's evidence showed a complete defense, a verdict for plaintiff was unauthorized.

Stephens, J., dissenting.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Suit by Carey Shields against the Southern Cotton Oil Company. Verdict and judgment for plaintiff, motion for new trial overruled, and defendant brings error. Reversed.

See, also, 20 Ga. App. 549, 93 S. E. 169.

M. L. Felts, of Warrenton, for plaintiff in error.

L. D. McGregor, of Warrenton, for defendant in error.

BROYLES, P. J. [1] This was a suit against a master for personal injuries sustained by his servant, and was based upon the alleged negligence of the master in not providing a safe place of work for the servant. In the plaintiff's petition the only reason given why the place was not safe was that it contained a defective machine. The undisputed evidence clearly showed that the defect in the machine was a very slight one, and one not dangerous in itself, nor apparently dangerous in conjunction with any other instrumentality in the place; that the defect did not directly cause the plaintiff's injury, but that it was only the indirect and remote cause thereof; and that the master could not, by the exercise of ordinary care, have reasonably anticipated that such an injury, or that any injury at all, would or might result from the defect. The master is not an insurer. He is not required to provide an absolutely safe place for his servants to work in, but only a reasonably safe place. In this case there is no evidence in the record which authorized a finding that the place provided by the master was not a reasonably safe one for the plaintiff and the other servants to work in, or that the master, by the exercise of ordinary care and diligence, could have foreseen or reasonably apprehended that the

defect in the machine would probably cause such an injury as that sued for, or any injury at all, either to the particular servant injured, or to any other of his servants. It follows that the plaintiff was not entitled to a recovery, that the verdict in his favor was contrary to law and the evidence, and that the court erred in overruling the general grounds of the defendant's motion for a new trial.

The above ruling being controlling in the case, it is unnecessary to consider the special grounds of the motion for a new trial.

Judgment reversed.

BLOODWORTH, J., concurs.

STEPHENS, J., concurs dubitante.

On Motion for Rehearing.

BROYLES, P. J. [2] In deciding that under the evidence adduced upon the trial the plaintiff was not entitled to recover, this court did not overlook its former ruling in the same case (20 Ga. App. 549, 93 S. E. 169) that the plaintiff's petition was not subject to demurrer. That ruling, of course, became the law of the case, and as such is binding upon this court.

[3] However, the evidence upon the trial did not affirmatively establish all the material allegations of fact set forth in the petition. The petition and the proof showed that the plaintiff's injuries were caused by a lever being knocked over upon his arm, on September 6, 1915, and paragraph 7 of the petition is as follows:

"(7) Petitioner further avers that on or about the 4th day of September, 1915, the said Southern Cotton Oil Company placed a new lever into the 'cake former' which controlled the steam, and that petitioner stated to the superintendent or vice principal that said lever was too long, whereupon the superintendent, who was vice principal of the Southern Cotton Oil Company, [said] to petitioner that [he] knew said lever was too long, that he would have it cut off, and commanded petitioner to work with said lever until it was cut, but that the said lever was not cut off, and the same being so long made it easily touched and knocked up, thereby turning on the steam into the 'cake former'; this being the lever which was knocked up by the 'charger' which caused the above injury, in the manner and form alleged."

[4] Upon the trial the only evidence tending to support the allegations of this paragraph of the petition was the testimony of the plaintiff, as follows:

"I did hear Mr. Creason [the superintendent of the defendant company] say he was going to have the lever cut off, because it was too long."

It is obvious that this testimony did not sustain all of the material averments in the paragraph. Nor was there any evidence

which tended to show that a new lever had been installed, or that the superintendent or vice principal had ordered the plaintiff to work with the lever until it was cut off, or that the length of the lever contributed to the injury sued for. The present ruling, therefore, is not in conflict with the former ruling (20 Ga. App., supra). Moreover, the only witness presented by the plaintiff, to prove his case as laid was the plaintiff himself, and his testimony was so self-contradictory, vague, equivocal, and, in some material respects, so improbable, as to require that it be construed in the light most unfavorable to him, and, there being no other evidence tending to establish his right to recover, and the version of his testimony most unfavorable to his cause showing that the verdict should be against him, and the evidence for the defendant, which was perfectly consistent with this version, establishing a complete defense, the verdict for the plaintiff was unauthorized. *Western & Atlantic R. R. Co. v. Evans*, 96 Ga. 481, 23 S. E. 494; *City of Thomasville v. Crowell*, 22 Ga. App. 383, 96 S. E. 335 (1b), and cases there cited.

Rehearing denied.

BLOODWORTH, J., concurs.

STEPHENS, J. (dissenting). In the judgment of reversal I concurred dubitante. On the motion for rehearing the cases of *Ga. Ry. & Elec. Co. v. Norris*, 135 Ga. 838, 70 S. E. 793, *A. & W. P. R. R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29, and *Loveless v. Standard Co.*, 116 Ga. 427, 42 S. E. 741, 59 L. R. A. 596, as well as *Mitchell v. Schofield's Sons Co.*, 16 Ga. App. 686, 690, 85 S. E. 978, supra, were brought to my attention. After a consideration of the same, I am of the opinion that the questions of negligence were, under the evidence, matters entirely for the jury. I think a rehearing should be granted, and that the judgment should be affirmed instead of reversed.

(23 Ga. App. 473)

McNEAL v. SEABOARD AIR LINE RY. CO.

WEATHERS v. SAME.

(Nos. 9831, 9832.)

(Court of Appeals of Georgia, Division No. 2
Feb. 20, 1919.)

(Syllabus by the Court.)

CARRIERS — NEGLIGENCE — DAMAGES — RECOVERY.

There can be no recovery of damages because of mental pain and anguish alone, which resulted from mere negligence, when there has been no physical tort resulting in injury to person or purse.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Separate suits by Gensie McNeal and by Annie M. Weathers against the Seaboard Air Line Railway Company. Demurrer in each case sustained, cases dismissed, and plaintiffs except and bring error. Affirmed.

Paul Donehoo, of Atlanta, for plaintiffs in error.

Brown, Randolph & Parker, of Atlanta, for defendant in error.

BLOODWORTH, J. Miss Gensie McNeal and Mrs. Annie M. Weathers were daughters of J. M. McNeal. Both sued the Seaboard Air Line Railway, the petition of Miss McNeal alleging, in part, that on or about August 26, 1917, the defendant received and accepted for shipment the corpse of her father at the Atlanta Terminal Station, Atlanta, Ga., to be transported to Luxomni, Ga.; that full fare was paid for the transportation thereof; that plaintiff and the funeral party boarded a train of defendant due to leave said terminal station about 8:45 a. m., and on which train the corpse of her father should have been carried; that when the funeral party reached Luxomni it was learned that said corpse was not aboard the train; that owing to the failure of defendant to transport said body as per agreement, the funeral had to be postponed from 11 a. m. until about 3:30 in the afternoon, necessitating petitioner's remaining in Luxomni an additional space of time, under a terrible strain; that the failure of the defendant to have the body at Luxomni when the funeral party arrived inflicted upon petitioner a severe mental and nervous shock, resulting in a spell of illness from which petitioner did not recover for several days; that the failure of the defendant to ship said corpse was due to the negligence of the agent in charge of the terminal station in Atlanta, and that the same was in reckless and wanton disregard of its duty as a common carrier, and of the rights, feelings, and sensibilities of your petitioner. She prayed for judgment for \$3,000.

The petition of Mrs. Weathers was the same as that of Miss McNeal, except that instead of alleging that the severe mental and nervous shock resulted "in a spell of illness from which petitioner did not recover for several days," the petition of Mrs. Weathers alleged, "By reason of which she remained in an unstrung condition for several days." The petition of Miss McNeal contained the additional allegation "that petitioner was the youngest daughter of her father, the only child remaining at home at the time of his death, and the only constant companion of her father." A demurrer to each petition was filed, containing both general and special grounds; the general demurrer

in each case was sustained and the case dismissed, and the plaintiffs excepted.

These two cases are almost identical, and both are controlled by the principle announced in a number of cases decided by the Supreme Court of our state, among them *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 480, 30 Am. St. Rep. 183; *Giddens v. Western Union Telegraph Co.*, 111 Ga. 824, 35 S. E. 638; *Sappington v. Atlanta & West Point Railroad Co.*, 127 Ga. 179, 56 S. E. 311 (2); *Seifert v. Western Union Telegraph Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210; *Southern Bell Telephone & Telegraph Co. v. Reynolds*, 139 Ga. 385, 77 S. E. 388; *Southern Bell Telephone & Telegraph Co. v. Glawson*, 140 Ga. 507, 79 S. E. 136; *Central of Georgia Ry. Co. v. Wallace*, 141 Ga. 51 (2), 53, 80 S. E. 282, 49 L. R. A. (N. S.) 429, Ann. Cas. 1915A, 1076. See, also, *Southern Express Co. v. Byers*, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197. In the *Chapman* Case, supra, Mr. Justice Samuel Lumpkin said:

"The law protects the person and the purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79 [13 S. E. 250]. The body, reputation, and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one, by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries."

We are not unmindful of the fact that this court has said:

"While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts merely negligent, yet such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings." *Dunn v. Western Union Telegraph Co.*, 2 Ga. App. 846, 59 S. E. 189 (3).

The *Dunn* Case is easily differentiated from the one now under consideration. While the negligence of the railroad com-

pany in the instant case was alleged to be "in reckless and wanton disregard of its duty as a common carrier, and of the rights, feelings, and sensibilities of your petitioner," this is but a conclusion of the pleader. The recital of facts upon which plaintiffs base their claims for damages makes a case of negligent omission only. "If a tort is committed through mistake, ignorance or mere negligence, the damages are limited to the actual injury received."

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 413)

SOUTHERN COTTON OIL CO. v. FARKAS.
(No. 9652.)

(Court of Appeals of Georgia, Division No. 2
Feb. 12, 1919.)

(Syllabus by the Court.)

1. SALES \Leftrightarrow 413—VARIANCE.

Plaintiff having declared on an oral contract, and the proof showing a written one, the court properly directed a nonsuit.

(Additional Syllabus by Editorial Staff.)

2. PLEADING \Leftrightarrow 354(2) — STRIKING PLEA — RULING.

In buyer's action for value of shortage of cotton seed purchased refusal to strike a plea denying each and every paragraph of petition on ground that it was in effect a plea of general issue was not erroneous, in view of Civ. Code 1910, § 5634.

Error from City Court of Albany; Clayton Jones, Judge.

Action by the Southern Cotton Oil Company against Paul Farkas. Judgment of nonsuit, and plaintiff excepts and brings error. Affirmed.

The Southern Cotton Oil Company sued Farkas, alleging that it entered into an oral agreement with the defendant, whereby he sold to it 50 tons of sound cotton seed at \$65 per ton, and was to ship the seed, with draft attached to bill of lading for each car; that pursuant to said agreement the defendant shipped two cars of cotton seed from Albany to Dawson, Ga., with sight draft attached to the bill of lading, and, after payment of the draft, the plaintiff discovered that the two cars were short 6,370 pounds of seed, of the value of \$207.02; that it purchased 50 tons of cotton seed from the defendant and received only 76,930 pounds, and that under the contract he was still due to it 23,070 pounds of seed, worth at the time of bringing the suit \$10 per ton more than the contract price, making him due the plaintiff

therefor \$115.35, "being the difference in the contract price and the market price of 23,070 pounds of cotton seed." The total amount sued for was \$322.37. Defendant filed a plea as follows: "Defendant denies each and every paragraph of said petition." Plaintiff moved to strike the plea, on the ground that it "is in effect a plea of general issue." This motion was overruled, and the case proceeded to trial. At the conclusion of the evidence for the plaintiff a nonsuit was granted on motion of defendant's counsel, and the plaintiff excepted.

R. R. Jones, of Dawson, for plaintiff in error.

Milner & Farkas, of Albany, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [2] 1. The court committed no error in refusing to strike the plea. Civ. Code 1910, § 5634.

[1] 2. Upon the trial of the case C. E. Ragan, sworn for the plaintiff, testified in part as follows:

"My occupation is manager of the Southern Cotton Oil Company, at Dawson, Ga. My duties as such manager are buying cotton seed, selling the by-products, just general management of the plant. * * * I employ agents over the country to buy seed for us. I employed Mr. Davis of the Davis Grocery Company in Albany the past season to represent us. His duties were to buy seed under my instructions upon my quotations from Dawson. * * * Mr. Davis made this contract that we are now suing on, with my authority. I don't know what the contract was, except what he told me over the phone. As a matter of fact I think the contract is in writing. I think I have it right here in court. The only contract I have ever had in reference to these seed from Mr. Farkas is a contract Mr. Davis made, and that contract is in writing. * * * After the discussion came up about the seed he sent me this memorandum and confirmation of sale. It was signed by Meyers. This memorandum and confirmation of sale is the contract we are now suing on, the verbal contract over the phone. I told Mr. Davis over the phone to buy them. I only claim one contract with Paul Farkas. * * * I know that represents the particular trade we are now suing on [witness here referring to the confirmation of sale signed by Joe A. Meyers]."

J. C. Davis testified, in part:

"I was in the employ of the Southern Cotton Oil Company in the fall of 1917, in Albany, in the capacity of buying cotton seed. * * * I bought these seed from Mr. Farkas through Mr. Meyers. * * * Me and Meyers reduced that contract to writing. The contract is in writing, and right here in court."

J. A. Meyers, for plaintiff, testified:

"I contracted with Mr. Davis for these seed. * * * My contract was reduced to writing. * * * I sold those seed to Mr. Davis for the

Southern Cotton Oil Company; made that contract for Mr. Farkas. * * * The contract was one contract for 50 tons, and that was reduced to writing."

Plaintiff introduced the following writing, dated September 15, 1917:

"This is to confirm sale of 50 tons sound cotton seed at \$65.00 per ton f. o. b. cars Albany. Shipment as soon as possible. [Signed] Joe A. Meyers."

In reference to this writing the bill of exceptions says:

"The same being the contract in this case about which witnesses testified had been reduced to writing, and being the only writing in reference to the contract between the parties in this case."

It may be that the record in this case does not show all the facts, but as the record comes to us it shows only one "contract," and that is the paper dated September 15, 1917. In the brief of plaintiff in error he insists:

"The proof does not show a written contract. The most that can be said of the writing introduced in evidence is that it is evidence of the contract. The writing itself fails in many essentials of being a contract. It is not signed by both parties. It is not addressed to anybody. It was simply a confirmation of the sale, written down by one of the parties, but not assented to by the other party to the contract. The writing was unilateral. It no doubt embodied the terms of the contract that had been made between the parties, but the Southern Cotton Oil Company did not sign it, nor did it assent in writing to its terms."

Had there been no performance of this "contract" the argument of the plaintiff in error would probably be good. But the evidence shows that the agents of the contracting parties reduced the contract made to writing, each agent acting for his principal, and that the principals acted on and ratified the contract made by the agents, cotton seed were shipped and accepted in accordance therewith, and for this reason the incomplete contract was perfected. In *Harris & Mitchell v. Amoskeag Lumber Co.*, 97 Ga. 465, 25 S. E. 519, Mr. Justice Lumpkin said:

"We do not think that the correspondence between Harris & Mitchell and the lumber company, tested by any recognized legal rules of construction, ever amounted to a fully completed and binding contract. Nevertheless, the evidence shows unmistakably that the parties so treated it, and this amounts to the same thing, in law, as if this result had been successfully accomplished by the letters themselves."

See, also, *Spence Drug Co. v. American Soda Fountain Co.*, 11 Ga. App. 475, 476, 75 S. E. 817.

Both principals, having acted on the contract as written, incomplete though it is, are

bound thereby. Plaintiff having declared on an oral contract and the proof showing a written one, the court properly ordered a nonsuit. "In a complaint founded on an account, it was proven by the plaintiff's witness, on the trial, that there was a written contract between the parties, touching the subject-matter of the account. Held, that the plaintiff could not proceed, and that the defendant was entitled to a nonsuit." *Blue v. Ford*, 12 Ga. 45. The facts of the instant case clearly differentiate it from those cases in which our courts of last resort have held that:

"Where there is a special contract which has been performed on one side, and there is nothing left to be performed but payment on the other, a recovery can be had either upon the contract, or upon a general indebitatus assumpsit or quantum meruit." *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200.

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 416)

I. M. SCOTT & CO. v. WARD. (No. 9656.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919. Rehearing Denied
Feb. 28, 1919.)

(Syllabus by the Court.)

LANDLORD AND TENANT ⇄330(2)—VENDOR AND PURCHASER ⇄85—RENTAL BY PURCHASER—TRANSFER OF RENT CONTRACT TO VENDOR—LIEN.

Where a vendor of land executed to the vendee a bond for title, and delivered to him the possession of the land, and thereafter the vendee rented the land and transferred the rent contracts to the vendor, the only legal effect of the transfer was to place the title to the rent contracts in the transferee and "carry the liens as a necessary incident thereof," as provided in Civ. Code 1910, §§ 3345, 3346, and with the right in the transferee to enforce the liens arising under the contracts, as provided in section 3347 of the Code.

(a) The fact that the transferee of the rent contracts was also the vendor of the land did not cancel or rescind the original contract of sale, or create the relation of landlord and cropper between the vendor of the land and those cultivating it under contract with the vendee, nor did it place the title to any portion of the crop in the vendor.

Error from City Court of La Grange; Henry Reeves, Judge pro hac.

Action by W. A. Ward against I. M. Scott & Co. Verdict and judgment for plaintiff, and defendants bring error. Reversed.

In the fall of 1913 Ward sold certain lands on credit to Hogg, taking notes for the pur-

chase price and giving bond for title. On January 24, 1916, Hogg executed and delivered to Ward the following paper:

"For value received I hereby transfer and assign to W. A. Ward my landlord's liens for the year 1916, on all crops of the tenants hereinafter named, and also transfer and assign to W. A. Ward the rents due me by the following named tenants for the year 1916: Said tenants being Major Cooley, one-horse farm on halves; Geo. Lynch, one-horse farm on halves; Peter Brooks, one-horse farm on halves; Sam Lovelace, alias Sam Sherman, one-horse farm on halves; William Lovelace, 1½ bales of cotton, standing rent; William Lovelace, Jr., 2 bales cotton, standing rent; J. W. Ward, 2 bales cotton, standing rent; Richard Key, 2 bales, standing rent; Abb Copeland, 600 pounds lint cotton, standing rent; Tom Winston, 4 bales, standing rent; A. F. & S. F. Ward, 4 bales, standing rent, said bales to be 500 pounds each of middling cotton, packed in merchantable bales, delivered in West Point; also all rents of all tenants on the Palmer home place, on which there will be run a four-horse farm on halves. These rents are due and payable October 15, 1916. These rents are given for the land purchased by me from W. A. Ward, and are for the rent of the lands for the year 1916, and are to be turned over to W. A. Ward, to be credited to the indebtedness I am now due him for the purchase of said lands. It is the intention of this paper to transfer and assign all my rights and liens as landlord, so that W. A. Ward may enforce his landlord's lien for rents and supplies and advances he may furnish said tenants to make crops for the year 1916. Witness my hand and seal this January 24, 1916."

Hogg applied to Scott & Co., who were merchants dealing in farm supplies, to furnish his tenants for the year 1916. Scott & Co. agreed to do this on condition that Ward would waive a certain amount of rent for each of Hogg's tenants. This Ward did on April 6th. There were six of these "waivers," and all were alike, except as to name of tenant, amount of land to be cultivated, and amount of rent cotton to be waived, and of which "waivers" the following is a sample:

"In order to enable W. F. Hogg and Perry Green to get mule, guano, and supplies to make a crop on my farm, which I have rented him for the year 1916, I agree to let him use first 3,000 pounds middling lint cotton, completing my rent for two-horse farm on place known as * * * farm for the year 1916. All other farm products to be subject to indebtedness with Scott & Co. I also agree not to furnish him anything as landlord for the year 1916."

After receiving these "waivers," Scott & Co. furnished the tenants and charged the account of each tenant to him and Hogg. In the fall of 1916 Hogg and his tenants delivered certain cotton and cotton seed to Scott & Co. Ward claimed that half of the cotton and cotton seed delivered to Scott & Co. belonged to him as landlord, and upon their failure to make settlement with him therefor

filed a petition against I. M. Scott & Co., alleging that he was the owner of the lands upon which this cotton and cotton seed had been raised, that he was farming thereon, that said lands "were operated by croppers of petitioner," and that "defendant agreed to furnish the croppers of petitioner during said year, on condition that petitioner would waive his rights as landlord, so that the croppers could secure the defendant for supplies furnished, which condition was met by petitioner, he waiving in writing his rights as landlord, for the purpose of having said croppers buy such supplies as was necessary, for the purpose of making a crop." Plaintiff further alleged that his croppers delivered to defendants the cotton and cotton seed raised by them, and a half of the cotton and cotton seed of each cropper was sufficient to pay the indebtedness of that cropper, and the other half of the cotton and cotton seed belonged to him.

Defendants filed a plea denying liability, and further pleading that the plaintiff was not landlord, but that Hogg was the owner of the land and in possession thereof, and that the supplies they furnished were to Hogg and his croppers, and were so charged on their books, "all of which was done with the knowledge of said W. A. Ward." Defendants further pleaded that they had made full settlement with Hogg and his croppers. The issues raised by the pleadings were submitted to the jury, which rendered a verdict for the plaintiff, and the defendants excepted.

B. J. Mayer, of West Point, for plaintiffs in error.

M. U. Mooty, of La Grange, and Watkins, Harwell & Watkins, of Atlanta, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). The plaintiff testified, in part, as follows:

"I sold the property to Hogg in the fall of 1913, and gave him a bond for title. I don't know where the bond for title is. I gave it to him, and it is his property, and still his property. It is my property, but his bond. I have not paid taxes on it since then, and haven't given it in for taxes. Hogg hasn't paid me for it, and I still hold his notes. When this transaction took place, Hogg was in possession of the property. In 1916 he came to me and told me he was unable to go further, and was unable to furnish his hands, and was unable to meet his payment and he went into this written agreement under this contract. I didn't consider that Hogg was still the landlord. My attorney told me I was in possession under this contract, and that Hogg was not under the bond for title. I signed the waivers to furnish certain hands and W. F. Hogg, which was done at the request of Hogg."

The "written agreement," referred to in the evidence just quoted, is the paper copied

in the statement of facts, and dated January 24, 1916. A copy of the "waivers" referred to will also be found in the statement of facts. A part of the evidence of Hogg is as follows:

"I hold land that I hold under bond for title that I purchased from W. A. Ward. I held this land in 1916. I purchased the land from W. A. Ward in 1913, and I was in possession of the land in 1916, and am in possession of it now. I know Sam Lovelace, Major Cooley, Whit Davidson, Perry Green, Peter Brooks, and Geo. Lynch. They were tenants in 1916 on the lands I purchased from W. A. Ward. They were working that year on halves. I. M. Scott & Co. furnished them at my request. * * * I paid the taxes on the property, 1916 and 1915. * * * I made the agreements with these negroes for the year 1916, and Ward did not make them, and he never had anything to do with them."

Under the foregoing facts it is quite clear that the relation of landlord and cropper never existed during the year 1916 between Ward and those who cultivated the land sold by him to Hogg. The evidence shows that Ward sold the land to Hogg, gave him bond for title, which Hogg still held, and Ward held the notes given for the purchase price of the land. In *Broxton v. Ennis*, 96 Ga. 792, 22 S. E. 945, it was held:

"Where, under a contract for the sale of land, the vendor executes to the vendee the usual bond for titles, and delivers to him the possession of the premises, even if the latter fail to pay the purchase money at maturity, he may nevertheless retain possession, either by himself or his tenant, until such time as he shall be legally evicted therefrom by the vendor; and the tenant who enters under the vendee cannot, without first surrendering his possession to the latter, attorn to the vendor upon any supposed right of the latter, without the consent of the vendee to rescind the contract of sale."

In the case of *Guin v. Hilton & Dodge Lumber Co.*, 6 Ga. App. 488, 65 S. E. 332, this court referred to *Broxton v. Ennis*, supra, and said:

"This decision is in effect a holding that the vendee in possession under a bond for title is to all intents and purposes the owner of the land until the vendor, in some manner prescribed by law, recovers possession of the land."

Applying the rulings in those cases to the facts of the one now under consideration, we must hold that Hogg was landlord, and that the only legal effect of the paper of January 24, 1916, was to transfer to Ward the title to the rent contracts and "carry the liens as a necessary incident thereof," as provided by sections 3345 and 3346 of the Civil Code of 1910, with the right in him to enforce the liens arising thereunder as provided in section 3347 of said Code. It did not cancel or rescind the contract of sale of the land made by Ward to Hogg, nor did it

change the relation between Hogg and the tenants and make Ward landlord, nor did the "waivers" signed by Ward have this effect. It will be noted that in the agreement of January 24, 1916, Hogg transfers to Ward his liens for 1916, "on all crops of the tenants hereinafter named," and also transfers and assigns to Ward "the rents due me by the following named tenants for the year 1916." This transfer also says:

"These rents are due and payable October 15, 1916. These rents are given for the lands purchased by me from W. A. Ward, and are for the rent of the lands for the year 1916, and are to be turned over to W. A. Ward to be credited on the indebtedness I am now due him for the purchase of said lands."

As the petition was based upon the allegation that plaintiff was the landlord and that the parties cultivating the land were his "croppers," and as the evidence clearly establishes the fact that he was not the landlord, and that the persons cultivating the land were not his croppers, and that he had only a lien on the cotton and cotton seed raised by the tenant, and not title thereto, the evidence fails to support the allegations of the petition. The verdict is therefore contrary to the law and the facts, and must be set aside. Under this ruling it is unnecessary to consider the special grounds of the motion for new trial.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 447)

GEORGIA CASUALTY CO. v. DIXIE TRUST & SECURITY CO. et al.
(No. 9714.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. COURTS \Leftrightarrow 189(3)—CITY COURT OF MACON—JURISDICTION.

Under the allegations in the pleadings, the city court of Macon had no jurisdiction of the Dixie Trust & Security Company in this case.

2. GUARANTY \Leftrightarrow 4, 82(3)—CONSTRUCTION OF CONTRACT—JOINT SUIT AGAINST GUARANTOR AND PRINCIPAL DEBTOR.

The contract signed by Wilson was one of guaranty, and a guarantor cannot be sued jointly with the principal debtor.

3. EVIDENCE \Leftrightarrow 419(11) — CONSIDERATION — PAROL EVIDENCE.

As a general rule, the consideration of a contract is open to inquiry as between the original parties; but "if the consideration be so stated in the contract as to make it one of its terms or conditions, as where the consideration consists of mutual promises expressed in the

contract, a different consideration, whether variant or additional, cannot be shown by parol."

(Additional Syllabus by Editorial Staff.)

4. BILLS AND NOTES §227—CERTIFICATES OF DEPOSIT—INDORSEMENT.

One who merely agrees to indorse certificates of deposit could not be held as indorser upon his mere promise to indorse.

5. BILLS AND NOTES §227—CONSTRUCTION OF CONTRACT.

One who agreed to indorse certificates of deposit might be sued for breach of his agreement, in which case plaintiff could only recover by showing loss.

6. GUARANTY §36(1) — CONSTRUCTION OF CONTRACT.

The contract of guaranty is stricti juris, and the guarantor may stand upon the precise terms of his contract.

Error from City Court of Macon; Du Pont Guerry, Judge.

Suit by the Georgia Casualty Company against the Dixie Trust & Security Company and R. L. Wilson. Demurrer to petition, as amended by Dixie Trust & Security Company, sustained, and demurrer of defendant R. L. Wilson to original and amended petition sustained, and suit dismissed, and plaintiff brings error. Affirmed.

P. F. Brock, of Macon, for plaintiff in error.

Hardeman, Jones, Park & Johnston and R. Curd, all of Macon, for defendants in error.

BLOODWORTH, J. The brief of counsel for defendants in error is such a clear and fair presentation of the issues involved in this case, and so fully in accord with our opinion of the principles of law involved, that we adopt it almost in its entirety as our opinion in the case.

The Dixie Trust & Security Company issued two certificates of deposit, dated February 26, 1915. These certificates were signed by the trust company, through two of its officers alone. No other party appeared as joint maker, security, indorser, or otherwise thereon. The company was chartered in Crisp county, and had its principal office and place of business in that county. Subsequently, on March 1, 1915, R. L. Wilson executed a contract wherein he agreed to indorse these certificates and to guarantee the Georgia Casualty Company against loss thereon. This contract was signed by Wilson alone. The trust company was not a party thereto in any way, and, so far as shown on the face of the contract, was not interested therein beneficially or otherwise. Wilson was a resident of Bibb county, Ga. The Georgia Casualty Company, the holder of these cer-

tificates, sued the trust company and Wilson jointly in the city court of Macon for their full face value with interest, attaching copies of the certificates and contract to the petition. The trust company demurred to the petition, on the ground that it affirmatively appeared that the court was without jurisdiction as to it. Wilson demurred on the grounds that it affirmatively appeared that he was a guarantor against loss only; that he was not a party to the certificates nor liable thereon, and could not be sued jointly with the trust company; and that he could not be sued individually on the contract of indemnity until it was shown that the holder had been unable to recover from the maker of the certificates. On the hearing the plaintiff filed an amendment, which was allowed, alleging that the consideration for the contract executed by Wilson was extension of time and indulgence granted by the plaintiff to the trust company and another upon these certificates and other indebtedness, and that it was the intention of the parties that Wilson should become surety for said debts. This amendment was demurred to on the ground that it was an attempt to vary the plain terms of the contract set forth, was directly contradictory thereof, and that the same could not be changed or varied by any alleged intention of the parties. The court sustained the demurrer of the trust company and also sustained the demurrer of R. L. Wilson to the original petition and to the petition as amended, and dismissed the entire case. The correctness of the court's rulings upon all of the demurrers depends primarily upon the terms of the contract between plaintiff and Wilson. The material portions thereof are:

" * * * Whereas the Georgia Casualty Company has on deposit with the Farmers' State Bank the sum of \$7,710.00 * * * and also holds the following certificate of deposit issued by said bank: * * * Now, therefore, in consideration of \$5.00, * * * the said R. L. Wilson hereby agrees to indorse the above-named certificates as well as the other two certificates of deposit held by the Georgia Casualty Company and issued by the Dixie Trust & Security Company, * * * and to likewise indorse any renewals or extensions of the above-named certificates of deposit. And for the consideration aforesaid the said R. L. Wilson does also guarantee the said Georgia Casualty Company against loss on account of the above-named certificates of deposit * * * or the above-mentioned deposit with the Farmers' State Bank, and guarantees to the said Georgia Casualty Company the faithful payment of all amounts due or owing by said Farmers' State Bank to the Georgia Casualty Company. * * *"

[1] 1. After fixing the venue of divorce cases, land cases, and equity cases, the Constitution of Georgia provides:

"Suits against joint obligors, joint promisors, copartners, or joint trespassers, residing in different counties, may be tried in either county." Civil Code 1910, § 6541.

"Suits against the maker and indorser of promissory notes, or drawer, acceptor, and indorser of * * * inland bills of exchange, or like instruments, residing in different counties, shall be brought in the county where the maker or acceptor resides." Civil Code 1910, § 6542.

"All other civil cases shall be tried in the county where the defendant resides. * * *" Civil Code 1910, § 6543.

It is not contended that Wilson was a joint maker. He was not an indorser in the technical sense. If he had been, a joint suit could only be maintained in Crisp county. If a guarantor, there could be no joint suit in either county. Both parties would have to be sued independently in the county of their respective residences. *Musgrove v. Luther Publishing Co.*, 5 Ga. App. 279, 63 S. E. 52; *Manry v. Waxelbaum*, 108 Ga. 14, 33 S. E. 701; *Renfro v. Shuman*, 94 Ga. 153, 21 S. E. 373; *Lewis v. Close*, 91 Ga. 302. Was he a surety? There is no connection whatever on the certificates of deposit themselves, either on their face or elsewhere, between the trust company and Wilson. They are promises to pay by the trust company alone, independently of any one else, and the company is not a party to any other agreement by any other persons relating to them. The difference between the contract of surety and guarantor is thus stated in a decision of this court:

"A surety and guarantor have this in common, that they are both bound for another person; yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to every known default of his principal. * * * On the other hand, the contract of guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its nonperformance." 1 *Brandt on Suretyship* (3d Ed.) § 2. The surety joins in the same promise as his principal and is primarily liable; the guarantor makes a separate and individual promise and is only secondarily liable. His liability is contingent on the default of his principal, and he only becomes absolutely liable when such default takes place and he is notified thereof. 20 *Cyc.* 1400 et seq.; *Childs on Suretyship and Guaranty*, 7." *Musgrove v. Luther Publishing Co.*, 5 Ga. App. 281, 63 S. E. 53.

The distinction is thus stated by the Supreme Court:

"One difference is pointed out by our Code. It says that a contract of suretyship 'differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor.' Civil Code, § 2966. * * * In brief, we understand the difference to be this: A surety binds himself to perform if the principal does not, without regard to his ability to do so. His contract is equally absolute with that of his principal. They may be sued in the same action, and judgment may be entered up against both. A guarantor, on the other hand, does not contract that the principal will pay, but simply that he is able to do so; in other words, a guarantor warrants nothing but the solvency of the principal. Before an action can be maintained against a guarantor, therefore, it must be shown that the principal is unable to perform. The surety says to the creditor: If your debtor will not pay, I will pay. The guarantor says to him: Proceed first against the principal, and, if he should not be able to pay, then you may proceed against me. It has been said that there is no instance in the books of a guarantor contracting jointly with his principal. Much has been written upon this subject, but we think the above expresses the true distinction between the two classes of contracts." *Manry v. Waxelbaum*, 108 Ga. 17, 33 S. E. 703.

Measured by the rules laid down in the decisions cited, whatever may be the particular nature of the obligation entered into by Wilson, it was not that of a surety. The obligations were evidenced by different instruments executed at different times and upon different considerations. Wilson was not a debtor from the beginning, and has at no time ever been primarily liable upon the certificates. Under no view of the transaction could the city court of Macon have had jurisdiction of the trust company.

[2, 4, 5] 2. By the terms of the writing signed by Wilson, the casualty company bound itself to nothing. Wilson agreed to three things: (a) To indorse all the certificates of deposit. (b) To guarantee the Georgia Casualty Company "against loss on account of the above-mentioned certificates of deposit," or the deposit with the Farmers' State Bank. (c) To guarantee to the Georgia Casualty Company the faithful payment of all amounts due or owing by said Farmers' State Bank to Georgia Casualty Company.

(1) Wilson merely agreed to indorse. He did not indorse and is not sued as indorser. He could not be held as indorser upon a mere promise to indorse. He might be sued for breach of his agreement, but then plaintiff could only recover by showing loss. *National Bank v. Leonard*, 91 Ga. 805, 18 S. E. 32; *Birdsell v. Brown*, 96 Mich. 213, 55 N. W. 806; 1 *Daniel, Neg. Inst.* (6th Ed.) § 689. If one agrees to give a note, can you bring a suit against him on the note which he fails to give? See *Adams v. Williams*, 125 Ga. 430, 54 S. E. 99. (2a) An indorsement may always be explained. Civil Code 1910, § 5796.

If Wilson had indorsed the certificates, what kind of indorsement would he have placed thereon? The contract answers the question. He was to indorse on the Farmers' State Bank certificates a guaranty to faithfully pay. He was to indorse on the Dixie Trust certificates a guaranty against loss. Otherwise, why did not the contract stop with a simple agreement to indorse?

(2) Under the authorities quoted from in the first division of this opinion, Wilson was a guarantor. Under the terms of the specific contract in question here, his guaranty was against any loss on the Dixie Trust Company certificate. This was an agreement to indemnify only.

"A guaranty of a note is a covenant to pay it, breached by failure of the note's maker to do so; while an indemnitor's covenant is merely to make good any loss from nonpayment." *Eckhart v. Heier*, 37 S. D. 382, 153 N. W. 403.

"So, in general, there is a well-settled distinction between an agreement to indemnify and an agreement to pay, or a covenant to do a certain act. In the latter case a recovery may be had as soon as there is a breach of the contract, whereas in the case of a covenant of indemnity strictly—that is, of an indemnity against loss—no right of action accrues until the indemnitee has suffered a loss against which the covenant runs." 14 *Ruling Case Law*, 44.

See, also, *Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L. Ed. 752, 753; *Wilson v. Stillwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *Henderson v. Shillito*, 64 Ohio St. 236, 60 N. E. 295, 298, 82 Am. St. Rep. 745; *Bain v. Arthur*, 129 La. 143, 55 South. 743; *Poe v. Philadelphia Casualty Co.*, 118 Md. 347, 84 Atl. 476.

"A guaranty of collection or a guaranty against loss as the result of the failure to collect a debt places upon the one for whose benefit the guaranty is made the duty of making a reasonable effort to collect the debt from the principal debtor, and a cause of action does not accrue thereon until after such effort has been made and proved unavailing. There is no right of action upon such contingent liability immediately upon the failure of the principal to perform." *Burton v. Dewey*, 4 Kan. App. 592, 46 Pac. 325.

See, also, *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599; *Allison v. Waldham*, 24 Ill. 132; *Bosman v. Akeley*, 39 Mich. 710, 33 Am. Rep. 447; *Osborne & Co. v. Thompson*, 36 Minn. 528, 33 N. W. 1; *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Woods v. Sherman*, 71 Pa. 100 (2); *Evans v. Bell*, 45 Tex. 553; *Day v. Elmore*, 4 Wis. 190; *Parker v. Culvertson*, 18 Fed. Cas. 1122, No. 10732.

[6] Inasmuch as there has been no effort (prior to the present suit in a court without

jurisdiction) to collect from the Dixie Trust & Security Company, and that company is not even alleged to be insolvent, the liability contracted for has not arisen. The contract of guaranty is stricti juris, and the guarantor may stand upon the precise terms of his contract. *Williams Valve Co. v. Amorous*, 19 Ga. App. 155 (1, 5), 91 S. E. 240.

(3) The language used evidences a clear intention to guarantee against loss only on the Dixie Trust & Security Company certificates. Wilson therefore was not subject to a suit upon his undertaking until efforts to collect out of the trust company were exhausted or some reason shown why such efforts would prove fruitless.

[3] 3. No relation between Wilson and the trust company is mentioned in the writing. The sole consideration therefor recited in the agreement was the payment of \$5. If this was not paid, then there was no consideration flowing from the casualty company for the contract. It neither did anything nor agreed to do anything. While the consideration of a contract may be inquired into, an executory consideration different from that expressed in the contract cannot be proven. It does not appear how any agreement to extend the time for payment of the Farmers' State Bank certificates could have been of any benefit to the Dixie Trust & Security Company or could have furnished any consideration for Wilson's agreement to indorse or guarantee the trust company's certificates. But even if so, and if the alleged extension of time on the trust company's certificates constituted a consideration for Wilson's agreement, this could not be shown by parol to vary or add to the writing. *Smith v. Newton*, 59 Ga. 113 (5); *Atkinson v. Lanier*, 69 Ga. 460 (2); *Burke v. Napier*, 106 Ga. 329, 32 S. E. 134; *Wellmaker v. Wheatley*, 123 Ga. 203, 51 S. E. 436 (2); *Coldwell Co. v. Cowart*, 138 Ga. 236, 75 S. E. 425; *Brousseau v. Jacobs Pharmacy Co.*, 147 Ga. 189, 93 S. E. 293 (1); *Kehoe v. Southern Paving C. Co.*, 7 Ga. App. 236, 66 S. E. 547. In no event could it have changed the contract from one of guaranty to one of suretyship in the face of the specific provisions to the contrary in the agreement itself. The demurrers, including the demurrer to the petition as amended, should have been sustained and the case dismissed as to all parties, and the court was clearly right in so doing. See *Adams v. Williams*, 125 Ga. 430, 54 S. E. 99.

Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 356)

WASHINGTON EXCH. BANK v. SMITH.
(No. 9634.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1919. On Rehearing, Feb. 27, 1919.)*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇨231(3)—OBJECTIONS
IN LOWER COURT—STATEMENT OF GROUNDS.**

This court cannot say that the admission in evidence of the deed from R. M. Smith to Sallie L. G. Smith was error. The only objection made at the time of its admission was that it was "inadmissible." This objection was too general and indefinite. Some specific ground or reason why it was inadmissible should have been stated.

**2. MORTGAGES ⇨114—PROVISION IN NOTE—
SECURITY.**

Under the agreed statement of facts, the court, passing by consent upon all questions both of law and fact, did not err in finding and adjudging that the \$5,000 note was the only note sued on, which was secured by deed, and that the \$447 note was not so secured. The deed in question, which secured the \$5,000 note, was executed prior to the execution of the \$447 note. The \$447 note was, however, executed prior to the execution of the \$5,000 note, and was held by the plaintiff bank at the time of the making of the latter note. The \$5,000 note did not specifically refer to the \$447 note (both notes being executed by the same person), but contained the following provision: "And it is hereby agreed and understood that any excess of security upon this note shall be applicable to any other note or claim held by said bank against me." No parol evidence was introduced to show that the \$447 note was secured by the deed given to secure the \$5,000 note, or that this was the intention of the parties, and the language just quoted from the \$5,000 note was insufficient in itself, to establish such fact.

**3. APPEAL AND ERROR ⇨1071(1)—INTEREST
⇨50—TENDER ⇨16(2)—HARMLESS ERROR
—NECESSITY OF TENDER.**

The court erred in finding that the defendant made a legal tender of the amount due on the \$5,000 note. The agreed statement of facts clearly shows that no such tender was ever made. This error, however, was harmless to the plaintiff, as the undisputed evidence showed that the plaintiff stated to the defendant, when the latter offered to pay the \$5,000 note, that it would not accept the amount due on the \$5,000 note unless the amount due on the \$447 note was also paid. "A formal tender is unnecessary, where express declarations are made by the party to whom money is payable that he will not accept it, if tendered. The law takes one who makes such a statement at his word, and does not thereafter require the doing of a vain thing." *Arnold v. Empire Life Insurance Co.*, 3 Ga. App. 685 (5), 708, 60 S. E. 470, 480; *Southern Life Insurance Co. v. Logan*, 9 Ga. App. 503 (2), 507 (2), 508, 71 S. E. 742; *McLeod v. Hendry*, 126 Ga. 187 (2), 171 (2), 54 S. E. 949; *Irwin v. Askew*, 74 Ga. 581 (4). Under the facts of the instant case, a tender by the defendant would have been "a mere idle

and useless ceremony," and it was therefore unnecessary.

(a) The plaintiff was entitled to recover the amount of the principal due on the \$5,000 note, with accrued interest thereon to the date of its refusal to accept payment of such note and interest from the defendant.

4. JUDGMENT ⇨222—DEFINITENESS.

The judgment is too general, in that it does not specifically designate the amount due the plaintiff on the \$5,000 note. The court below is directed to amend its judgment to cure this defect.

*On Rehearing.**(Additional Syllabus by Editorial Staff.)***5. INTEREST ⇨50—CONTINUING TENDER—
RUNNING OF INTEREST.**

The rule that a tender to prevent running of interest must be continuing is not applicable, in case where no legal tender was ever made.

**6. INTEREST ⇨50—REFUSAL TO ACCEPT TEN-
DER.**

Where a debtor made a bona fide offer to pay a note, and intended and was able to make payment, but offer was rejected by creditor, he was not entitled to interest on note after rejection of tender.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by the Washington Exchange Bank against R. M. Smith. From the judgment, plaintiff brings error. Affirmed, with direction.

Colley & Colley, of Washington, Ga., for plaintiff in error.

I. T. Irvin, Jr., of Washington, Ga., for defendant in error.

BROYLES, P. J. Judgment affirmed, with direction.

BLOODWORTH and STEPHENS, JJ., concur.

On Rehearing.

BROYLES, P. J. [5, 6] In our judgment the principle of law stated in *Gray v. Angler*, 62 Ga. 597, that "a tender, to prevent the running of interest, must be continuing," is not applicable in a case where no legal tender was ever made. In the instant case, as decided by this court, no legal tender was made; but the evidence authorized a finding that a bona fide offer to pay the \$5,000 note was made by the debtor to his creditor on March 14, 1917, that the former really intended and was able to make the payment, and that this offer was rejected by the creditor on the following day. Under these circumstances the creditor was not entitled to interest on the note after the latter date, to wit, March 15, 1917. "Where

a debtor is really and bona fide ready to make payment, and intends to do so, but is prevented from so doing by the act or omission of his creditor, the latter will not be entitled to interest." 15 R. C. L., 33, § 30; Hart v. Brand, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715. "If the failure to make payment of the principal debt is due to any improper act of the creditor, or to such conduct on his part as prevents the debtor from complying with his contract to pay, interest on such debt is generally suspended during the time the debtor is so prevented from making payment." 22 Cyc. 1554, § 2, note 93.

Judgment adhered to.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 408)

TEXAS CO. et al. v. HEARN. (No. 9560.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 12, 1919.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨230(2) — CONTRIBUTORY NEGLIGENCE—AGE OF CERTIFICATE.

A servant 19 years old, "of fair education and training," is chargeable with the same degree of diligence for his own safety as an adult engaged in the same work.

2. MASTER AND SERVANT ⇨217(13)—DEFECTIVE TOOLS AND APPLIANCES—CONTRIBUTORY NEGLIGENCE—LIABILITY.

"A master is not responsible in damages to his servant for injuries sustained by the latter while in the employment of the former, in consequence of defects in a tool furnished by the master, which the servant was using at the time of the injury, when the defects were such that they were known to the servant, or could have been known by the exercise of ordinary care on his part."

3. MASTER AND SERVANT ⇨155(1) — DANGERS INCIDENT TO EMPLOYMENT—WARNING.

"The duty of a master to warn his servants of dangers incident to his employment does not embrace an obligation of the master to anticipate that the servant may perform his task improperly, and to warn him of an obvious danger resultant from such improper method of performing his task."

(Additional Syllabus by Editorial Staff.)

4. MASTER AND SERVANT ⇨258(11)—TOOLS AND APPLIANCES—WARNING—SUFFICIENCY OF PETITION.

Petition alleging that deceased servant, 19 years old, was employed to sell and deliver gasoline from a truck, the platform of which was too high to remove cans, that defective covers permitted spilling of gasoline on his clothing, as result of which it caught fire as he was

standing near cigar lighter, and a failure to warn of dangerous machinery and inflammable character of gasoline fumes, stated no cause of action.

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Suit by Mrs. Leah V. Hearn against the Texas Company and another. General and special demurrers to petition overruled, and defendants bring error. Reversed.

Mrs. Leah V. Hearn sued the Texas Company, alleging, in substance, as follows: That petitioner is the mother of Cline Hearn, who in his lifetime contributed to her support; that on December 29, 1916, the said Cline Hearn, then a minor 19 years old, was employed by the defendant, and while engaged in the discharge of his duties was killed as a result of the negligence of defendant and its agent, Homer A. Massey; that prior to December, 1916, the said agent employed the deceased to drive a truck and to sell and deliver gasoline; that said agent furnished the deceased, for use by him in performing his duties, an automobile truck and a number of 10-gallon oil cans, to be carried on said truck, for the transportation of oil and gasoline; that the platform of the truck upon which the cans stood was 40 inches above the surface on which the truck ran, and the cans were 24 inches high; that it was Hearn's duty to carry these cans, filled with gasoline and oil to the point of delivery, and take them from the truck and pour their contents into the tanks of dealers to whom he sold; that a number of the cans furnished Hearn had defective covers, in that the covers did not fit the opening of the cans tight enough to prevent their falling out when they were tilted; that on the date of his death Hearn drove his truck to Gordon, and there made a sale of gasoline for his employer to a dealer, and, in taking the can of gasoline from the truck for the purpose of delivering it, tilted the can, and the defective cover came off and gasoline poured out over the said Hearn's body and clothing; that within five minutes after making this delivery he was in the drug store of Dr. Evans, at Gordon, standing at the counter near a cigar lighter, which was burning a small flame, and standing more than 12 inches therefrom, when the fumes of gasoline from his clothing caught fire from the flame, and the fire was communicated to his gasoline-soaked clothing, and the burns therefrom caused his death; that Cline Hearn never handled gasoline until after his employment by the defendant, which was less than 4 months prior to his death; that he had no knowledge of the danger attending the handling of the same, and that he had no knowledge of the inflammable nature of its fumes, while the defendant well knew of the dan-

gers incident to his employment, and of the inflammable nature of the gasoline; that the defendant well knew the youth, inexperience, and lack of knowledge of Hearn about his business; that the truck and cans furnished Hearn were defective and dangerous tools, in that Hearn was only 5 feet 4 inches tall, the floor of the truck was 40 inches above ground, the top of the can 24 inches above the floor of the truck, and the cans, when full, weighed more than 100 pounds, and, in order for Hearn to remove the cans from the truck, it was necessary to tilt the can until he could encircle it with his arms; and that Hearn had no opportunity to learn of the dangerous character of the tools. It is alleged that the defendant was negligent in furnishing Hearn with dangerous machinery and tools, with a machine whose floor was too high for him to safely remove therefrom cans of the character furnished him, filled with gasoline, with cans having defective covers, that permitted the spilling of gasoline on his body and clothes, with a truck and cans which necessitated the tilting of the cans in unloading; in failing to warn him of the dangerous character of the machinery and tools furnished him, of the dangers attending his duties, of the dangers of spilling gasoline upon his clothes, and of the inflammable character of the fumes of gasoline, and in failing to instruct him to use the machine furnished and handle the gasoline in a safe manner. Demurrers, both general and special, were overruled, and the defendant excepted.

Ryals & Anderson and B. S. Deaver, all of Macon, for plaintiffs in error.

Hines & Vinson, of Milledgeville, for defendant in error.

BLOODWORTH, J. (after stating the facts as above). [1] That the deceased was only 19 years old when the burning which resulted in his death took place cannot avail the plaintiff. The petition distinctly alleges that he was "of fair education and training." In *Skipper v. Southern Cotton Oil Co.*, 120 Ga. 942, 48 S. E. 360, Mr. Justice Lamar said:

"The petition stresses the fact that the plaintiff was a minor and inexperienced, but that he was only 19 years of age was immaterial. The case is to be treated as though he had attained majority; for there is no suggestion that he was not chargeable with the duty of using due care, nor that he was incapable of appreciating the danger of stepping into the midst of moving machinery."

As illustrating the principle above announced, see *Muscogee Mfg. Co. v. Butts*, 21 Ga. App. 558, 94 S. E. 821 (1); *Vinson v. Willingham Cotton Mills*, 2 Ga. App. 53, 58 S. E. 413 (2); *Wilder v. Miller*, 128 Ga. 139, 57 S. E. 509 (1); *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674 (6); *Central Railroad Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952 (2); *Central*

Railroad & Banking Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634 (2); *Sims v. East & West Railroad Co.*, 84 Ga. 152, 10 S. E. 543, 20 Am. St. Rep. 352; s. c., 80 Ga. 807, 6 S. E. 595.

[2] 2. From the foregoing statement of facts it will be seen that the petition alleges that the defendant was negligent, because the deceased was low of stature and had been furnished with an auto truck too high for him to remove the cans of gasoline therefrom without tilting them, and that some of the cans had defective tops, which allowed the gasoline to spill when the cans were tilted. It does not appear from the petition that the truck and cans were not equal in kind to those in general use and reasonably safe for all persons who operated them with ordinary care and diligence, and there is no allegation that the servant made complaint to the master in reference thereto, nor is there any charge that there were any latent defects in the truck or cans. The plaintiff by the petition seems to attempt to place this case in a special class because deceased was "low of stature." From the very character of the complaint as to the alleged defects of the truck and cans, these defects were patent and obvious to the deceased. It also appears from the declaration that the servant for nearly 4 months had been using the truck and cans, and his opportunity of knowing of "the defects or danger in the machinery supplied" was equal, if not superior, to that of the master. See *Williams v. Atlantic Coast Line Railroad Co.*, 18 Ga. App. 120, 89 S. E. 158, and cases cited, and *Beck v. Tumlin Co.*, 13 Ga. App. 618, 79 S. E. 587, and cases cited. Even if it be conceded that the truck and cans, as related to the low stature of the deceased, were dangerous because of the alleged deficiencies therein, the deceased, with full knowledge of these deficiencies, assumed the risk and continued voluntarily to use them, and the plaintiff would not be entitled to recover for any injury resulting solely from such use. It is apparent, from the allegations in the petition, that the saturation of the clothes of the deceased resulted from his own failure to perform with due care the work assigned him, and was not the result of any negligent act or omission of the defendant, and that the master is not liable for providing the truck and cans used by the deceased.

"A master is not responsible in damages to his servant for injuries sustained by the latter while in the employment of the former, in consequence of defects in a tool furnished by the master, which the servant was using at the time of the injury, when the defects were such that they were known to the servant, or could have been known by the exercise of ordinary care on his part." *Banks v. Schofield's Sons*, 126 Ga. 667, 55 S. E. 939.

"The servant seeking to recover for an injury takes the burden upon himself of establishing

negligence on the part of the master, and due care on his own part." *McDaniel v. Acme Brewing Co.*, 113 Ga. 80, 38 S. E. 404 (1).

See, also, Civil Code 1910, § 3131; *Musco-gee Mfg. Co. v. Butts*, 21 Ga. App. 558, 94 S. E. 821 (2); *Short v. Cherokee Mfg. Co.*, 3 Ga. App. 377, 59 S. E. 1115.

[3, 4] 3. The petition alleges that the deceased had never handled gasoline until he was employed by the defendant, "had no knowledge of the inflammable nature of the fumes of gasoline," and "had no knowledge of the dangers attending the handling of the same," and that the defendant failed to warn him of the inflammable nature of gasoline, and failed to instruct him "of the dangers of permitting gasoline to get upon his person and clothing." Generally it is the duty of the master to warn the servant of the dangers incident to his employment, yet this duty "does not embrace an obligation of the master to anticipate that the servant may perform his task improperly, and to warn him of an obvious danger resultant from such improper method of performing his task." *Howard v. Central of Georgia Ry. Co.*, 138 Ga. 537, 75 S. E. 624 (2). See *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 209 (2). The saturation with gasoline of the clothes of the deceased was not an incident to the proper performance of his work, but clearly resulted from an improper performance thereof, and was the *causa sine qua non*, the cause without which the burning could not have taken place. The proper performance of the duties of the deceased would not be attended by extraordinary hazard or danger.

"The failure of the master to instruct the servant how to perform work which any person of ordinary intelligence can perform without instructions, and the performance of which is unattended by extraordinary hazard or danger, is not such a breach of his duty to instruct as will give a servant injured while performing the work a right of action for damages." *Howard v. Central of Georgia Railway Co.*, 138 Ga. 537, 75 S. E. 624 (1).

It follows from the decisions above quoted and cited that the defendant was under no legal duty to warn the deceased of the danger resulting from the improper performance of his task. In addition to the above, the petition shows:

That at the time his "clothing caught fire he was in the drug store of Dr. Evans, at Gordon, Ga., standing at the counter near a cigar lighter, which was burning a small flame," and that "the fumes of gasoline from his clothing caught fire from the flame, and the fire was communicated to his gasoline-soaked clothing, and the burns therefrom were the cause of his death."

There is no allegation that he was in this drug store delivering gasoline, or that in the discharge of his duty it was necessary for

him to be standing near the cigar lighter from which the "fumes" of gasoline caught fire, and which resulted in his death. See *Kennedy v. Atlantic Coast Line R. Co.*, 9 Ga. App. 661, 72 S. E. 66; *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470, 65 S. E. 322; *Strange v. Wrightsville & Tennille R. Co.*, 133 Ga. 730, 66 S. E. 774; *Central of Georgia Ry. Co. v. McWhorter*, 115 Ga. 476, 42 S. E. 82; *Whitton v. South Carolina & Georgia R. Co.*, 106 Ga. 796, 32 S. E. 857; *Central Railroad & Banking Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273; *Atlanta & Charlotte Air Line Ry. v. Ray*, 70 Ga. 674 (4). Taking into consideration all the allegations of the petition, we are convinced that the death of Cline Hearn was not due to the failure of any duty due him by the defendant, or to any negligent performance of any such duty, and that the court erred in overruling the demurrer to the petition.

Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

(23 Ga. App. 434)

AMERICAN NAT. BANK OF MACON et al.
v. ANDERSON. (No. 9566.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 18, 1919.)

(Syllabus by the Court.)

BANKS AND BANKING — 283—CONSOLIDATION—SUIT FOR SERVICES ON LIQUIDATING COMMITTEE.

The court erred in overruling the general demurrer to the petition.

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Suit by W. T. Anderson against the American National Bank of Macon and the Commercial National Bank of Macon. General demurrer to petition filed by the American National Bank of Macon overruled, and it brings error. Reversed.

Hardeman, Jones, Park & Johnston and Harry S. Strozler, all of Macon, for plaintiff in error.

Hall & Grice, of Macon, for defendant in error.

BROYLES, P. J. W. T. Anderson brought suit jointly against the American National Bank of Macon and the Commercial National Bank of Macon, Ga., for the recovery of an amount alleged to be due him for services rendered both banks as a member of the liquidating committee of the Commercial Bank in assisting the American Bank to reduce to cash certain assets of the Commercial Bank which had been transferred to and taken over by the

American Bank. The theory upon which the petition was drawn was that under a certain written contract (a copy of which was attached as an exhibit to the petition), entered into between the two banks on August 11, 1914, a consolidation or merger of these banks resulted, and that the surviving bank, the American Bank, was liable for the debts of the absorbed bank, the Commercial, and especially, as in this case, for services rendered upon the request of both banks, although the services were performed under employment by the absorbed bank. As the petition is drawn, there can be no recovery against the American Bank unless there was a consolidation or merger of the two banks; and this question depends upon the proper construction of the contract of August 11, 1914. That contract was as follows:

"Georgia, Bibb County.

"Articles of agreement for the liquidation of the Commercial National Bank of Macon, Georgia, by the American National Bank of Macon, Georgia, both being National Banking Associations, made and entered into between said banks as the contracting parties.

"Whereas, on the 1st day of August, 1914, the board of directors of the Commercial National Bank at a meeting of said board duly and regularly called, adopted a resolution which authorized the officers of the said association to commence proceedings for the liquidation of said association under section 5220 and 5223 of the U. S. Revised Statutes for consolidation with said American National Bank and to transfer to said American National Bank all the assets of said Commercial National Bank, which assets were by said resolution so transferred and assigned in order to fully protect and secure said American National Bank for all moneys advanced or to be advanced by said association in the assumption and payment of the liabilities of said Commercial National Bank shown by a list of said liabilities hereto attached and identified as 'Exhibit A' and by the signature of the parties hereto; and which said resolution further provided that said American National Bank should take over the business of said Commercial National Bank, liquidate said assets, and account to the shareholders of said Commercial National Bank for any overplus which might remain after paying the depositors and other indebtedness of said Commercial National Bank in full, and the expense of realizing on the assets so transferred, the said American National Bank to charge nothing for its services in so doing; and which resolution further authorized and directed the officers of said Commercial National Bank to make such contract with the American National Bank as might be necessary or appropriate in order to carry out the general purposes of said resolution, the details of said contract to be left to the discretion of said officers; and

"Whereas, on the same date, the board of directors of the American National Bank, at a meeting of said board duly and regularly called, adopted a resolution whereby said American National Bank assumed the payment of said depositors and other liabilities of said Commercial National Bank, shown by the list of li-

bilities set out in Exhibit A hereto attached and hereinbefore referred to, upon condition that the assets of said Commercial National Bank should be transferred to said American National Bank sufficient in amount and in value in the estimation of the officers of the American National Bank to fully protect and secure said association for any and all amounts payment of which was assumed under said resolution; and which resolution authorized the officers of said association to make such contracts as might be necessary to carry out the purposes of said resolution, the details to be left to the discretion of said officers; and

"Whereas, the preliminaries and conditions in said resolution mentioned have been complied with, and the assets of the Commercial National Bank have been delivered to said American National Bank;

"Now therefore these articles of agreement, witness:

"I. That said Commercial National Bank has transferred, assigned, conveyed and confirmed, and does by these presents transfer, assign, convey and confirm unto the American National Bank of Macon, Georgia, its successors and assigns all of the assets of every kind and description including cash and cash items on hand at the close of business on August 1, 1914, bills receivable, bonds, real estate and personal property and interest therein, and choses in action of all kinds including all the United States bonds now on deposit with the Treasurer of the United States as security for the circulation of the Commercial National Bank of Macon and for deposits of United States deposits; to have and to hold the same unto it the said American National Bank of Macon, its successors and assigns, in fee simple, forever; and the title to said assets and each and all thereof said the Commercial National Bank of Macon for itself and its successors hereby warrants unto said the American National Bank, its successors and assigns, against the claims of all persons whatsoever.

"II. That in contemplation of the liquidation of said Commercial National Bank under sections 5220, 5221 and 5223, U. S. Revised Statutes, said Commercial National Bank by its officers and directors, will call a meeting of the shareholders of said association to be held at Macon, Georgia, on August 12, 1914, and on the date or dates to which said meeting may be from time to time adjourned, and will procure proper resolutions by said shareholders and a sufficient majority thereof to comply with the law in such cases made and provided, liquidating said association and consolidating same with the American National Bank of Macon by the purchase of the assets of said Commercial National Bank by the American National Bank but without providing for stock in the American National Bank to be issued to the shareholders of the Commercial National Bank; and ratifying and confirming the action of the board of directors of said Commercial National Bank as herein recited; and ratifying and confirming this contract.

"III. That said Commercial National Bank will also procure proper resolutions to be passed by said shareholders, appointing said American National Bank as liquidating agent for said Commercial National Bank in said liquidating for consolidation as aforesaid, said liquidation

to be conducted in accordance with law and under the supervision of the board of directors of said Commercial National Bank.

"IV. That said Commercial National Bank, until the final liquidation of its affairs and final settlement with its shareholders, agrees to maintain its corporate existence, and that its directors and officers will at all times when called upon so to do by said American National Bank execute and deliver in the name of said association all other and further writings of all kinds which may be necessary to fully effectuate the transfer of said assets, the liquidation of said association, and this contract.

"V. That in consideration of the foregoing acts and agreements by the Commercial National Bank, said American National Bank hereby agrees that it will, and it does hereby assume and promise to pay the same when and as the same are presented for payment, the depositors and other liabilities of said Commercial National Bank of Macon shown in Exhibit A hereto attached; and that in addition thereto, it will and does hereby assume the redemption of the circulating notes of said Commercial National Bank; and that it will procure such resolution to be passed by its board of directors as may be necessary for it to so assume the redemption of said circulating notes.

"VI. That said American National Bank will accept the appointment as liquidating agent of said Commercial National Bank and will proceed with all due and reasonable diligence to liquidate said association and to collect and reduce to cash all the assets of said association all of said assets to be held as security by said American National Bank for all advances made by it in paying the depositors and other liabilities of said Commercial National Bank and the actual expenses incurred by said American National Bank in realizing on said assets, and that after deducting from the proceeds of said assets the actual expenses incurred by said American National Bank in liquidating said association and acting as liquidating agent and in collecting said assets and realizing upon the same, it will apply said proceeds, first, in repaying to itself all amounts advanced by it hereunder, with interest thereon at the rate of seven (7%) per annum; next, in discharging the liabilities of said Commercial National Bank which shall not have been paid by advances made by said American National Bank; and that when all of said liabilities have been fully [dis]charged it will account to the shareholders of said Commercial National Bank and from time to time pay over to said shareholders pro rata of the surplus remaining in its hands from the proceeds of said assets; said American National Bank to act as such liquidating agent without compensation for its own services.

"It being distinctly agreed and understood that in the event the said liquidating should be interrupted or discontinued for any reason beyond the control of said American National Bank, then and in that event said American National Bank shall and does hold all the assets of said Commercial National Bank as security for the advances which may have been made by it, up to the time such liquidation may be so discontinued.

"And it being further agreed and understood that neither the resolutions of said boards of directors of said associations nor this contract

shall relieve the shareholders of the Commercial National Bank from their legal liabilities as shareholders to respond in the event, it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities.

"In witness whereof, the parties hereto have caused these presents to be signed and delivered in duplicate by their proper corporate officers, and their corporate seals to be hereto affixed this 11th day of August, 1914."

The liability sued on in this case was not included in the list of liabilities set out in Exhibit A.

It is contended by the learned counsel for the defendant in error that this contract and the performance under it, as set out in the declaration, showed consolidation or merger of the two banks, and that the contract entered into and performance under it did not result in the creation of the relation of creditor and debtor between them. As was said by the United States Circuit Court of Appeals, Fifth Circuit, in passing upon this identical contract in the case of American National Bank of Macon v. Commercial National Bank of Macon, 254 Fed. 249 (opinion filed November 15, 1918):

"Provisions contained in the contract give some color to this contention if they are considered by themselves without due regard to the remainder of the contract, the situation with which it dealt, and the conduct of the parties to the contract while performance under it was in progress evidencing what each of them understood was the effect of a compliance by the American Bank with the obligations imposed upon it by the contract. The provisions referred to—viz., the one as to the transfer of the assets, the one in regard to liquidating the Commercial Bank and consolidating it with the American Bank by the purchase by the latter of the assets of the former, and the one in regard to making one of the banks liquidating agent for the other—lose the significance sought to be attributed to them when they are considered in connection with other provisions contained in the contract and in the light of the situation existing when the contract was made and for some time afterwards, and of the construction of the contract by both parties to it as disclosed by what was done under it. * * * The contract contains expressions and provisions which do not seem to us to be reconcilable with the existence of an intention other than that the making by the American Bank of the agreed disbursements in taking care of the liabilities of the Commercial Bank was to have the effect of creating a debt or debts owing by the latter to the former. * * * The concluding provision of the contract was to the effect that neither the contract nor the resolutions authorizing it 'shall relieve the shareholders of the Commercial National Bank from their legal liability as shareholders to respond, in the event it may be necessary to have recourse upon such shareholders' liability, for any deficit which may remain after exhausting the other assets of said association in the payment of its liabilities.' It hardly is conceivable that this pro-

vision would have been inserted in the absence of an intention that the making by the American Bank of the disbursements it obligated itself to make would result in creating a liability of the Commercial Bank for which the latter's shareholders would be individually responsible."

We do not think that the petition as amended showed a consolidation or merger of the two banks. On the contrary, the averments of fact in the petition, when considered in the light of the contract attached thereto, showed that the relation of creditor and debtor existed between them; and in this ruling we are, in effect, sustained by the decision cited above, in which the contrary ruling of Judge Evans of the United States District Court, Southern District of Georgia (248 Fed. 187), was reversed.

From what has been said it follows that the plaintiff's petition failed to set out a cause of action against the American National Bank, and that the court erred in overruling its general demurrer to the petition.

Judgment reversed.

BLOODWORTH and STEPHENS, JJ., concur.

(83 W. Va. 390)

MYERS v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 3551.)

(Supreme Court of Appeals of West Virginia. Feb. 18, 1919.)

(Syllabus by the Court.)

1. INSURANCE — 265 — LIFE INSURANCE — REPRESENTATIONS OR WARRANTIES.

The declarations and statements made by the insured in an application for a policy of life insurance are, according to their nature and effect, either representations or warranties.

2. INSURANCE — 266 — LIFE INSURANCE — "WARRANTIES."

"Warranties" in such a policy of insurance constitute part of the contract and stipulate for the absolute truth of the statement made. They must be strictly complied with, else the policy may be avoided.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Warranty.]

3. INSURANCE — 253 — LIFE INSURANCE — "REPRESENTATIONS."

"Representations" are not, strictly speaking, part of the insurance contract, but are collateral thereto. They are statements made to the insurer before or at the time of making the contract, presenting the elements upon which the risk is either accepted or rejected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Representation.]

4. INSURANCE — 265 — LIFE INSURANCE — REPRESENTATIONS OR WARRANTIES.

Such statements or declarations will not be construed to be warranties unless the provisions of the application and the policy taken together leave no room for any other construction.

5. INSURANCE — 256(2) — LIFE INSURANCE — REPRESENTATIONS — EFFECT.

A policy of insurance issued upon an application containing statements and declarations which are treated as representations will not be avoided because of the falsity thereof, unless they are untrue in a material regard, and are made with the intent to mislead or deceive, or are a statement of some material fact as true without its being known to be true, and which has a tendency to mislead.

6. INSURANCE — 265 — LIFE INSURANCE — REPRESENTATIONS — STATEMENTS IN APPLICATION.

Statements or declarations made by an applicant for insurance as to the condition of his health, as to his habits in regard to the use of intoxicating liquors, as to his previous condition of health, and as to his having consulted or not consulted physicians within a prescribed period, will be treated as representations, unless it plainly appears that the parties intend them to be warranties.

7. INSURANCE — 255 — LIFE INSURANCE — REPRESENTATIONS.

The answer of an applicant for insurance to a particular question directed to him will be treated as a material representation. The fact that a specific answer is sought and obtained in regard thereto is proof that the parties consider the matter material.

8. INSURANCE — 291(6), 292 — LIFE INSURANCE — TREATMENT BY PHYSICIAN — VALIDITY OF POLICY.

In determining whether or not an applicant for insurance has been treated by a physician so as to render voidable a policy of insurance issued to him upon the representation that he had not been so treated, prescriptions for slight temporary ailments will not be considered; neither will such slight temporary ailments be taken into consideration in determining the truth or falsity of a representation as to diseases or maladies with which the insured may have been afflicted.

9. INSURANCE — 297 — LIFE INSURANCE — USE OF INTOXICANTS — VALIDITY OF POLICY.

A policy of life insurance issued upon an application in which is contained a representation of the insured that he did not, at the time of making said application, use intoxicating drinks, and had not used any for more than a year, but that he had been intoxicated twice within the preceding five years, will not be avoided by proof that the insured more than two years prior to the application for the insurance had used intoxicating drinks, and had been under the influence thereof on at least two occasions.

10. INSURANCE — 292 — LIFE INSURANCE — TREATMENT BY PHYSICIAN—AVOIDANCE OF POLICY.

A policy of insurance, issued upon an application therefor, in which the representation is made, in answer to a question asked, that the insured had not consulted nor been treated by a physician within five years next preceding the making of said application, will be avoided at the instance of the insurer upon a showing that the insured within said time had been treated for several consecutive months for a chronic malady with which he was then suffering.

11. INSURANCE — 291(4)—LIFE INSURANCE—HEALTH—AVOIDANCE OF POLICY.

A policy of insurance will be avoided at the instance of the insurer, where the insured, in answer to a question in his application for insurance, states that he had since childhood only suffered from certain named complaints, from which he had fully recovered, when the evidence shows that he had been treated for several months at a time long subsequent to the complaints mentioned by him for a disease with which he was then suffering.

12. EVIDENCE — 482—ACTION ON POLICY—OPINIONS.

Upon the trial of a suit to recover upon a policy of life insurance, where the defense is that the insurer has the right to avoid the policy because of alleged false representations made by the insured in his application therefor, the opinion of the medical director of the insurer as to what action would have been taken upon such application had all of the representations therein made been in accordance with the truth as contended for by the insurer, or as to the general custom of insurance companies in passing upon an application containing such representations, is not admissible as evidence.

Error to Circuit Court, Wetzel County.

Action by W. O. Myers, committee, etc., against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Brown, Jackson & Knight, of Charleston, Thos. P. Jacobs, of New Martinsville, and Frederick L. Allen, of New York City, for plaintiff in error.

Edwin O. Kelfer, of New Martinsville, for defendant in error.

RITZ, J. This writ of error seeks the reversal of a judgment rendered upon two policies of insurance issued by the defendant upon the life of Columbus J. Myers. The policies in question were issued on the 15th day of April, 1912, and Myers died on the 14th day of December of the same year. Prior to the issuance of the policies, Myers made to the company written applications therefor. In these applications he made certain statements as to the condition of his health, both at that time and previously, as to his having

consulted a physician, or physicians, within five years previous thereto, and as to his habits in regard to the use of intoxicating liquors. In answer to a question contained in the application, Myers stated that he had had three attacks of pneumonia in 1887, 25 years prior thereto, and two attacks of typhoid fever in 1876 and 1896; that his recovery from all of those illnesses had been complete. And in answer to a specific question he replied that the above were all of the illnesses, diseases, or injuries with which he had been afflicted since childhood. He was also asked to state every physician who had prescribed for him, or whom he had consulted in the past five years, and to this question he answered that no physician had prescribed for him, and he had consulted none within that time. In answer to a question as to whether or not he was in good health, he answered that he was, and that there was no impairment of his health. He further replied, in answer to a question as to whether he had any bodily deformity, that he had none. He was asked in the application whether or not he used wine, spirituous, or malt liquors, and replied thereto that he did not. In answer to a question as to what kind of such liquors he had used within the past year, and how much in any one day, he replied that he had used none within that time. In answer to a question as to whether or not he had been intoxicated during the past five years, he answered that he had been so intoxicated twice within that time. He also replied that he had never taken treatment for the liquor or drug habit, and that he was a total abstainer and had been such for several years. It is charged in the statement of defense made by the company that the answers made by Myers above referred to were false; that in fact and in truth he had had other illnesses since childhood than those referred to; that he had consulted physicians, and had been prescribed for by physicians within five years next preceding the making of the application; that he was not in good health at the time he made the application; and further that he was at said time, and had been for a long time prior thereto, addicted to the excessive use of intoxicating liquors, and because of these alleged untruthful and false representations the defendant sought to avoid the payment of the amount of the policies.

The evidence offered in support of these contentions shows that Myers was formerly a resident of Wetzel county, W. Va.; that several years prior to the making of the applications for these policies of insurance he removed to Oklahoma; that he resided there for awhile, and about the year 1907 or 1908 he removed to New Mexico, where he resided for about two years, returning to Oklahoma in the fall of 1909 or 1910, where he resided until a short time after the issuance of the

policies, when he returned to his old home in Wetzel county, W. Va., dying there in December, 1912. In regard to the use of intoxicating liquors, it appears that during the two years that Myers lived in New Mexico he drank intoxicating liquors to some extent. This is shown by a number of witnesses. It appears that he lived at some distance from a town where intoxicating liquors were sold, and went to that town some two or three times a month, and that on those occasions he drank intoxicating liquors. No witness, however, testifies to seeing him under the influence of such liquors during this time on more than two occasions. There are some witnesses introduced by the defendant company who testify that on some occasions after Myers returned to Oklahoma from New Mexico he appeared to them to be under the influence of intoxicating drinks, but no witness testifies that he ever saw him take a drink after he returned from New Mexico. A great many of his intimate business and familiar associates testify that Myers was not only a temperate man, but that during the time he lived in Oklahoma, after his return from New Mexico, they never knew him to take a drink, or to be under the influence of liquor. We think it may safely be said that the evidence proves without substantial contradiction that Myers did use intoxicating liquors while he was in New Mexico, which was more than two years before the issuance of the policies of insurance, but that he had been a total abstainer therefrom after his return to Oklahoma.

It is also shown that during the time Myers was in New Mexico he had been treated by Dr. J. T. Stone. This treatment was during the year 1909. Dr. Stone testifies that Myers came to him and complained of his stomach hurting him, and gave him the history of his case, from which he pronounced the disease chronic gastritis, and administered to him treatment therefor. He testifies that he prescribed for him for this trouble off and on for several months, and he thinks he was also treated by other doctors for the same trouble. It is also shown that after his return to Oklahoma, and just a few months before he applied for the policies of insurance sued on in this case, he was treated by Dr. Schrader. This physician testifies that in February or March, 1912, Myers came to his office and consulted him in regard to his condition, complaining of his kidneys bothering him, and asked the doctor to give him something to relieve him; that, after making no examination of the patient other than to ask him some questions in regard to his troubles, he prescribed for him, and this was the only occasion upon which this physician treated him. No attempt is made to show that Myers was not, apparently at least, in good health at the time of the making of the applications.

[1-4] The question involved here is: Do the facts shown above furnish ground to the

defendant for avoiding the payment of the amount of the policies? Declarations and statements made by a person desiring insurance in his application for a policy therefor are, according to their nature and effect, distinguished as representations or warranties. "Representations" are in their nature no part of the contract of insurance. Their relation thereto is collateral. They are facts presented to the insurer before or at the time of making the contract as a presentation of the elements upon which the risk is to be accepted or rejected. They furnish a basis for the contract on the faith of which it is entered into, and if false in any respect material to the risk the contract may be avoided. A "warranty," on the other hand, is a part of the contract itself. It defines by way of particular stipulation and condition the precise limits of the obligations which the insurer undertakes to assume, and no liability can arise outside of such limits. As to whether or not the statements made by Myers, which it is contended were false, were warranties or representations, there can be little doubt in this jurisdiction. Declarations of the same character made in applications for life insurance were involved in the cases of *Schwarzbach v. Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227, *Logan v. Assurance Society*, 57 W. Va. 384, 50 S. E. 529, and *Marshall v. Insurance Association*, 79 W. Va. 121, 90 S. E. 847, and in all of those cases were held to be representations and not warranties. That conclusion is not only fixed by those decisions, but is well supported by the authorities. 3 Cooley's Briefs on Insurance, p. 1931, etc.; 3 Joyce on Insurance, § 1882, etc.

We conclude, therefore, that these declarations were representations made by Myers to the defendant company as a basis upon which it might determine the acceptance of the risk, and, if accepted, upon what terms. Their effect upon the policies of insurance is determined substantially by the same rules as representations made in the procurement of any other contract. If they are false in a material respect to the knowledge of the one making them, they will afford ground for the avoidance of the contract at the instance of the party defrauded. The rule has been stated that to avoid a policy of insurance by misrepresentation the false statements must have been made wilfully, and with intent to deceive, and must have been relied upon by the insurer. It necessarily follows from this that a misrepresentation made innocently will not avoid the policy; neither will a false representation as to a fact not material. The trouble arises, however, in the application of these general rules to particular cases. It may be said that where a representation is made by one in an application for insurance of a fact peculiarly within his own knowledge, and it turns out to be untrue, it will be held to be a fraudulent representation. In

many of the cases it has been argued that where such a representation is false, but it did not appear that the insured had not acted in perfect good faith in making it, it would not be treated as a fraudulent representation. But the correct rule in this regard seems to be that laid down in *Schwarzbach v. Protective Union*, supra, to the effect that, as to those representations peculiarly within the knowledge of the insured, if the statements are untrue he is guilty of a legal fraud, though he may not have intended to deceive, and he will be bound by the effect thereof. *Logan v. Assurance Society*, supra; *Marshall v. Insurance Association*, supra. The doctrine of these cases seems to be that where a representation is made as to the existence or nonexistence of a certain state of facts which, from their peculiar nature, the assured is bound to know about, he will be bound by the representation, notwithstanding for the moment he may not have recalled the facts, or have overlooked them.

[5-9] Difficulty is also encountered in determining what representations are material in such an application. In this regard it seems to be firmly established by the authorities that by making inquiry in regard to the existence or nonexistence of a particular fact, or facts, the same is made material; it is brought into prominence by the very force of the fact that information is sought concerning the particular matter, and for this reason the courts with practical unanimity treat answers to such specific inquiries as material representations. 3 *Joyce on Insurance*, § 1914; *Schwarzbach v. Protective Union*, supra; *Logan v. Assurance Society*, supra; and *Marshall v. Insurance Association*, supra. Applying these rules to the representations made by Myers, which it is charged here were false, it may be said that they were material representations. They were statements which the insurance company had a right to rely upon as being true, and further they were in the main statements of facts or circumstances within the knowledge of the applicant, and, if they were false within the meaning of the law, then the defendant could avoid the policies of insurance for that reason. 14 R. C. L. p. 1068, etc.; 3 *Joyce on Insurance*, § 1884, etc.; 3 *Cooley's Briefs on Insurance*, p. 1959, etc.; *Masonic Life Association v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505; *Knights of Maccabees v. Shields*, 156 Ky. 270, 160 S. W. 1043, 49 L. R. A. (N. S.) 853; *Quinn v. Mutual Life Insurance Co.*, 91 Wash. 543, 158 Pac. 82; *Metropolitan Life Ins. Co. v. Solomito*, 184 Ind. 722, 112 N. E. 521; *Germania Life Ins. Co. v. Klein*, 25 Colo. App. 326, 137 Pac. 73; *Price v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; *Thorner v. John Hancock Mutual Life Ins. Co.*, 164 App. Div. 34, 149 N. Y. Supp. 345; *Burruss v. National Life Association*, 96 Va. 543, 32 S. E. 49; *Ætna Life Ins. Co. v. Moore*, 231 U. S.

543, 34 Sup. Ct. 186, 58 L. Ed. 356; *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202. Many more authorities might be cited to the same effect, but these representative ones will serve to illustrate the principles controlling in this case.

The question therefore remains: Were these representations false and fraudulent? The representation made by Myers in regard to his use of intoxicating liquors was that he did not at the time of the application for the policies of insurance use any intoxicating liquors, and that he had not for a year; in fact, had been a total abstainer for several years; that he had within the five years next preceding, however, been intoxicated on two occasions. From the recital we have before made of the facts proved in this regard it will be seen that the statements made by Myers at the time he made the applications were very nearly, if not quite, the facts proved as to his habits in this regard. It sufficiently appears, we think, that he was a total abstainer for more than two years prior to the time the applications were made, and it does not appear from the evidence that he was ever intoxicated on more than two occasions within the five-year period, while it is shown that within that five-year period, but more than two years prior to the time of making the applications, he had been an occasional drinker of intoxicating liquors. We find that the proof on this question does not show the falsity of the representations made by the assured.

As to the representation that the assured was in good health at the time of the making of the applications, there is no evidence to the contrary. It is true, it is shown that a short time before that Dr. Schrader had prescribed for him on one occasion, and that more than two years before he had been treated for several months for chronic gastritis; but there is no showing that he was to his knowledge affected by any disease at the time he made the applications for the policies. In fact, the proof of those who knew him most intimately is that he was in apparent good health without any indication of disease of any kind.

[10,11] It is shown, however, beyond question, that he had consulted physicians at least twice within the five years next preceding the issuance of the policies, and that he had suffered from an illness during that time not disclosed by his applications. It is argued that not every consultation with a physician or every temporary illness will make such a representation false, and no doubt this is the law. Many times physicians are consulted to furnish relief from slight temporary indispositions, such as headaches and colds, and it is held that such consultations are not within the purview of a representation of this character, nor are such diseases within the same. 3 *Cooley's Briefs on Insurance*, p.

2163; *Logan v. Assurance Society*, supra. But can we say that the evidence in this case justifies the conclusion that the malady for which Myers received treatment while in New Mexico covering a period of several months was such a slight indisposition? The insurance company was entitled to have Myers act fairly and honestly with it. He was bound to know when these questions were asked that the insurance company would act upon his answers, and his concealment of the treatment he had received during a period of several months cannot be looked upon in any other light than that it was fraudulent and deceitful and calculated to mislead the defendant. The treatment received by him from Dr. Schrader on the one occasion testified to by that physician may have been for only a slight indisposition, as it seems not to have been followed up, and we think it might well be said that his trouble at that time was of such character as not to fall within the terms of the question asked. We cannot say this, however, in regard to the treatment undergone by him while in New Mexico. It extended over a period of several months; he was prescribed for by a physician a number of times, different remedies being prescribed on different occasions to meet the varying phases of the trouble with which he was suffering. Clearly it was the duty of Myers in answering this question to have informed the company of his treatment by this physician, and the malady with which he was then suffering. There is no attempt made to contradict in any way the testimony of the doctor offered on this phase of the case, and the jury could not be allowed to disregard it, nor could the jury be allowed to say this misrepresentation in this regard was immaterial.

[12] The defendant assigns as error the action of the court in refusing to allow its medical director and his assistant to testify as to what action would have been taken upon the insured's applications if he had answered the questions correctly to which it is contended he made false answers, and also as to the custom of insurance companies generally in acting upon such applications. It was entirely immaterial what the opinion of these witnesses at this time might be. The parties fixed the materiality of these inquiries and the answers thereto, and the opinion of any witness as to what would have happened had the answers been different, or as to the custom of insurance companies generally in regard to passing upon applications, would have proved nothing that would in any way enlighten the jury. At most, such answers were merely the opinion of the witnesses, not dependent upon scientific knowledge or skill, and there is no rule of law which permits the admission of such opinion as evidence.

Schwarzbach v. Protective Union, 25 W. Va. 622-651, 52 Am. Rep. 227.

For the reasons above pointed out, we reverse the judgment, set aside the verdict of the jury, and remand the cause for a new trial.

POFFENBARGER, J., absent.

(83 W. Va. 415)

BROWN v. BROWN et al. (No. 3727.)

(Supreme Court of Appeals of West Virginia.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. PARTITION — 12(4) — JURISDICTION — SALE OF CONTINGENT INTERESTS OR ESTATE — STATUTE.

The purpose of the Legislature in enacting chapter 17, Acts 1911 (Code 1913, c. 71 [secs. 3766-3777]), was to empower courts of equity to make a valid sale and conveyance or lease of lands of persons whose interests or estates therein are of such contingent or uncertain nature that good title thereto cannot be passed in the usual modes of conveying by such parties themselves, but it was not intended that the interests of such persons, who are *sui jura*, should be sold without their consent.

2. PARTITION — 12(5) — LIFE ESTATES — STATUTE.

One to whom a several or joint estate, for life, in land is given by will, contingent upon the death, without lawful issue living at the time of his death, of a life tenant then in possession, with remainder in fee likewise conditioned to vest, upon the same contingency, in a class of persons of a certain description, is authorized by subsection (b) of section 24b2, c. 71, Barnes' Code (Acts 1911, c. 17; Code 1913, c. 71 [secs. 3766-3777]), to file a bill praying for the sale of the land.

3. PARTITION — 12(4) — JURISDICTION — SALE OF CONTINGENT INTERESTS OR ESTATE — STATUTE.

Any person having such interest in land as entitles him, by virtue of said section 24b2, c. 71, Barnes' Code (Acts 1911, c. 17; Code 1913, c. 71 [secs. 3766-3777]), to file a bill praying for a sale or lease thereof, may, when a party defendant to such bill, prevent such sale or lease by refusing to consent thereto.

4. EQUITY — 247 — PARTITION — 14 — JURISDICTION — SALE OF CONTINGENT INTERESTS OR ESTATE — DEMURRER — AMENDMENT.

Courts of equity are vested with large discretion in determining whether or not the existing facts and circumstances are sufficient to justify a sale or lease of lands in such case; and where a demurrer to the bill is filed by a person whose consent is essential to the court's right to sell, and the facts and circumstances averred in a bill praying for the sale of valuable farming lands do not show that any waste is being committed, or that the land contains

minerals of a fugitive character which are in danger of being withdrawn therefrom, or that any other facts and circumstances exist indicating a liability of the land to depreciate in value, the court is not justified in decreeing a sale. In such case, it is not error to sustain the demurrer and dismiss the bill without leave to amend, on the ground that such bill cannot be cured by amendment.

Appeal from Circuit Court, Jackson County.

Suit by Charles L. Brown, as trustee of William J. Brown, against William J. Brown and others. Demurrers to bill filed by part of defendants sustained, and bill dismissed, and plaintiff appeals. Motion to reverse decree overruled, and decree affirmed.

Chas. E. Hogg, of Point Pleasant, and Pendleton, Mathews & Bell, of Spencer, for appellant.

Wm. Beard, of Parkersburg, and Somerville & Somerville, of Point Pleasant, for appellees.

WILLIAMS, J. This suit was brought by C. L. Brown, as trustee of William J. Brown, against said William J. Brown, Ephraim W. Brown, and his children, and said C. L. Brown in his own right, and Mrs. Helen M. Fowler, his only child, under the provisions of chapter 17, Acts 1911, made a part of chapter 71, Barnes' Code of West Virginia, for the purpose of selling a tract of 539 acres of land in which said William J. Brown was given a life estate by the will of Robert S. Brown, the father of William J., Ephraim W., and C. L. Brown. All persons now in being, having any kind of interest or estate, vested or contingent, in the land, are made parties defendant, all of whom are alleged to be *sui juris*. Demurrers to the bill, interposed by Ephraim W. Brown and by some of his children, were sustained, and the court, being of the opinion that the bill could not be cured by amendment, dismissed it, and plaintiff has appealed. The cause is now up for review on plaintiff's motion to reverse the decree, which motion is made pursuant to permission previously granted, after due notice thereof to the appellees.

The demurrer challenges the sufficiency of the bill on four several grounds, viz.: First, because the wife of William J. Brown is not made a party to the bill; second, because Charles L. Brown is not such a trustee as is authorized by the statute to maintain the suit; third, because the court is not authorized to decree a sale of the land without the consent of all parties interested therein who are *sui juris*; and, fourth, because the bill fails to allege sufficient grounds for a sale.

[1] There is no merit in the first objection for the obvious reason that the wife of William J. Brown has no sort of interest in the

land and can never acquire any by virtue of her marital relation. Her husband is not now, nor has he been at any time during his marriage, seized of an estate of inheritance in the land, neither is it possible, under the will of his father, for him to be seized of such an estate at any future time. Hence, by no possibility can his wife ever become entitled to dower in the land.

Before considering the other points raised by the demurrer, it is necessary to consider some of the facts averred in the bill, the truth whereof is admitted by demurrants. Robert S. Brown, deceased, by his will exhibited as a part of the bill, directed that his lands, known as the General George Washington survey, lying along the Ohio river and extending back on the hills and consisting of numerous tracts but constituting one compact body, be divided into three parts equal in value, by lines running from the river to the back Washington lands. To Ephraim W. Brown he gave a life estate in the upper lot, to C. L. Brown a life estate in the middle lot, and to William J. Brown a life estate in the lower lot, with remainder after the death of each life tenant "to the heirs of his body lawfully begotten," and provided that, in the event he should have no such issue living at his death, the land was to go to his two remaining sons for life, with remainder to their heirs. The devise to William J. Brown is in the following language:

"And the said lower or third tract of land next to Ravenswood I will and bequeath to my dear son William J. Brown for and during his life, but subject to the management and use thereof hereinafter directed, with remainder at his death to the heirs of his body, lawfully begotten, but if my said son William J. Brown shall die without issue living at the time of his death, then said lower parcel of land shall pass to my said sons Ephraim and Charles for life, with remainder to their heirs, per stirpes, lawfully begotten."

Testator provided for a like division of his "back lands" into three equal parcels, one of which was to be allotted to each of his three sons "as may be most convenient, or as they may agree among themselves." These parcels were likewise subject to the same limitations and provisions as the river or front lands, and all of the devises were subject to the dower right of the testator's widow, who is now deceased. The remainder of his lands he disposed of in the following language:

"I direct that all my other lands and my town property in Ravenswood shall be divided equally between my said three sons in fee simple, that is to say and with this provision that one-third thereof shall pass absolutely in severalty to my said son Ephraim, and that the other two-thirds thereof shall be allotted and pass jointly to my said sons William and Charles to be rented out and managed, or sold and conveyed by them jointly and for their joint benefit, and I make this provision because of

the fact that my said dear son William J. Brown has been from infancy an invalid in health, and I therefore affectionately commit the trust of the management of his share and interest in my estate under this will to his brother, the said Charles L. Brown trusting to his kindness and sense of justice to do at all times what may seem best in the interest and for the comfort and happiness of his said brother William J. Brown, and full power is hereby given the said William J. and Charles L. Brown to sell and convey all or any part of the lands and property hereinbefore devised to them jointly, in fee simple."

The right and power to sell, it is observed, is limited to the lands devised to William J. and C. L. Brown in fee.

The bill avers that in a suit in chancery instituted in the circuit court of Jackson county by William J. Brown against the said C. L. Brown and all the other parties to the present suit, praying for a construction of the will of Robert S. Brown, deceased, and for the ascertainment of his rights, powers, and duties thereunder, the court by a decree which, it is averred, is final and binding on all the parties to the present suit, determined the powers and duties of this plaintiff as trustee for William J. Brown as follows:

"It was the plain and manifest intention of said will to create an express trust in the hands of said C. L. Brown as a trustee for the use and benefit of the plaintiff, and that under said will said C. L. Brown is entitled to the use, possession, and management of the real estate derived by plaintiff in severalty under said will, and that said C. L. Brown as trustee is possessed of the legal title to said real estate, and that the plaintiff has the equitable title only thereto. The court is further of the opinion, and doth decree, that said C. L. Brown as trustee is invested with a personal discretion as to the management of said trust; a discretion that a court of equity cannot control so long as said trustee acts in good faith and with honesty. It is therefore further adjudged, ordered, and decreed that, as to the one-third of the home farm of said R. S. Brown mentioned in the will as devised to said W. J. Brown, and the adjoining back lands, said C. L. Brown shall retain possession of the same as trustee; and he is directed to do what he may in his discretion deem best for the interest, happiness, and comfort of said plaintiff as directed by said will paying the taxes on said land, and keeping the same in repair, and accounting to plaintiff for the residue, if any, of the rents, issues, and profits to be derived from said real estate. And it is further decreed that said C. L. Brown as trustee shall annually account to said plaintiff in person, or before a commissioner of accounts of this county, for the said rents, issues, and profits of said home farm lands, and he shall be entitled to a reasonable compensation for his services as such trustee."

[2, 3] We are unable to see, in view of the language of the will devising the lower one-third of the land to William J. Brown, how the court could have so interpreted the language as to vest in C. L. Brown the legal

title to the land as trustee for William J. Brown. But it is not necessary for us to determine the effect of that decree upon the status of C. L. Brown, as we think the will clearly shows that he, independent of the trust created by the will, whatever its extent, has such interest in the land of William J. Brown as entitles him to file the present bill in his own right. He and Ephraim W. Brown have an equal interest in the land devised to William J. for life. The bill alleges that William is now 65 years old and that no child has been born to him. If he should die, leaving no children living at his death, C. L. and Ephraim W. would be entitled to a joint estate in the land during their lives. Therefore granting, arguendo, that their estate is now contingent, still section 2, c. 17, Acts 1911, section 24b2, c. 71, Barnes' Code, authorizes a person having such interest in land to bring a suit for the sale thereof. That section is:

"Such bill may be filed by any of the following persons: (a) * * * (b) Any person in whom alone or with others a contingent remainder would vest, either at law or in equity, if the contingency or event upon which the remainder is to vest, or determining who the remainderman or remaindermen are, should happen at the time of the commencement of the suit."

The contingency, on the happening of which both Ephraim W. and C. L. Brown would become vested with a legal life estate in the land of William J., is the death of William J., without lawful issue living at his death. It is therefore clear that both C. L. and Ephraim W. fall within the class of persons described in subsection (b), and either one of them is authorized to bring a suit in his own right.

We come now to a consideration of the third objection to the bill raised by the demurrer, which is that certain ones of the defendants, all of whom are sui juris, object to a sale. In reply to this objection, counsel for plaintiff insist that they have not such interest in the land as entitles them to make the objection. Section 8 of said act, section 24b8 of the Code, reads as follows:

"If it be clearly shown by the pleadings and proofs that the interests of all persons having any vested, contingent or expectant estates or interests in said property will be promoted by the sale, lease or mining lease of the land, oil, gas, coal or other minerals to be sold or leased, and the court shall be of the opinion that the rights of no person interested will be materially injured or prejudiced, the court may, with the consent of all persons in being having any vested estate or vested interest in said land, oil, gas, coal or other minerals to be sold or leased, decree the sale, lease, or mining lease of such land, oil, gas, coal or other minerals in such manner and on such terms and in such parcels as may be deemed most beneficial to all persons interested."

The learned counsel for plaintiff have filed very exhaustive briefs, citing many authorities to sustain the proposition that demurrants have no vested interest or estate, and therefore are not of that class of persons whose consent is a prerequisite to the right of the court to decree a sale. Strictly speaking, according to the technical rules respecting vested and contingent remainders and executory devises, it may not be said that demurrants have a vested estate. But the question is not so much what particular kind of estate or interest they have, under the rules of the common law, as it is to ascertain in what sense the Legislature used the terms "vested estate or vested interest" in the particular act in question. In order to determine this, it is necessary to consider the general scope and purpose of the act. Section 1 reads as follows:

"That whenever there is either at law or in equity, in any land, or in any oil, gas, coal or other minerals, any contingent remainder, or any vested remainder, which is liable to open and let in after-born children or to open and let in members of any class, or any executory interest, or executory devise, or any base, qualified, conditional or limited fee, or any other qualified, conditional, limited or determinable estate, or interest, it shall be lawful for the circuit court of the county in which the land, oil, gas, coal or other minerals, or any part thereof, to be sold or leased, are situate, upon a bill filed by any of the persons specified in section two of this act, to decree a sale, lease, or mining lease of such land, or of any such oil, gas, coal and other minerals, or of any one or more of them, as hereinafter provided."

This section describes the character or quality of estates or interests in land, which must exist in order to entitle a person having such an interest as is described in any of the subdivisions of section 2 to file a bill praying for the sale or lease of the land. Section 3 provides that "all persons in being who have any vested, contingent or expectant estate or interest, either at law or in equity, in said land," shall be made parties. Would it not make the statute seem very incongruous to say that the Legislature intended to authorize persons, having certain vested or contingent estates or interests in land, to file a bill for the sale thereof, requiring him to make all persons in being in any wise interested therein parties to the bill, and yet, at the same time, deny such defendants, although having the same kind of interest as the plaintiff, a right to object or make defense to the sale? Would not such an interpretation of the statute bring about an inconsistency? We can scarcely conceive that the Legislature intended any such result as is contended for.

[4] Courts of equity had no inherent power to sell lands even of persons under disability, whatever their estates therein might be. It is only by virtue of statutes in Virginia and

this state, which have existed from very early times, that jurisdiction for such purpose has been conferred upon them; and in such cases the jurisdiction can be invoked only when it is clearly shown that the interest of such persons will be thereby promoted, and the rights of no other persons interested will be violated. Such statutes have been upheld on the theory that the Legislature has the power to authorize a conveyance on behalf of persons under disability when it is shown that their interests will be promoted thereby. But we seriously doubt the constitutional right and power of the Legislature to authorize a court to sell the lands, or any vested interest therein of a person who is sui juris, without his consent, simply for the purpose of reinvesting the funds for his benefit. The *jus disponendi* is a property right which the policy of the law has always been to allow the owner, when sui juris, to determine for himself. From time immemorial it has been one of the fixed principles of the common law, to guard jealously individual property rights, and especially is this true in respect to estates of freehold in land.

It is unnecessary to determine the character of interest the children of Ephraim W. Brown have in the land, whether a vested or contingent interest or estate, as his objection alone is enough to defeat the sale. The act was never intended to authorize one person, having a certain defined interest or estate in land, to file a bill to sell it and deny to another, similarly situated, who is required to be made a party to the bill, any right to object thereto. After a very careful consideration of the question, we have concluded that the chief purpose and design of the statute was to provide a means whereby a valid conveyance or lease of lands might be made, by persons having uncertain estates or interests therein, who, because of such uncertainty, could not make valid title thereto, and that, as a prerequisite to the right of the court to make such conveyance, the consent of all persons in being, who are sui juris and have such interest, whether vested or contingent, as would entitle them to bring the suit, is necessary. The bill avers that plaintiff is advised that William J. Brown will give his consent, but his consent alone is not enough; there are others interested who do not consent. Ephraim W. Brown has by his demurrer expressed his objection to the sale, and, holding as we do that his consent is necessary to give the court power to sell, it is unnecessary to enter upon a consideration of the other of the averments of the bill to determine whether they are sufficient to show that the interest of the parties having "vested, contingent or expectant estates or interests" in the land, will be promoted by a sale thereof. It suffices to say that, in view of the quantity and quality of the land, the manifest purpose

of the testator to create an estate therein which would, in the future, vest in fee in his grandchildren, after the life estates of his three sons—a purpose not inconsistent with public policy and violative of no positive rule of law—we hardly think the price which plaintiff alleges he has been offered and thinks he can get for the land, and the proposed plan of reinvesting the funds in government bonds or other valid securities, to be held in the same manner and subject to the same provisions and for the same persons as the land itself is now held under the will, and all the other circumstances, are not enough to justify a sale. The statute evidently vests courts of equity with a large discretion in determining, from all the facts and circumstances appearing, whether or not a sale will be beneficial to all the parties concerned. The chancellor has not abused his discretion by refusing to entertain the suit and dismissing plaintiff's bill upon demurrer. It was his right and duty to consider the interests of those who are to come into the possession of the land after the life estates have ended, and determine whether or not they would be benefited by a sale, as well as the life tenants. No particular circumstances or conditions are alleged to exist now, which would make a present sale more advantageous than a sale at any future time. There is no showing that the land is liable to depreciate in value, and nothing to indicate that it may not grow in value as the years go by. The fact that William J. Brown is now 65 years of age and is becoming less able as he grows older to cultivate the land does not show good cause to sell it. If he, with no family but himself and wife, and with the advice of plaintiff, is not able to make a comfortable living upon the 539 acres of land, nearly half of which, according to a map filed with the bill, appears to be river bottom land, only about 25 acres of which is subject to overflow, such inability must be attributed to poor husbandry rather than to any failure in the land to yield its increase.

For the reasons stated, appellant's motion will be overruled, and the decree affirmed.

(83 W. Va. 409)

STATE v. RICE. (No. 3604.)

(Supreme Court of Appeals of West Virginia;
Feb. 18, 1919.)

(Syllabus by the Court.)

1. GRAND JURY §41—INVESTIGATION—SECRECY.

Generally grand jurors cannot be required or permitted to divulge what occurred during an investigation of matters properly committed to them.

2. WITNESSES §72—COMPETENCY—GRAND JUROR.

But where an oath of secrecy is not required of or administered to grand jurors, a member of the grand jury which returned the indictment against accused is competent as a witness in his behalf to show that statements made by a prosecuting witness at the trial of accused regarding his guilt or some fact material to his defense are inconsistent with or contradictory to statements made by the same witness at the preliminary examination.

3. WITNESSES §268(1), 379(1)—CROSS-EXAMINATION—IMPEACHMENT.

Where, on the trial of one indicted for incest with his daughter, the latter, as prosecutrix, is permitted to give in evidence to the jury the fact of the birth of her child, and to impute its paternity to her father, she is subject to cross-examination thereon, and it is error to deny defendant the right to such examination, and, the foundation being laid therefor, she is liable also to be impeached by showing that she has made contradictory statements in relation thereto on other occasions.

4. CRIMINAL LAW §713—TRIAL—CONDUCT OF COUNSEL—ACTION OF COURT.

Counsel ordinarily are allowed great latitude in discussing the facts of the case, and if for any cause they transgress this rule, as sometimes they may inadvertently do, adversary counsel should invoke and the court enforce adherence to proper proprieties in the discussion.

5. INCEST §5—RAPE §18—RELATIVE OF PROHIBITED DEGREE.

A relative of the prohibited degree may be guilty of both rape and incest.

6. INCEST §4, 15—CORROBORATION—QUESTION FOR JURY.

Generally age and lack of corroboration of the prosecutrix will not excuse a defendant charged with criminal assault upon her; the weight and credibility of the testimony being questions exclusively for the jury.

7. CRIMINAL LAW §829(1), 834(2)—TRIAL—INSTRUCTION—REFUSAL.

Ordinarily a defendant properly may demand an instruction couched in his own language, if aptly drawn, intelligible, and pertinent, though the state may have asked and the court given a similar one upon the same subject; but if the two instructions in form and effect embody the same legal principle and amount to the same thing, and the one given is aptly drawn, intelligible, and pertinent, it is not reversible error to refuse to give the one last proffered.

Error to Circuit Court, Monongalia County.

Loring Rice was convicted of incest, and he brings error. Reversed, verdict set aside, and a new trial awarded.

Lazzelle & Stewart and Glasscock & Glasscock, all of Morgantown, for plaintiff in error.

E. T. England, Atty. Gen., and Henry Nolte, Asst. Atty. Gen., for the State.

LYNCH, J. Complaining of a judgment of conviction and sentence for confinement in the penitentiary for ten years for incest, Loring Rice assigns as erroneous rulings upon the admissibility of evidence offered in his behalf and rejected, the giving of instructions for the state, the refusal of instructions propounded by him, and the denial of his motion for a retrial predicated upon these grounds.

[1, 2] The only witness who testified to the criminal assault was defendant's daughter, Pearl, who at the time of the commission of the several acts of sexual intercourse was 12 to 14 years old. Her testimony in chief was direct, positive, and unequivocal. Defendant offered, but was not permitted to prove, by W. C. Kelley, a member of the grand jury that returned the indictment, that upon her examination as a witness before that body she testified that W. W. Irvin, her mother's brother, who also was indicted on her testimony for the same offense at the same term, had had intercourse with her within the time covered by the indictment against her father. The purpose of the testimony was to furnish a basis either to impeach or discredit her testimony given to support the prosecution against her father. How the attempt to impeach or discredit could be effected by proof of statements by the same witness as to the guilt of the father and uncle is not apparent, and becomes apparent only when aided by the declaration of defendant's counsel that he expected to show by Kelley and other witnesses that the prosecutrix charged to the uncle the paternity of the child born to her as the result of the intercourse with him.

For some purposes, it is true, as remarked by the judge of the trial court, grand jurors cannot be required or permitted to divulge what occurred during an investigation of matters properly committed to them under the usual charge, especially where as in some jurisdictions they are sworn to secrecy. The action of no member of such inquisitorial body can lawfully become the subject of inquiry, nor can he be interrogated with respect thereto. *State v. B. & O. R. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803. Nor can the sufficiency of the proof be inquired into to invalidate an indictment found by a lawfully constituted grand jury. *Wadley v. Commonwealth*, 98 Va. 803, 35 S. E. 452.

There is in this state and in Virginia no statutory provision, general rule of law, procedure or custom requiring an oath of secrecy to be administered to members of a grand jury. Section 5, c. 157 (sec. 554) Code 1913, prescribes the only form of oath required in impaneling such a jury. The question of the competence of a grand juror,

when interrogated as was the witness Kelley in this case with reference to the testimony of the prosecutrix, was raised for the first time in Virginia in the case of *Little v. Commonwealth*, 25 Grat. (Va.) 921, and, though not made a point of the headnotes or of the decision, because not necessary therefor, the opinion clearly discloses the view of the court to be to sustain such proof as competent. For it is there said that the trial court erred in refusing to permit Dearthmont, who with others returned the indictment, to state the testimony of a witness examined by them touching the matter under investigation. The same court, however, in *Harris v. Commonwealth*, 110 Va. 905, 68 S. E. 834, foreclosed further doubt upon the competency of the source of such proof where the grand juror is called and examined on behalf of the accused to show inconsistent or contradictory statements by a witness before the grand jury regarding the guilt of the accused or some fact material to his defense. The Attorney General, it appears, confessed the error, and upon such confession the court was content to enter an order of reversal without a written opinion. The admission of this character of proof does not, we think, contravene public policy or improperly divulge the secrets of the inquisitorial body, but substantially promotes the ends of justice, and may prevent injustice. See 4 Horwitz' Edition Jones' Com. on Evidence, § 785; 4 and 5 Wigmore on Evidence, § 2363.

[3] Other assignments relied on for reversal likewise relate to proof offered by way of contradicting the prosecutrix as to sexual intercourse between herself, her uncle and defendant, and to interrogations propounded to her on cross-examination touching the subject, which the court refused. Besides Kelley, the witnesses introduced by defendant to lay the ground for impeachment were Posten, the justice before whom she appeared March 17, 1917, and by a complaint, duly verified by her own affidavit, a copy of which with the verification is copied into the record, charged her uncle, William W. Irvin, with having had sexual intercourse with her in 1916, and others to whom she is alleged to have disclosed the assault upon her. This evidence the court should have permitted defendant to submit to the consideration of the jury for the purpose disclosed by his counsel, not because it necessarily would establish the innocence of the accused, an effect not claimed or pretended, but as affecting her credibility, a fact as to which the jurors were the sole judges.

There could not well be a more obvious similarity between the facts and issues and the impropriety of the rulings made in this case and those involved in *State v. Koch*, 75 W. Va. 648, 84 S. E. 510. The defendants were charged with the same offense. The

accusations were made by daughters, to each of whom a child was born, and its paternity was imputed to their fathers in each case, and the same attempt was made, but not permitted, to lay the ground to impeach their uncorroborated testimony for a like reason. As aptly to the one case as to the other do points 1 and 2 of the syllabus of the case cited apply, and without further discussion of this phase of the inquiry, except in one respect, we quote these points:

(1) "Where, on the trial of one indicted for incest with his daughter, the state relies on and attempts to prove by her the birth and parentage of her child, and to impute the same to defendant, as inculcating facts or facts tending to show guilt, the evidence is material and relevant, and is properly admitted to the jury."

(2) "Where on such trial the daughter, as prosecutrix, is permitted to give in evidence to the jury the fact of the birth of her child and to impute its parentage to her father, she is subject to cross-examination thereon, and it is error to deny defendant the right to such cross-examination, and the foundation being laid therefor, she is liable also to be impeached by showing that she has made contradictory statements in relation thereto on other occasions."

The Attorney General has undertaken to defend the action of the court on the ground of an alleged defect in the form of the interrogatories. As to some but not all of them this criticism may properly apply. Excluding the latter, however, there remain enough to warrant reversal for the errors pointed out, certainly as to the foundation for the questions propounded to Posten.

[4] Counsel for defendant complain of the state's instructions Nos. 2, 9, and 13, and the refusal of his instruction No. 11. It is difficult to perceive or infer the purpose of No. 2. The jury, of course, is limited to the evidence in the case and cannot go beyond it in ascertaining the guilt or innocence of the defendant, as that instruction and the oath administered told them. But the reason or purpose for telling them not to "consider the statements of counsel as to alleged facts or as to supposed facts as evidence" seems obscure. No basis therefor is disclosed, unless it rests upon the statements of counsel as to what he proposed to prove by the witnesses whose testimony was not allowed to go to the jury. If so, the instruction should have been clear and positive to that effect, because counsel ordinarily are allowed great latitude in discussing the facts of the case (*State v.*

Clifford, 58 W. Va. 681, 686, 52 S. E. 864; *Sims v. Carpenter*, 68 W. Va. 223, 69 S. E. 794); and if for any cause they transgress this rule, as sometimes they may inadvertently do, adversary counsel should invoke and the court enforce adherence to proper proprieties in the discussion (*Wickham v. Turpin*, 112 Va. 236, 70 S. E. 514; *State v. Cooper*, 74 W. Va. 472, 82 S. E. 358, Ann. Cas. 1917D, 453).

[5, 6] The objection urged in argument to instructions Nos. 9 and 13 are that as the evidence showed sexual coition before the prosecutrix attained the age of 14, the defendant was guilty of rape, not incest; and that as her testimony was unreasonable and uncorroborated, he could not properly be convicted. Clearly neither ground is tenable. A relative of the prohibited degree may be guilty of both rape and incest. Nor will age and lack of corroboration excuse a defendant charged with criminal assault upon a female according to most authority, the weight and credibility of the testimony being a question exclusively for the jury (11 Enc. Dig. Va. & W. Va. Rep. 629), except in rare cases, as in *Harvey v. Commonwealth*, 103 Va. 850, 49 S. E. 481, where the defendant charged with rape was 70 years of age, and the assault was not discovered until after the birth of the child, and the evidence bore the impress of falsehood.

[7] Other instructions, both those given and refused, we have examined so far as deemed necessary to avoid error upon the retrial we are compelled to award, and see no reasonable objection thereto, unless it be defendant's No. 11, which was not given apparently because of its similarity to an instruction given at the request of the state on the same subject, namely, the weight the jury should give to the testimony of the defendant himself. Ordinarily a defendant properly may demand an instruction couched in his own language, if aptly drawn, intelligible, and pertinent, though the state may have asked and the court granted a similar one upon the same subject. However, as appears to be the case, the form and effect of the two instructions substantially embody the same legal principle and amount to the same thing, are intelligible and pertinent, and hence not prejudicial warranting reversal.

Judgment reversed, verdict set aside, and new trial awarded.

(88 W. Va. 561)

HOWARD v. BLAIR et al. (No. 3634.)

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)*(Syllabus by the Court.)***1. LIMITATION OF ACTIONS §85(2)—SUSPENSION DURING ABSENCE FROM STATE—APPLICATION OF STATUTE—CASE OVERRULED.**

The provision of section 18, chapter 104, of the Code of 1913 (sec. 4431), that "Where any such right as is mentioned in this chapter, shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, * * * obstruct the prosecution of such right, * * * the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted," has no application to one who was not at the time of the incurrance of the liability nor before nor since a resident of this state. *Hefflebower v. Detrick*, 27 W. Va. 16, in so far as it holds otherwise is overruled.

2. LIMITATION OF ACTIONS §85(2)—SUSPENSION—STATUTE.

The departure from this state by one who at the time of incurring an obligation or liability resided here, operates proprio vigore an obstruction to the prosecution of such right as is mentioned in said section 18 of chapter 104 of the Code of 1913 (sec. 4431), and upon a plea of the statute of limitations the plaintiff, to have the benefit of said statute, is not required to show that he was otherwise obstructed by the defendant in the prosecution of his right.

3. LIMITATION OF ACTIONS §93 — CONVEYANCE OF PROPERTY.

Where a non-resident debtor in fraud of his creditors conveys lands belonging to him in this state, and such creditors promptly institute a suit in equity, upon foreign attachment, to set aside the fraudulent deed, but one of such creditors does not include one of his claims because not then due, he can not be regarded as having been obstructed by such fraudulent deed in the prosecution of a new suit to avoid said deed and recover his debt not due at the time of the first suit, so as to avoid the plea of the statute of limitations.

Appeal from Circuit Court, Marion County.

Bill by John A. Howard, receiver, etc., against Marie Antoinette Blair, W. D. Bryan, administrator of W. J. Bryan, deceased, and others, with garnishment against the Fairmont Coal Company. Demurrer to bill by W. D. Bryan, administrator, sustained, and bill dismissed, and plaintiff appeals. Decree affirmed.

McCamie & Clarke and J. M. Ritz, all of Wheeling, for appellant.

W. S. Meredith, of Fairmont, for appellees.

MILLER, P. The decree to which the present appeal relates, pronounced on March 12, 1918, sustained the demurrer of the de-

fendant W. D. Bryan, administrator of the estate of W. J. Bryan, deceased, and, the plaintiff declining to amend, dismissed his bill. The other defendants, except the Fairmont Coal Company, garnishee in the attachment sued out in the cause, namely Marie Antoinette Blair, John Blair, her husband, S. W. Loller, Cecelia Bryan, A. E. Fox and S. A. Englehard, not served with process and not appearing, are all alleged to be non-residents of the state, and it is alleged that W. J. Bryan in his life time and before and after the accrual of the cause of action sued on was also a non-resident of the state of West Virginia.

The object of the suit, begun July 7, 1916, was to recover of the defendant W. D. Bryan, appointed by the circuit court of Harrison county, West Virginia, administrator of the estate of W. J. Bryan, deceased; first, the sum of \$5,000, upon a promissory negotiable note for that sum, dated August 10, 1903, payable on or before April 10, 1904, to the order of the defendant E. A. Fox, and by him endorsed without recourse to the defendant S. A. Englehard, and by the latter also endorsed, and of which note the bill alleges the First Citizens' Bank, a corporation, of which bank plaintiff was appointed special receiver, became the bona fide holder in due course for a valuable consideration before maturity, amounting with interest at the date of the suit as per affidavit filed, to \$8,875.00; second, to set aside as being fraudulent and void as to said debt a certain deed made by the said W. J. Bryan and wife to their daughter Lizzie B. Loller, now deceased, dated April 3, 1903, purporting to convey to the grantee therein a certain tract of land situated in Marion county, West Virginia, and then under lease for coal to the defendant Fairmont Coal Company, garnishee, attached in the cause, and subject to said lease, and to sell said land to pay said debt, interest and costs, and also to have applied any money in the hands of said garnishee to the satisfaction of the debt as decreed, and for general relief.

The demurrer was a general one, and no specific grounds were assigned therefor in the court below. Here two grounds are urged in support of the decree, namely, the statute of limitations and laches or staleness of the demand.

[1, 2] On the first ground, the statute of limitations of ten years, it fully appears on the face of the bill and exhibits that right of action on the note sued on matured on April 10, 1904, and that the present suit was not begun until July 7, 1916, more than twelve years after the right of action accrued to plaintiff, or to the bank of which he is special receiver, so that unless upon some ground sufficient to defeat the operation of the statute or bring the case within the ex-

ception thereto, the action was clearly barred and the bill was properly dismissed.

The exception in section 18, chapter 104 of the Code (sec. 4431), is as follows:

"Where any such right as is mentioned in this chapter, shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

To bring this case within that exception the bill alleges that although the maker of the note was at the time he executed it a resident of the state of Pennsylvania and had not before or since been a resident of this state, he was personally present in the state, where and when he executed the note and where by its terms it was to be paid, and that by immediately departing from the state and remaining away continuously thereafter he thereby obstructed the prosecution of plaintiff's right against him within the true meaning and intent of the statute.

For this proposition plaintiff takes cover under some early decisions of this court, namely, *Heffebower v. Detrick*, 27 W. Va. 16; *Pugh v. Cameron's Adm'r*, 11 W. Va. 523; *Abell v. Penn Mut. Life Ins. Co.*, 18 W. Va. 400; and also the early Virginia case of *Wilkinson v. Holloway*, 7 Leigh, 277. The fourth point of the syllabus of *Heffebower v. Detrick* is:

"If a person residing in another state, makes his note in this state, and thereafter departs from, and continues to reside out of this state, he will be considered as a person, 'who before the action accrued resided in this state,' and who by his departure from it, and his residence out of it, has obstructed the payee in the prosecution of his right of action on such note during such absence from this state."

That the statute clearly contemplates that the defendant should have at some time before the cause of action originated or accrued resided in West Virginia seems too plain for controversy. The very words of the statute "who had before resided in this state," and "by departing without the same" read in juxtaposition as they should be, leave no possible room for doubt or quibble as to their meaning. They are plain words, not technical, and should be construed according to their natural and usual acceptance. This was the view of Dr. Minor, of the statute of Virginia, substantially the same as ours. IV Minor, pt. 1 (3d Ed.) 622. The *Heffebower-Detrick* Case was disposed of on a demurrer to the evidence, and we think Judge Woods, who wrote the opinion, intended no violence to the language of the statute, but put his decision on the presumption,

for lack of evidence to the contrary, that the place of residence of the defendant at the time of making the note was where the note was actually executed and where by its terms the contract was to be performed, for he cites and reviews numerous decisions on the subject, and at page 28 says respecting the sufficiency of the evidence to overcome this presumption, "he," the defendant, "never, so far as this record shows, pretended * * * that at the time," the time of the making of the note, "he did not reside in this state." We think the point of the decision should be interpreted in the light of the facts and presumptions from the evidence, so strongly emphasized in the opinion. The case of *Abell v. Penn Mut. Life Ins. Co.*, supra, involved the status of the defendant, a foreign corporation. It was decided that for the purpose of that action its place of residence was in this state, where at the time of the contract it had qualified to do business and had and maintained an agent, and that having thereafter withdrawn from the state and ceased to maintain an agency here until shortly before the institution of the suit, the case was clearly within the statute, and that the time of such withdrawal should be eliminated from the computation of time. It is true the opinion in that case apparently approves *Wilkinson v. Holloway*, supra, but of which Dr. Minor says at the page and in the volume already cited, the doctrine of that case "is no longer maintainable." And in *Embrey v. Jemison*, 131 U. S. 336, 350, 9 Sup. Ct. 776, 780 (33 L. Ed. 172), involving the construction of the Virginia statute, in which the district court had construed the statute in accordance with the contention of counsel here, Justice Harlan says:

"This construction of the statute was supposed to be required by the decision in *Ficklin's Executor v. Carrington*, 81 Grat. [Va.] 219. We are satisfied, upon a careful examination of that case, that it was misinterpreted by the learned district judge who presided at the trial below"

—and at page 352 of 131 U. S., at page 781 of 9 Sup. Ct. (33 L. Ed. 172), says:

"The statute, so far as it relates to obstructions caused by a defendant having departed from the state, means that, being a resident of Virginia when the cause of action accrues against him, and being then suable in that state, the defendant shall not, in computing the time in which he must be sued, have the benefit of any absence caused by his departure after such right of action accrued, and before the expiration of the period limited for the bringing of suit. The plaintiff was at liberty to sue the defendant wherever he could find him. Having elected to sue him in Virginia, the courts sitting there must give effect to the limitation prescribed by her law, without any saving in favor of the plaintiff on account of the defendant's removal prior to the making of any contract whatever with the plaintiff."

There existed for a time some conflict in the decisions as to whether removal from the state by a defendant of itself constituted an obstruction to the prosecution of plaintiff's right within the meaning of the statute, or whether in addition thereto the plaintiff was bound to show actual obstruction in the prosecution of his particular action. *Wilson v. Koontz*, 7 Cranch, 202, 3 L. Ed. 315; *Ficklin's Ex'r v. Carrington*, 31 Grat. (Va.) 219, *Brown v. Butler*, 87 Va. 621, 625, 626, 13 S. E. 71; *Cheatham's Adm'r v. Aistrop's Adm'r*, 97 Va. 457, 34 S. E. 57; dissenting opinion of Judge Snyder in *Heflebower v. Detrick*, supra, 27 W. Va. p. 29; IV Minor, pt. 1, p. 622. The case of *Ficklin's Ex'r v. Carrington*, supra, distinctly affirms the first phase of the proposition, and so do our cases of *Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54, *Fisher's Ex'rs v. Hartley*, 48 W. Va. 339, 37 S. E. 578, 54 L. R. A. 215, 86 Am. St. Rep. 39, *Lamon v. Gold*, 72 W. Va. 618, 79 S. E. 728, 51 L. R. A. (N. S.) 883, and *Batten v. Lowther*, 74 W. Va. 167, 81 S. E. 821, while *Wilson v. Koontz* and *Brown v. Butler* would seem to hold the contrary. However the Virginia court in *Cheatham v. Aistrop*, supra, going to the other side reaffirms the rule of *Ficklin's Ex'r v. Carrington*, and contrary to the construction put by Mr. Barton on *Brown v. Butler* (see 1 Barton's Chancery Practice, 112, note 4), the court says:

"The opinion in *Brown v. Butler* does not overrule or disapprove the decision in *Ficklin v. Carrington*. It was not necessary to a decision of the question involved in *Brown v. Butler*, hence the opinion expressly says: 'Without stopping, however, to inquire whether those decisions (*Wilson v. Koontz*, and *Ficklin v. Carrington*) are irreconcilable, and if so, which is the correct one, it is enough for the purposes of the present case to say that upon the facts already adverted to, we are of opinion that the appellants are not shown to have been obstructed in * * * their rights, either actually or constructively.'"

Reference is also made to the fact that the statute as construed in *Ficklin's Ex'r v. Carrington* more than twenty years before had since been incorporated without change in the new Code, and though afterwards amended in several particulars had not been so amended as to change the decision in the *Ficklin-Carrington* Case. And this last holding in *Virginia* seems to accord with the construction of similar statutes in other states. 2 Wood on Limitations, sec. 244 et seq. Our decisions on this controverted proposition, however, seems to have been consistent from the beginning, namely, that removal by defendant from the state after accrual of the cause of action operates proprio vigore an obstruction to plaintiff's right.

[3] The next proposition advanced by appellant's counsel to reverse the decree is that Bryan the debtor by other indirect ways obstructed the plaintiff in the prosecution of

his right; namely, first, by the making of a deed to one Anderson for a tract of land in Marshall county, withheld from record by the grantee until after a decree in rem upon an attachment in favor of plaintiff, subjecting the said land to the payment of said debt, and subsequent appearance by both Bryan and Anderson and the setting aside of the decree and dismissal of the suit on the ground that Anderson was a prior purchaser for value and in possession of the land before plaintiff's action accrued; second, by the making and execution by Bryan to his daughter of a deed for a tract of land in Marion county, subsequently set aside as fraudulent by the decree of this court upon appeal, in the suit of the First Citizens' Bank against Bryan and others, and suits brought by other creditors for the same purpose, consolidated, as reported in 72 W. Va. 29, 78 S. E. 400. The bill alleges that plaintiff after the final decree of the court in said causes, undertook to intervene by petition therein, and also in other suits of said creditors begun and prosecuted in Marshall county, to secure the benefits of said decree to enforce payment of said note, but was denied such relief, upon the ground that it was too late to so intervene after final decree therein, wherefore the bringing of this original suit to obtain the relief prayed for. But we stop to inquire how plaintiff was obstructed in the prosecution of his rights as special receiver by the deed of Bryan to Anderson or by the one to his daughter. It is not alleged that Bryan was responsible for Anderson withholding his deed from record. That the bank was not thereby obstructed is shown by the fact that it actually brought its suit and got a decree of sale. The fact that Anderson prevailed because a bona fide purchaser of land constituted the deed no legal obstruction of plaintiff's rights. And that plaintiff was not obstructed in the prosecution of any right by the deed from Bryan to his daughter is evidenced by the allegations of the bill that the bank of which he was special receiver was plaintiff in one or more of the suits brought to set aside that deed for fraud and subject it to the payment of other notes of other and like classes held by it, and in which plaintiff after his appointment intervened. The reason alleged for not having included the note sued on, in those suits, is that it was not then due. But it became and remained due for more than ten years after maturity and before the attempt was made to intervene in the former suits after the final decree of this court therein, and this clearly appears on the face of the bill. Certainly, therefore, there was nothing in the making by Bryan of the deed to Anderson or of the one to his daughter, to obstruct him or the bank in the prosecution of a suit to set them or either of them aside as fraudulent and void.

The views expressed on the defense of the

statute of limitations renders it unnecessary to respond to the defense of laches.

Our conclusion is to affirm the decree, and to hold that in so far as *Heflebower v. Detrick*, 27 W. Va. 16, and *Abell v. Penn Mutual Life Insurance Company*, 18 W. Va. 400, may be regarded as inconsistent with the views herein expressed concerning the exception contained in section 18, chapter 104 of the Code, they must be regarded as overruled.

(88 W. Va. 429)

DEMING NAT. BANK v. BAKER.
(No. 3656.)

(Supreme Court of Appeals of West Virginia.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. ATTACHMENT §276 — LEGAL CLAIM — JURISDICTION.

When plaintiff's claim is purely legal and jurisdiction in equity depends solely on the validity of the attachment, if that is not good, the jurisdiction fails, and the bill should be dismissed.

2. ATTACHMENT §102 — AFFIDAVIT — SUFFICIENCY.

An affidavit for attachment as provided by section 1, ch. 106, Code (sec. 4455), is not invalid for omitting to allege that plaintiff believes he is entitled to recover from the defendant; it is sufficient to allege in the language of the statute the amount of the claim which he believes he is justly entitled to recover in the action.

3. ATTACHMENT §108 — NATURE OF CLAIM — STATEMENT.

As construed by our decisions, section 1, ch. 106, of the Code (sec. 4455), requires that plaintiff in stating the nature of his claim should state it with as much particularity, though not in detail, as is required in the declaration or bill, so that it may thereby be made to appear that he has a valid cause of action against the defendant.

4. ATTACHMENT §108 — AFFIDAVIT — ALLEGATIONS.

And in compliance with the rule just stated when the suit is upon a negotiable note against the indorser thereof, it is necessary for the plaintiff in his affidavit for an attachment in stating the nature of his claim to allege presentation for payment at the time and place appointed and within proper hours, demand of payment, and due notice to indorser, and when payable at a bank, according to the requirements of the Uniform Negotiable Instruments Law, it should allege presentation for payment at the bank where payable during business hours, and before the close of the bank in the event contemplated by the statute. It is not sufficient to allege that the note was duly protested.

(Additional Syllabus by Editorial Staff.)

5. BILLS AND NOTES §410 — "PROTEST" — CERTIFICATE AS EVIDENCE.

The term "protest" means that all steps have been taken to fix the liability of drawer or indorser of which the certificate of the notary is the formal and prima facie evidence (citing Words and Phrases, First and Second Series, Protest).

Appeal from Circuit Court, Preston County.

Suit in equity by the Deming National Bank against Charles E. Baker. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

Glasscock & Glasscock, of Morgantown, for appellant.

A. G. Hughes, of Kingwood, for appellee.

MILLER, P. This is a suit in equity founded upon a foreign attachment, in which the decree below was in favor of plaintiff, for the debt sued on, aggregating principal and interest at the date of the decree to \$2987.90, and for a sale of the real estate of the defendant attached in the cause, to pay the sum so decreed with interest thereon and the costs of the suit.

[1] The first point of error is that the circuit court should have quashed the affidavit for the attachment upon several grounds, naming them. The proposition advanced by counsel for appellees respecting this point is that affidavits in foreign attachments in equity are not viewed with the same strictness as in actions at law and that the affidavit may be amended or supplemented by the bill. When the plaintiff's claim is purely legal and the jurisdiction in equity depends solely upon the validity of the attachment, if the attachment is not good the jurisdiction fails, and the bill should be dismissed. This has been our construction of the present statute, sec. 1, ch. 106, Code (sec. 4455), in cases arising since the amendment of the statute in 1882. *Swarthmore Lumber Co. v. Parks*, 72 W. Va. 625, 628, 629, 79 S. E. 723; *Millar v. Whittington*, 77 W. Va. 142, 87 S. E. 164; *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135; *Miller v. Zeigler*, 44 W. Va. 434, 29 S. E. 981, 67 Am. St. Rep. 777.

[2] The objections to the affidavit that it was not subscribed by affiant and was bad for want of jurat, were abandoned in argument, and we think they are groundless. We are also of the opinion that the third objection, namely, that it does not allege that plaintiff is entitled to recover from the defendant the claim or debt sworn to, is also without substantial merit. Appellant is the only defendant. The affidavit in this respect is substantially in the language of the statute, and the allegation is equivalent to the charge that plaintiff is entitled to recover from the defendant. An affidavit using the language

of the statute or its equivalent is all that is required. *Ruhl, Koblegard & Co. v. Rogers*, 29 W. Va. 779, 2 S. E. 798; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409.

[3-5] Another point is that the affidavit is defective in its statement of the nature of plaintiff's claim in that it fails to allege that the note sued on was presented for payment at the place where according to its terms it was made payable, and for another reason included in the first, that it fails to allege that defendant had notice of the protest or that notice was waived by him. The affidavit does allege that the note was duly protested on March 16, 1915, the date of its maturity. Does this averment satisfy the requirements of our previous holdings on this subject? The meaning of the term "protest," at least in the popular sense, so the authorities say, is that all steps have been taken to fix the liability of drawer or endorser of which the certificate of the notary is the formal and prima facie evidence. *Daniel and Douglass on Elements of the Law of Negotiable Instruments*, § 929; 3 *Words and Phrases*, Second Series, 1312; 6 *Words and Phrases*, 5742, and cases cited; *Barnes' Code* 1916, sec. 118, ch. 98A (Code 1913, c. 98a, § 118 [sec. 4280]). Such being the definition of the term, it might on first impression seem that the allegation that the instrument was duly protested ought to be regarded as covering all the elements, of presentment for payment at the time and place appointed and within the proper hours, demand of payment and due notice to the maker and endorsers. But an attachment proceeding being a harsh remedy, strict construction has always been applied, and our decisions hold that the same strictness required in the declaration or bill should be demanded of the plaintiff in stating the nature of his claim in his affidavit for attachment. *Bank of Huntington v. Hy-sell*, 22 W. Va. 142, among the first of our cases, holds that in an action on a negotiable note against an endorser the declaration must allege that the note was duly presented at the place where it was payable, and that it was not paid, and that thereupon the said note was duly protested for non-payment, of all of which the endorser had prompt notice.

Approved forms of pleading require this strictness. *Hogg's Pleading and Forms*, No. 45. In *Sommers v. Allen*, 44 W. Va. 120, at page 123, 28 S. E. 787, a suit in equity with attachment, Judge Brannon strongly implies that the affidavit ought to allege all the material issuable facts necessary to entitle plaintiff to recover. In *Home Distilling Co. v. Himmel*, 74 W. Va. 756, 82 S. E. 1094, we said that it is essential that the nature of plaintiff's claim be so described in the attachment that the court can see therefrom that plaintiff has a valid cause of action against the defendant. See, also, *Cosner's Adm'r v. Smith*, 36 W. Va. 788, 15 S. E. 977; *Reed v. McCloud*, 38 W. Va. 701, 18 S. E. 924; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753; *Thompson v. Curry et al.*, 79 W. Va. 771, 91 S. E. 801; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528, 2 S. E. 888; *Delaplain v. Armstrong*, 21 W. Va. 211. If we adhere to these rules and principles of strict construction, which are not out of harmony with the decisions of other states, we think we are obliged to hold the affidavit in the case at bar fatally defective.

But it is said by counsel for plaintiff that we may look to the bill to supply the deficiency. If this were so, and we do not think it is, certainly not in a case where jurisdiction in equity depends solely on a valid attachment, the bill in this case is not sworn to and could not take the place of the affidavit, for that ground.

The affidavit being fatally defective for the reasons given, and also for the further reason that it is not alleged in affidavit or bill, in accordance with the laws of Pennsylvania, same as sec. 75, ch. 98A, *Barnes' Code* 1918 (Code 1913, c. 98a, § 75 [sec. 4246]), our Uniform Negotiable Instruments Law, that the note was presented for payment at the bank where it was made payable, during business hours or before the close of the bank, in the event contemplated by the statute, we should not go into the merits of the case, and our conclusion is to reverse the decree, sustain defendant's motion to quash the affidavit, and jurisdiction depending thereon, to dismiss the bill, and our decree will be as indicated.

(83 W. Va. 425)

FREEMAN v. SWIGER et al. (No. 3538.)(Supreme Court of Appeals of West Virginia.
Feb. 18, 1919.)*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS** ⚡438
(10)—HUSBAND AND WIFE ⚡188—**LEASE**
—PAYMENT BY LESSOR—ACTION AGAINST
HUSBAND—PARTIES.

Under a contract by which a married woman, her husband joining her, sells, and binds herself to convey, an interest in the oil and gas in a tract of land separately owned by her, for and in consideration of a certain sum of money payable to them, receipt of which is acknowledged by the contract, subject to a defeasance for nonpayment of an additional sum of money for a well drilled on the land and tubed and tested, the vendee may pay such last-mentioned sum to either husband or wife, while both live, or to the survivor, after the death of either, and the administrator of the wife's estate is not a necessary party to a suit against the husband and her heirs to compel specific performance of the contract.

2. SPECIFIC PERFORMANCE ⚡108(1) — **CONTRACT TO CONVEY INTEREST IN OIL AND GAS**
—PARTIES.

Nor is the lessee operating the well on such tract of land a necessary party to such suit; the bill not seeking an accounting for oil or gas taken or to be taken from the land.

3. WITNESSES ⚡158—**COMPETENCY.**

In such case, the vendee is a competent witness to prove payment to the husband, after the death of the wife, of the sum required to be paid to prevent forfeiture of the contract.

4. COSTS ⚡238(2)—**CORRECTION OF DECREE**
—INADVERTENCE.

Right of correction of a decree in such cause, omitting requirement of a defeasance clause in the deed ordered to be executed, accordant with a stipulation therefor in the contract, does not carry costs in the appellate court, if the omission appears to have been the result of inadvertence in the entry of the decree, and the appellant made no objection thereto in the court below.

Appeal from Circuit Court, Doddridge County.

Suit by Homer Freeman, against Martie Swiger and others. Decree for plaintiff, and defendants appeal. Modified and affirmed, and remanded for further proceedings.

J. V. Blair, of West Union, for appellants.
J. Ramsey, of West Union, for appellee.

POFFENBARGER, J. The decree appealed from requires specific performance of the contract construed by this court in *Freeman v. Carnegie Natural Gas Co.*, 74 W. Va. 83, 81 S. E. 572, but it was pronounced in a new

suit, the parties to which are not identical with those of the cause to which reference has just been made. The reported decision, however, sets forth the contract, the situation of the parties, and many of the facts material to the disposition of this cause.

The parties defendant to this bill are Lewis A. Swiger, husband of Rachel J. Swiger, the deceased owner of the land and vendor of the oil and gas interests in controversy, and her seven children and heirs at law. The Carnegie Natural Gas Company and Sarah M. Cumberledge, parties to the former suit, are omitted. Five of the children are infants, and are represented by a guardian ad litem. The administrator of Rachel J. Swiger was not made a party.

[1, 2] As the sufficiency of the bill is challenged, in argument here, only on the ground of failure to make the administrator and the Carnegie Natural Gas Company, assignee of the lease on the land, parties, acquiescence in its sufficiency in all other respects may be assumed. It alleges full and strict compliance with all the conditions of the contract, including payment of \$200 to Lewis A. Swiger, on account of the first and only gas well drilled on the land, April 1, 1907, and within 90 days after the tubing and testing thereof; the well having been completed January 7, 1907.

Admitting the well-settled doctrine that the personal representative of a deceased vendor is a necessary party to a bill for specific performance, of the contract (*Hill v. Proctor*, 10 W. Va. 59; *Steenrod v. W. P. & B. R. R. Co.*, 27 W. Va. 1; *Hinchman v. Ballard*, 7 W. Va. 152), counsel for the appellee, by way of avoidance of the effect thereof, treats the husband and wife as joint obligees at the date of the contract, and invokes the legal proposition that, in such case, the obligor may discharge himself by payment in full to either of the joint obligees. *Hatfield v. Cabell County Court*, 75 W. Va. 595, 84 S. E. 335; *Allen v. South Penn Oil Co.*, 72 W. Va. 155, 77 S. E. 905; *Blish. Con.* § 875; 1 *Parsons, Cont.* 271; *C. J.* 537. If the obligation to pay the \$200 is referable in point of time to the date of contract, and is analogous to rentals stipulated for in an oil and gas lease executed by a husband and wife, on land owned by only one of them, the money was payable to them jointly, and the vendee could discharge himself by payment to either of them. *Allen v. South Penn Oil Co.*, 72 W. Va. 155, 77 S. E. 905; *Sandusky v. Oil Co.*, 63 W. Va. 260, 59 S. E. 1082; *Coffman v. Hope Natural Gas Co.*, 74 W. Va. 57, 81 S. E. 575. The contract bears on its face evidence of intent to make the money payable to both husband and wife. It recites an agreement to make the first payment to them, and acknowledges receipt of the money, and is silent as to the payees of the amounts to be subsequently paid. Presumptively, the parties to whom the first pay-

ment was made were intended. If, on the other hand, it is to be regarded as having arisen at the date of payment, the vendee having the option to pay or not, and the consequence of nonpayment being forfeiture of his title, the forfeited title going to the husband and heirs, the right to the money would not have accrued to Rachel J. Swiger in her lifetime, nor to her administrator after her death. It was, in that case, purchase money of the life estate of the husband and the estate in remainder of the heirs, and therefore payable to them. Since it would not have been payable to the administrator in either event, he is not a necessary party.

As the bill does not seek an accounting for oil or gas taken from the land, or to be taken therefrom in the future, there is manifestly no occasion for the presence of the lessee. It is not interested in the cause of action set up in the bill. After settlement of the question of title, there may be no occasion for any litigation with it, and the court cannot assume necessity thereof.

[3] The time of payment of the \$200 having been proved only by the testimony of the plaintiff, objection to his competency as a witness to prove the fact was interposed under the claim that it was a personal transaction between him and a deceased person. It was obviously not a transaction with Rachel J. Swiger at all, for the bill alleges she died in 1906, and the answer, denying this, avers she died in 1904. Compensation for the well was paid to Lewis A. Swiger, one of the parties to this suit, and is proved, except as to date, by his receipt.

[4] Failure to require a defeasance clause in the deeds of conveyance ordered to be executed, accordant with the stipulation in the contract for forfeiture of the title for failure to pay \$200 for each well that shall be drilled on the land, within 90 days after the tubing and testing thereof, is an error necessitating a modification of the decree. This seems to have been the result of inadvertence, since the decree only impliedly negatives the requirement and the appellee admits the error. Disclaimer of right to an unconditional deed here argues lack of claim thereof in the court below, and of intent to make such claim, or take a decree giving such right. If the appellants had protested against the form of the decree in the court below, no doubt it would have been readily corrected in this respect. Modified, so as to correct the error noted, the decree will be affirmed, and costs in this court awarded to the appellees, agreeably to the principle enunciated in *Hope Nat. Gas Co. v. Shriver*, 75 W. Va. 401, 83 S. E. 1011, *Rowan v. Tracy*, 74 W. Va. 649, 82 S. E. 478, *Teter v. Teter*, 65 W. Va. 167, 63 S. E. 967, and *Frye v. Miley*, 54 W. Va. 324, 46 S. E. 135.

The cause will be remanded for further proceedings.

(83 W. Va. 401)

HALLAUER et al. v. FIRE ASS'N OF PHILADELPHIA. (No. 3518.)

(Supreme Court of Appeals of West Virginia. Feb. 18, 1919.)

(Syllabus by the Court.)

1. INSURANCE §130(6) — FIRE INSURANCE — COMMENCEMENT OF RISK.

Unless the application so provides, it is not necessary that a policy of fire insurance be issued before protection becomes effective. Insurance commences, as a general rule, at the date on which the contract to insure is consummated by the acquiescence of the parties, whether that is the date of the issuance of the policy or earlier.

2. INSURANCE §130(1) — FIRE INSURANCE — CONTRACT—APPLICATION AND ACCEPTANCE.

A contract of insurance, like any other contract, consists generally of two prerequisites—an offer or application and its acceptance.

3. INSURANCE §132—FIRE INSURANCE—LIMITED ACCEPTANCE—"BINDING SLIP."

Where the insurance is to become effective or the risk attach before the application has been formally accepted by the insurer, frequently a limited acceptance or "binding slip" is given stating such fact.

4. CUSTOMS AND USAGES §11—FIRE INSURANCE—LIABILITY.

But where the testimony offered in the case shows the existence of a custom among insurance agents and companies that, in cases of applications for fire insurance, where the agent agrees to try to write the policy, all the terms having been agreed upon, the insurance is regarded as in force from the date of the application subject to cancellation by the company, and where the acts of the agent are such as reasonably tend to indicate his intention to regard the policy as in force, and the jury finds from the evidence that such was his intention, the insurer is bound to compensate for the loss of the property incurred prior to notice of cancellation.

5. CONTRACTS §29, 176(1)—INTERPRETATION — AGREEMENT—QUESTION FOR JURY.

Though the interpretation of contracts, when made and free from ambiguity, is a question for the court, the determination of whether the facts proved or admitted are such as constitute an agreement binding the parties generally is within the province of the jury to ascertain from facts submitted for their consideration and judgment.

6. TRIAL §333, 334—VERDICT—INTEREST—PLEADING.

Though a jury cannot in an action on a contract allow damages beyond the amount laid in the declaration, yet it may add to that sum interest, though the aggregate exceed the amount demanded by the pleading; and where the excess can rightfully be attributed to interest, the verdict is good.

7. APPEAL AND ERROR §1041(4)—TRIAL §334—VERDICT—INTEREST—AMENDMENT AFTER VERDICT.

Where a jury awards as damages in an action on a contract a sum slightly in excess of

that demanded by the declaration, the excess being explainable as interest to cover the time between the dates of the accrual of the cause of action and the trial of the case, an amendment of the declaration after verdict increasing the amount demanded to a sum sufficient to cover the verdict is not prejudicial to defendant, because unnecessary; the verdict being proper if no amendment had been permitted.

(Additional Syllabus by Editorial Staff.)

8. INSURANCE ⇨132 — "BINDING SLIP" — "BINDING RECEIPT."

A "binding receipt" or "binding slip" is a limited acceptance of an application for insurance given by an authorized agent pending the ascertainment of the company's willingness to assume the burden of the proposed risk, the effect of which is to protect the applicant until the company acts upon the application, and, if it declines to accept the burden, the binding effect of the slip ceases eo instante.

Error to Circuit Court, Berkeley County.

Assumpsit by George Hallauer and others against the Fire Association of Philadelphia. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. H. Emmert, of Martinsburg, for plaintiff in error.

Allen B. Noll and Decatur H. Rodgers, both of Martinsburg, for defendants in error.

LYNCH, J. Plaintiffs brought assumpsit to recover the amount of an insurance policy issued, they alleged, by the defendant November 2, 1915, to indemnify them against loss that might result, and three days later did result, from the destruction by fire of the property insured, and obtained the judgment to which defendant prosecutes this writ. The chief defense interposed in the trial court and relied on here rests solely upon the ground that the contract pleaded and offered in evidence never was, and is not now, such a contract as required defendant to render compensation for the property destroyed.

The facts proved and admitted or controverted and constituting the grounds of recovery and of the defense interposed are these: Plaintiffs owned and operated a fruit-evaporating plant, the property insured and destroyed. Trammell & Co., themselves solicitors of insurance contracts for companies represented by them, theretofore had written policies of insurance for their companies covering the same property, but which they were directed to cancel after reporting to the companies respecting the writing of the policies, presumably because of the apparent hazard incident to property devoted to such use. Acting on behalf and at the request of plaintiffs, Trammell & Co. then applied to H. L. Alexander, also an insur-

ance solicitor in the same city, Martinsburg, on November 2, 1915, to write a policy covering the same property, and to the request he replied that he would try to write or place it. He did write, date, and countersign the policy sued on as of the date of the application so as to make it a complete and binding contract of insurance, except as to delivery and revenue stamps, and directed a clerk temporarily employed in his office to inclose it and an account against Trammell & Co. or plaintiffs for the usual premium in an envelope properly noted for delivery, and told her not to deliver it without his consent. The fire occurred three days later, and, without communicating to Alexander or to any employé of his then in his office, the information that the property was at that moment being burned, Trammell & Co., acting for plaintiffs, procured possession of the policy from a clerk in Alexander's office, other than the temporary clerk, who was not advised of the direction previously given, but later Alexander, having knowledge of the delivery and of the fire, authorized Trammell & Co., plaintiffs' witnesses say, and he does not deny it, to cause revenue stamps to be affixed to the policy and canceled by his initials "H. L. A.," which was done according to his directions. Alexander, on the other hand, affirmed his intention to have been not to do anything respecting a contract binding the defendant until it had consented to be bound, and stated further that as soon as he heard of the fire he went to the office of Trammell & Co. and demanded of their clerk, the principals being out, the return of the policy. The clerk, however, flatly denied that any such demand was made upon him, and the principals, Trammell and Nadenbousch, state that no such demand was made upon them personally or through their office.

[1, 2] A contract for insurance, like any other contract, consists generally of two prerequisites—an offer or application and its acceptance. Unless the application so provides, it is not necessary that the policy be issued before protection becomes effective. Insurance commences, as a general rule, at the date of the policy or at the date on which the contract to insure is consummated by the acquiescence of the parties, even though in the form of a parol contract. Insurance Co. v. Insurance Co., 19 How. 318, 15 L. Ed. 636; Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902. To become a binding contract, however, the party to whom the offer or application is made generally must signify his acceptance, so that, in the absence of some provision to the contrary, there must be an actual assent to the assumption of the proposed risk, or some act done implying assent from which the insurer cannot recede

without liability. 1 Joyce on Insurance (2d Ed.) § 55. When the proposal or application has been accepted by the company itself or by an authorized agent acting for and on its behalf, the act of the agent being the act of the principal, from that moment the contract becomes effective and enforceable. But to constitute such a contract it is not always necessary that acceptance of the risk and the manual delivery of the contract be concurrent or contemporaneous.

[3, §] Besides, the acceptance may be for a limited period of time with the right reserved to reject, as in a case where a fire insurance company, having received an application for a policy, contracted to accept the risk for the term of 30 days from date, "unless the applicant is sooner notified of its rejection." *Barr v. North American Ins. Co.*, 61 Ind. 488. And this limited acceptance often takes the form of what is known as a "binding receipt" or "binding slip" given by an authorized agent pending the ascertainment of the company's willingness to assume the burden of the proposed risk. 1 Joyce on Insurance (2d Ed.) §§ 64, 65. The effect of such a receipt generally is to protect one seeking insurance until the company acts upon the application, and if it elects to exercise the right reserved to decline to accept that burden, the binding effect of the slip ceases eo instante. See, also, *Tucker v. Mutual Fire Ass'n*, 71 W. Va. 690, 77 S. E. 279.

[4] Thus it is seen, where the insurance is to become effective or the risk attach before the application has formally been accepted by the insurer, frequently a limited acceptance or binding receipt is given stating such fact. In this case Alexander, agent of the defendant company, in stating that he would try to write the policy, used language which from its general tenor, and in the absence of modifying circumstances, might give the impression that it was his intention to communicate with some one or more of the companies represented by him before the conclusion of the insurance contract and the issuance of the policy. There was no agreement for a limited acceptance or binding receipt given. The only case similar to this which a careful investigation has disclosed, though it differs materially on its facts, is that of *Whitman v. Milwaukee Fire Ins. Co.*, 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25, in which the agent, replying to the applicant, told the latter that he "would see to it; take care of it so it would be all right;" would "get a policy." The court said:

"Evidence that the circumstances characterizing an application were closed by a mere promise on the part of the agent to attend to the matter of obtaining a policy of insurance is * * * proof that no contract of insurance was supposed to be closed in present."

And the court further said that to establish that something out of the ordinary was contemplated, namely, the actual closing of a contract precedent to the issuance of a policy, reasonably clear evidence is required to show that the minds of the parties met on the precise proposition.

But it is contended by the plaintiff that the testimony offered in the case shows the existence of a custom among insurance agents and companies that in cases of application for fire insurance, where the agent agrees to write or place the risk, all the terms having been agreed upon, the policy is regarded as in force subject to the rejection of the application by the company, and from that custom and the circumstances appearing in the case it is urged that the insurance became effective from the date of the application, though there was no express understanding to that effect and no binding receipt given.

The circumstances upon which plaintiffs rely to show that defendant's agent, Alexander, was acting in accordance with the custom proved at the trial, are: That he had the policy written at once on the day the request for insurance was made and dated as of that day; that he countersigned the policy knowing that it provided that "this policy shall not be valid unless countersigned by the duly authorized agent of the company at Martinsburg, W. Va.;" that he entered the policy name, number, and premium charge in his company book as of that date, that being the book in which it was his custom to keep the accounts of the different companies which he represented, and in which he entered "each policy as it is written to keep the number of the policy, the company and date"; that the premium on the policy, if collected, would have run from the date of the policy, i. e., the date of the application; that the policy was delivered to the plaintiffs' representative by the agent's clerk; that the agent, or his clerk at his direction, after knowledge of the delivery of the policy and of the fire, called Trammell & Co. over the phone and authorized them to place on the policy the revenue stamps omitted by the former, and deduct their cost from the premium, a fact not denied by the agent when on the stand; that Trammell & Co., who had written two policies on this risk, both of which were directed to be canceled by the companies when informed that they had been written, regarded its policies as having been in force until they were canceled. The only testimony to the contrary was that by Alexander, who insisted that he did not intend to bind defendant until it had a fair opportunity to express a willingness to carry the risk, and who stated that as soon as he heard of the fire he went to the office of Trammell & Co. and demanded of their clerk, the principals being out, the return

of the policy, a statement flatly denied by the clerk and by the principals.

[5] Not what he declared after the fire as to his intentions at the time of the application for the policy, but what he admits or the proof shows he actually did before and after the fire controls. The sufficiency of these acts and whether they were proved were submitted to the determination of the jury. Though the interpretation of contracts, when made and free from ambiguity, is a question for the court, the determination of whether the facts proved or admitted are such as constitute an agreement binding the parties generally is within the province of a jury to ascertain from the facts submitted for their consideration and judgment. *Bowyer v. Knapp*, 15 W. Va. 277; *Strause v. Richmond, etc., Co.*, 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937; *Art Syndicate v. German Ins. Co.*, 213 Pa. 506, 62 Atl. 1107; *Manson v. Metropolitan Surety Co.*, 128 App. Div. 577, 112 N. Y. Supp. 886.

This question was adequately presented to the jury by defendant's instruction No. 3, which, as modified by the court, is:

"The court instructs the jury that, before they can find a verdict for the plaintiff, they must believe from the evidence that H. L. Alexander, the agent of the defendant, at the time of the application for the insurance covered by the policy in the suit, * * * intended to issue a policy in one of the insurance companies represented by him which would be effective until canceled by the company whose policy should be so issued."

This instruction presented squarely to the jury the question of Alexander's intention. Assuming that intention to have existed, as the jury apparently found it so to exist, they were justified further from the evidence in finding that he, as general agent, had ample authority to bind his companies until they approved or canceled the policy. *Brown v. Franklin Mutual Fire Insurance Co.*, 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534. There is in the record no question or doubt raised by pleading or proof as to the authority of Alexander in the capacity of and as possessing all the powers of an agent to countersign and issue contracts binding defendant, or that for such purpose defendant furnished him with blank policies of insurance duly executed except as to dates, blanks, and his countersignature, and these defendant empowered him to complete and issue as and when necessary fully to consummate a binding contract when delivered.

The complaint founded upon instructions

is the refusal to give defendant's instruction No. 5 as requested, and its modification by eliminating the phrase, "The defendant is not bound by local technical terms." Before modification it read:

"The court instructs the jury that (the defendant is not bound by local technical terms, and) unless the expression, 'I will try to write the policy,' is a general technical term known and used by the insurance companies generally, then the jury must give the said phrase its usual construction."

Striking out the phrase does not make a material alteration or change in the purpose of the instruction, because, if the so-called technical phrase is not general, it is necessarily comparatively local, and the latter sense or meaning is certainly implied in the language used, and the implication has a force equivalent to that in the instruction as propounded by defendant; at least the similarity is so apparent between the two forms as not to warrant a reversal of the judgment.

[6, 7] The last assignment to be considered is the leave asked and granted to amend and the amendment of the declaration after the jury had rendered the verdict and defendant had moved the award of a new trial by striking out \$1,000 and inserting in lieu thereof \$1,500 to correspond with the practice and process, the former sum being that called for in the policy, in consonance with which the jury found, except that they apparently added interest to cover the time between the dates of the accrual of the cause of action and the trial of the case, the verdict being for \$1,054.33. Obviously defendant's rights were not impaired by the amendment of the *ad damnum* clause of the declaration to correspond with the damages specified in the summons; for no amendment of the declaration was in fact necessary. While it is true that the jury cannot in an action on a contract allow damages beyond the amount laid in the declaration, yet it may add to that sum interest, though the aggregate exceed the amount demanded by the pleading; and where the excess can rightfully be attributed to interest, the verdict is good. Section 14, c. 131 (sec. 4923) Code 1913; *Salem Terminal Traction Co. v. McGraw*, 66 W. Va. 321, 66 S. E. 463; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366. Since the verdict would thus have been proper if no amendment of the declaration had been permitted, the amendment therefore was not prejudicial to defendant.

Judgment affirmed.

(83 W. Va. 488)

HAMILTON v. McLAIN et al.

(Supreme Court of Appeals of West Virginia.
Feb. 18, 1919.)

(Syllabus by the Court.)

1. INSURANCE — 774—APPOINTMENT OF BENEFICIARY—SUBSEQUENT CHANGE OF RELATIONSHIP.

The appointment of beneficiaries to death benefits by the insured in a contract of insurance, valid in its inception and unrevoked by him, is not affected by subsequent change of relationship by marriage or divorce unless so stipulated in the contract or controlled by some provision of law.

2. INSURANCE — 774—MUTUAL BENEFIT ASSOCIATION—SUBSEQUENT MARRIAGE OF INSURED.

Where in such contract of insurance in a voluntary mutual benefit association the applicant in accordance with the regulations of the association has appointed his father and mother to death benefits resulting solely from natural causes or from accident not under control of the person or corporation by whom he is employed, as stipulated, such appointment is not revoked by the subsequent marriage of the insured, unless so stipulated in the contract or by the rules and regulations made part thereof.

3. INSURANCE — 774—MUTUAL BENEFIT ASSOCIATION—APPOINTMENT OF BENEFICIARY—REVOCATION.

Where a subsequent regulation specifically provides that death benefits for death resulting from *accident* shall go to the widow, children or parents of the deceased member, but provides that if at the time of his application the member shall have neither of the preferred beneficiaries named, he may if he so elects appoint some other person or persons beneficiary or beneficiaries, the subsequent provision thereof that his marriage subsequent to such application shall be a revocation of such appointment, the effect of such revocation should be limited to death benefits resulting from *accident* and should not be extended by construction to benefits for death resulting from *natural causes* which the member in his application has directed to be paid otherwise and according to some other provision of the contract.

4. INSURANCE — 783—RIGHTS OF BENEFICIARY.

The right of a beneficiary lawfully appointed to such benefits is in its inception inchoate but becomes consummate on the death of the insured and cannot be thereafter waived or abrogated by the insurer or otherwise changed unless absolved by some positive rule of law.

Appeal from Circuit Court, Doddridge County.

Interpleader by H. Curt Hamilton, Secretary-Treasurer, etc., against Virginia A. McLain and others, and J. J. McLain and others. Decree for defendants Virginia A. McLain and others, and defendants J. J. McLain

and others appeal. Reversed in part, and decree for appellants.

J. Ramsey and J. V. Blair, both of West Union, for appellants.

W. S. Stuart and H. L. Hammond, of West Union, and L. N. Tavenner, of Parkersburg, for appellees.

MILLER, P. The plaintiff, secretary-treasurer of the Relief Association of Employees of the South Penn Oil Company, a voluntary association, by bill filed in the circuit court, interpleaded defendants Virginia A. McLain, widow, in her own right and as administratrix of the estate of Harry H. McLain, deceased, Robert McLain and Allen Dotson McLain, infants, and Virginia A. McLain, guardian for said infants, who together constitute one set of claimants, and J. J. McLain and E. McLain, respectively father and mother of said decedent, the other set of claimants to \$1,500.00, which plaintiff acknowledges on behalf of said relief association to be due to one or the other of them on account of the death of said decedent, a member in good standing in said association, and which money with accrued interest plaintiff professed himself ready to pay to the parties adjudged to be lawfully entitled thereto under the contract.

Each set of claimants answered the bill setting up their respective claims, and besides the documentary evidence, depositions of witnesses were taken by both sides and filed in the cause, and on final hearing on the issues presented by the interpleaded defendants, the circuit court by final decree pronounced on April 30, 1917, adjudged the widow and the two infant children of the decedent entitled to said fund in the proportion of one-third to each and decreed payment by plaintiff accordingly. From this decree the other claimants, J. J. McLain and E. McLain, were awarded the present appeal.

It was not the practice of said association to issue certificates or policies of insurance; the application of the member and the printed regulations which formed a part thereof constituted the only evidence of the contract, and it is conceded that the rights of the claimants must be determined thereby.

The declared purpose of said association as stated in said regulations was of "establishing and maintaining a fund from which to pay benefits to those members of the Association, who, under the regulations hereinafter set forth, may be entitled to receive payment of such benefits." As a means of establishing the fund it is provided as follows:

"Said fund shall be known as the Relief Fund, and shall be established and maintained by monthly contributions of the amounts hereinafter specified, from the members of the Association, and by the contributions of the South

Penn Oil Company, hereinafter called the company, and by the income arising from investments of such parts of the fund itself as may not be needed for the payment of benefits and operating expenses of the Association."

Following these declarations are some thirty-five regulations by which it is provided the business of the association shall be conducted, the second whereof prescribes the form of application and the manner in which it shall be signed and witnessed.

The bill and exhibits show that decedent made several applications for membership; the first in October, 1904, in which he designated no beneficiary; the second, March 3, 1908, in which he provided, "In the event of death from natural causes pay death benefits to mother;" the third, September 11, 1909, in which he provided, "In the event of death from natural causes, pay death benefits to Father and Mother;" the fourth and last, April 2, 1913, in which he said: "In the event of death from natural causes or by accident outside of control of the South Penn Oil Company, pay death benefits to J. J. McLain and E. McLain who is my parents." The record also shows that in November or December, 1906, the insured made a will whereby he undertook according to its language to "Give everything to my father and mother both real and personal." The several applications for membership referred to were rendered necessary by increases in wages and consequential changes in ratings for dues to be paid by the applicant in accordance with the rules and regulations.

It is also alleged and proven that on July 2, 1913, said Harry H. McLain intermarried with the said Virginia A. McLain, whose maiden name was Virginia A. Dotson, and with whom he continued to live as husband until his death, September 30, 1915, the result of typhoid fever, a natural cause, in no way superinduced by accident of any kind or character, and by whom he had two infant children, one born before and the other after his demise.

It is argued that sections 24 and 25 of the regulations as amended and in force at the time of the fourth and last application properly interpreted are controlling and that the rights of the conflicting claimants must be determined thereby. They are as follows:

"Twenty-fourth: Death Benefits shall be paid to those who by law would be entitled to take the deceased member's estate in case of intestacy, except when the deceased member shall have appointed, in the manner prescribed by these Regulations, some other person or persons beneficiary to receive payment thereof, in which case payment shall be made to such beneficiary or beneficiaries. Applicants for membership in the Association may name in their application a beneficiary or beneficiaries to receive Death Benefits for death resulting solely from

natural causes, or from accident outside of the control of the Company; and members may at any time, and as often as they desire, change such beneficiary or beneficiaries previously named in their application or appointed, by filing with the Secretary of the Association a new application naming therein the substituted beneficiary or beneficiaries. The word 'Members' as used in this amendment shall include members who have been and hereafter are retired by, and placed upon the Special Pay Roll, and Annuity Plan List, of the Company."

"Twenty-fifth: Death Benefits for death resulting from accident shall be paid to the widow, children or parents of the member on account of whose death the same may become payable. If such deceased member shall leave a widow, but no children, such widow shall be entitled to receive payment of the whole amount of such Death Benefits; if he shall leave a widow and children, said Death Benefit shall be paid to them in the same proportion as they would take his personal estate in case of intestacy; if he shall leave children but no widow, said death benefit shall be paid to such children in the same proportions as they would take his personal estate, in case of intestacy; if he shall have neither widow nor children, but leave a father and mother, or either, said Death Benefit shall be paid to such father and mother jointly, if both be living, or to the survivor, if one of them be dead. Any member who at the time of applying for membership in the Association shall have neither wife, child, father or mother, may, if he so elects, appoint such person or persons as beneficiary or beneficiaries, of the Death Benefit secured to him, by membership in the Association, as he may see fit, in which case, if but one person be so designated, he or she shall receive payment of the whole of said Death Benefit, or if more than one be so designated, they shall be paid said Death Benefit in equal shares or in such other proportions as such member may request in his application. The marriage of a member subsequent to his appointment of a beneficiary of the Death Benefit secured by his membership shall be a revocation of such appointment."

Based on these regulations and provisions of the contract and the fact that the insured came to his death solely from natural cause and not from an accident either outside of or under the control of the South Penn Oil Company, the contentions of the claimants are as follows: On behalf of the appellants that being designated beneficiaries by the insured in his application they are entitled to the fund as provided in said regulation 24. On behalf of appellees that the marriage of the insured subsequent to his application and appointment of appellants as beneficiaries, worked a revocation of such appointment and let them in as beneficiaries as provided by the final provision of section 25.

We do not see how there can be any doubt about the proper construction of the contract depending on these two regulations, read and considered in the light of the declared purposes of the association and paragraph 6 of the application, which is as follows:

"6. I agree that the acceptance of a benefit from the Relief Fund of said Association for sickness, bodily injury or death happening to me, shall operate as a release of all claims for damages against the South Penn Oil Company by reason of such injury or death which could be made by or through me, and that I or my legal representatives will, upon request, execute such written instrument as may be necessary to evidence such release."

[1] It is not controverted that at the time of his application the insured had the right to name therein "a beneficiary or beneficiaries to receive death benefits for death resulting solely from natural causes, or from accident outside of the control of the company," this by the very words of regulation 24. The applicant exercised this right of appointment, designating appellants, his father and mother respectively, and limiting their rights to benefits thus accruing. It is well settled respecting such contracts that the designation of a beneficiary, valid in its inception remains so, and it is not to be disturbed by changed relationships of marriage or divorce unless otherwise stipulated in the contract or controlled by the laws of the state. *Courtois v. Grand Lodge, A. O. U. W.*, 135 Cal. 552, 87 Pac. 970, 87 Am. St. Rep. 137; *White v. Brotherhood of American Yeomen*, 124 Iowa, 293, 99 N. W. 1071, 68 L. R. A. 164, 104 Am. St. Rep. 323, 2 Ann. Cas. 350; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350.

[2, 3] There is not found anywhere in the contract any provision denying the power of appointment or revoking the same unless, as contended by appellees, the last provision of regulation 25 does so. It is suggested in argument that policies or contracts of life insurance are testamentary in character and should be so construed; but we do not understand counsel as affirming that the appointment made was by virtue of our statute relating to wills revoked by the subsequent marriage of the insured. Certainly the statute can in no way affect a valid contract. Nor can said appointment be treated as revoked by marriage according to any declared object of the association or rule of the common law applicable to such cases. In *Massachusetts, etc., Foresters v. Callahan*, 146 Mass. 391, 16 N. E. 14, where the statute authorized such beneficiary associations for the purpose of assisting widows and orphans or other relatives of deceased members, and the constitution of the association stated its object to be to make suitable provisions for the widow and orphan, it was held that the designation of the mother of the applicant as beneficiary was one to which the association could give its assent and was a valid appointment and was not revoked by the subsequent marriage of the applicant.

But the question in the case at bar is, Was the appointment of appellants revoked by the subsequent marriage of the applicant by virtue of the provision of said regulation 25? If it was, of course the decree below was right and should be affirmed, otherwise it should be reversed and a decree entered here for appellees. Counsel for appellees in a very elaborate argument contend that the provision of regulation 25 reaches back and controls the construction of regulation 24. Grammatically it certainly cannot be said to do so. The former refers to "death benefits secured by his membership" which might if proper to do so be referred also to regulation 24. But the latter regulation is dealing with death benefits generally and says in the first paragraph that they shall be paid to those who by law would be entitled to take the deceased member's personal estate, unless or except when the deceased shall have appointed some other person in the manner prescribed by the regulations. By that regulation applicant could make no appointment to death benefits except those accruing solely from death due to natural causes or from accident outside the control of the company, and as we have already observed he did not by the appointment actually made attempt to go beyond this limitation.

But how about regulation 25? The first provision thereof is that "Death Benefits for death resulting from accident (plainly meaning accident under the control of the company for which it might be held responsible) shall be paid to the widow, children," etc. Under this regulation what is the power given a member to appoint a beneficiary? There is none, except that if at the time of his application he shall have neither wife, child, father nor mother, and he so elects, he may designate some other person or persons as his beneficiary or beneficiaries. Clearly it is such an appointment to benefits to accrue from accident that is revoked by the subsequent marriage of the applicant and not an appointment authorized by regulation 24. This is undoubtedly a provision made for the benefit of the oil company, which by the constitution of the association is a contributing member. It cannot be a beneficiary except for protection from liability for accidents under its control. If the association or the officers could waive this provision made for the benefit of the company, we do not think that they have done so by impleading the contesting claimants. True, we held in *Pleasants v. Locomotive Engineers' Mutual Life & Accident Insurance Association*, 70 W. Va. 389, 73 S. E. 976, Ann. Cas. 1913E, 490, that an insurance association might waive an objection to a beneficiary not within the class of persons authorized to take benefits. But no such question is presented here. Appellants are of

the class of beneficiaries authorized to accept benefits, and when appointed by the applicant to benefits accruing from death by natural cause or accident from under control of the company, they are preferred to the wife, children or any other favored class.

[4] It is argued however that a beneficiary in such a contract of insurance has no vested interest, and that the inchoate right as appointee may by the provisions of the regulations be taken away at any time by the voluntary act of the insured or by operation of law. But after the death of the insured the right of the beneficiary, before inchoate, becomes consummate, and unless in some way taken away by the terms of the contract or by law, he cannot be deprived of his rights. 1 Bacon on Life and Accident Insurance, § 379. The rule is different where no power is reserved to change the beneficiary. In such cases the beneficiary is said to have a vested interest from the inception of the contract. 14 R. C. L. 1376; Bacon on Life and Accident Insurance, § 377. So the appellants' rights having been fixed by the death of the insured, the association had no authority thereafter by waiver or otherwise to abrogate or affect the rights of the appellants.

As the rights of the parties must necessarily be determined by the provisions of the contract, the terms of which seem plain and unambiguous, we do not see what bearing

the prior or subsequent acts of the parties can have on the construction of the contract. But both sides refer to these matters as evidencing an intent on the part of the insured to prefer them. Reference is made to the fact that the insured intermarried with Virginia A. McLain within a short time after making his new contract of insurance, and that his understanding must have been that such marriage revoked his previous appointment. But the other side points to the fact that he knew when making the new contract of his engagement and prospective marriage, and that afterwards he did make changes in other contracts of insurance so as to prefer his wife as beneficiary, but made no change in the contract here involved. At the time of his death he had in force insurance aggregating \$8,500.00, of which \$4,000.00 was in favor of his wife. These and other facts shown in the evidence, we think, evince an intention to make no change in the beneficiaries named in the present contract. At all events none were made, and the contract and the rights of the parties must be solved by the provisions thereof properly construed and which appear very plain and unambiguous.

Our conclusion is to reverse the decree and enter such a decree here in favor of the appellants as we think the circuit court should have pronounced.

(177 N. C. 186)

FLEMING et al. v. BOARD OF COM'RS OF PITT COUNTY et al. (No. 169.)

(Supreme Court of North Carolina. March 12, 1919.)

1. ELECTION OF REMEDIES ⇨1—NATURE—INCONSISTENT REMEDIES.

The doctrine of the election of remedies is an application of the law of estoppel on the theory that a party cannot occupy inconsistent positions, and applies only where there are two or more remedies existing at the same time which are alternative and inconsistent with each other and not cumulative.

2. ELECTION OF REMEDIES ⇨3(1)—INCONSISTENT REMEDIES—RECOVERY OF DAMAGES FOR TAKING LAND.

That landowners filed petition before the county commissioners under Pub. Laws 1905, c. 714, § 8, for damages because of the construction of a road, and later withdrew such petition without objection after a jury to assess damages had been summoned, did not constitute a bar to a subsequent suit against the county for damages; the two remedies being consistent.

Walker, J., dissenting.

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Action by Emma Fleming and others against the Board of Commissioners of Pitt County and others. Judgment for plaintiffs, and defendants appeal. No error.

This is an action to recover damages of the defendant, Pitt county, for constructing a new road through the property of the plaintiffs. When the case was called for trial and the pleadings read, the defendants demurred ore tenus, and moved to dismiss for that the plaintiffs had not complied with the Public Laws of 1905, c. 714, § 8, in that they had filed their petition with the board of commissioners at the May term of said board in 1915. The petition filed with the board of commissioners on May 3, 1915, was as follows:

To the Board of Commissioners of Pitt County:

Maggie L. Fleming and Emma L. Fleming respectfully sheweth to your honorable board, the following facts:

1. That they own a body of farming lands situated in Greenville township, Pitt county, N. C., and that the public road force, building public roads in Greenville township, Pitt county, N. C., have entered upon said tract of land and have laid out and constructed a public road thereon, being the new road laid out beyond House Station, and in so doing have taken and appropriated to the public use a portion of said lands about 36 feet wide and about 1,435 yards in length, which aggregates between three and four acres of land.

2. That the taking of said portion of land was without the consent of the owners thereof, to wit, Maggie L. Fleming and Emma L. Fleming.

3. That the changing of the old course of the public road along said lands and the laying out of said new road over said lands greatly inconveniences your petitioners in the management and cultivation of said lands, and your petitioners pray:

That they be compensated for the land so taken, and for the damages and inconveniences sustained by reason of the taking of said land and the construction of said road, and these petitioners aver that their damage so sustained exceeds \$500, but they hereby offer and consent to accept the sum of \$500 in compromise of their said claim, provided their honorable body will pay the same without litigation.

This the 3d day of May, 1915.

Maggie L. Fleming.

Emma L. Fleming.

Upon the filing of the petition the board of commissioners issued an order to the sheriff to summon three freeholders to go over the road and assess the damages. In compliance with the said order of the board of commissioners, the sheriff summoned a jury of three men, who assembled at the courthouse, and, after being sworn and declared themselves ready to hear the case, the plaintiffs' counsel appeared before the said board and withdrew his petition, to which the defendant did not object. This action was then commenced.

The only exception taken on the trial was to the refusal of the court to sustain the demurrer made at the beginning of the trial. There was a verdict in favor of the plaintiff, and judgment given accordingly, and defendant appealed.

S. J. Everett, of Greenville, for appellants.

F. C. Harding and Harry Skinner, both of Greenville, for appellees.

ALLEN, J. The road law of Pitt county (Pub. Laws 1905, c. 714, § 8) provides that where any person, across whose land a road is located, claims damages, and files his petition therefor, the board of commissioners shall order a jury of three freeholders to be summoned, who, after notice to the owner, shall assess the damages, and gives the right of appeal to the owner of the land to the superior court, where the petition is heard before a jury de novo, but this statutory remedy is not exclusive, and does not prevent the owner from resorting to the common-law remedy to recover damages by action in the superior court. *Mason v. Durham*, 176 N. C. 641, 96 S. E. 110, approved in *Keener v. Asheville*, 97 S. E. 724, at last term.

It follows therefore that the plaintiffs have stated a cause of action in their complaint within the jurisdiction of the court, and that they have the right to pursue their remedy by action, unless prevented by filing their petition before the board of commissioners; the defendant contending that,

having two remedies and having elected to ask for the assessment of damages under one, they cannot demand redress under the other.

[1] The doctrine of the election of remedies is "generally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions" (9 R. C. L. 957), and it "applies only where there are two or more remedies, all of which exist at the time of election, and which are alternative and inconsistent with each other, and not cumulative, so that, after the proper choice of one, the other or others are no longer available. This is upon the theory that, of several inconsistent remedies, the pursuit of one necessarily involves or implies the negation of the others." 9 R. C. L. 958. This is the accepted doctrine in this court. *Machine Co. v. Owings*, 140 N. C. 504, 53 S. E. 345, 8 L. R. A. (N. S.) 582, 6 Ann. Cas. 211; *Pritchard v. Williams*, 175 N. C. 322, 95 S. E. 570. In the first of these cases Justice Hoke states the principle as follows:

"As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through the prosecution of another. * * * In 3 Words and Phrases Judicially Defined, p. 2338, it is said: 'The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies.' These statements of the doctrine are supported by well-considered decisions, and are very generally accepted as correct. *Whittier v. Collins*, 15 R. I. 90 [23 Atl. 47, 2 Am. St. Rep. 879]; *Bacon v. Moody*, 117 Ga. 207 [43 S. E. 482]; *Austin v. Decker*, 109 Iowa, 277 [80 N. W. 312]; *Black v. Miller*, 75 Mich. 323 [42 N. W. 837]."

This is quoted with approval in the second case, and the court adds:

"It is only when two rights are inconsistent that the party is put to his election, and that the exercise of one or the failure to do so bars the other."

The *Machine Company Case* is also reported in 6 Ann. Cas. 212, and the editor says, in the note appended:

"The rule stated in the reported case that the doctrine of election of remedies applies only when the remedies invoked are inconsistent, and that when the remedies are consistent all may be pursued, finds affirmance in numerous decisions"

—and he cites decisions from the highest courts of 19 states and from the Supreme

Court of the United States in support of the text.

[2] Applying this principle, it is clear that filing the petition before the commissioners, conceding it to have been filed under the statute, which the plaintiffs deny, and which was withdrawn before the present action was commenced without objection by the defendant, is no bar to the present action, because the two remedies are consistent, both having the same purpose in view—the recovery of damages for an entry upon the land of the plaintiffs—based on substantially the same facts.

There is therefore no error in the judgment appealed from.

No error.

CLARK, O. J., concurs for the reasons so well given in the opinion of the court, and upon the following additional grounds:

1. The application of the plaintiff to the county commissioners was not a proceeding or an action, but an offer to settle for the damages sustained, as therein stated, "without litigation."

2. Even if it had been an action or special proceeding, the plaintiff took a nonsuit, or what was equivalent thereto, and there is no estoppel to bring this action.

WALKER, J. (dissenting). This case differs in no wise, in its essential facts, from *McIntire v. Railroad*, 67 N. C. 278, and a long line of decisions by this court, which have affirmed it and applied the principle that, where the statute prescribes a special remedy for the enforcement of a right created by it, that remedy must be pursued, and it supersedes the common-law remedy. We considered this to be a well-settled law of this state until *Mason v. Durham*, 175 N. C. 641, 96 S. E. 110, was decided, which permitted the landowner to pursue the common-law remedy, by civil action originally brought in the superior court, and this ruling was approved in *Keener v. Asheville*, 97 S. E. 724.

It is not a question of election of remedies, as the law abolishes the common-law remedy and leaves only one remedy, a proceeding before the clerk of the superior court. Nor is this proceeding merely administrative in character, but jurisdictional. It is the only remedy, and is not a civil action, but a special proceeding before the clerk. This was so held in the *McIntire Case*, and also in the numerous cases following it. It, therefore, follows that what is said in the opinion of the court about the election of remedies is, in my opinion, beside the real question involved.

I have discussed the question fully in the *Mason and Keener Cases*, where I dissented, Justice Brown concurring with me.

(177 N. C. 189)

PRIDGEN et al. v. LONG et al. (No. 221.)

(Supreme Court of North Carolina. March 12, 1919.)

1. FRAUD ¶4—BY VENDOR—INTENT.

Intent of vendor of land, in representing he had good and indefeasible title, to deceive buyer, was an essential ingredient of vendor's alleged fraud.

2. FRAUD ¶54—BY VENDOR—EVIDENCE.

On issue of fraudulent purpose of vendor, trial court erroneously excluded evidence as to dealings of vendor with third person holding legal title in regard to delivery of possession by him to vendor to sell land and exercise general control over it as if he were absolute owner.

3. COVENANTS ¶125(1)—COVENANT OF SEIZIN—ACTION FOR BREACH—DAMAGES.

When covenantee buys in outstanding paramount title, measure of damages, in action for breach of covenant of seizin in his deed, is reasonable price which he has fairly and necessarily paid for title, not to exceed original consideration paid by him.

4. COVENANTS ¶125(1)—FRAUD ¶59(1)—VENDOR AND PURCHASER—BREACH OF COVENANT OF SEIZIN—ACTION BY VENDEE ON FRAUD.

The usual recovery for breach of covenant of seizin or right to convey is purchase money paid by covenantee, and interest; but, where vendee is induced to purchase by fraudulent representations of vendor as to title, he may, on eviction by better title, recover of his vendor all damages naturally resulting from fraud, though land was conveyed by deed with warranty, action being on fraud, not on covenants.

5. COVENANTS ¶97, 128—COVENANT FOR QUIET ENJOYMENT—EVICTION—DAMAGES.

Plaintiff cannot recover, in action for breach of covenant for quiet enjoyment, without showing eviction from possession under paramount title; measure of damages being price paid for land, with interest.

6. COVENANTS ¶94—COVENANT OF SEIZIN—SHOWING OF LACK OF TITLE.

In action on covenant of seizin, plaintiff need show only that defendant had no title, or right to convey.

7. COVENANTS ¶94—"COVENANT OF SEIZIN"—TIME OF BREACH—"SEIZIN"—"COVENANT OF RIGHT TO CONVEY."

Covenant of seizin is broken when deed is delivered, as it implies covenantor then has, not only possession, but right of possession and property; such being primary meaning of "seizin," its secondary meaning being possession alone, and the covenant being one of title synonymous with covenant of right to convey.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Covenant of Seizin; Covenant of Right to Convey; Seizin.]

8. SALES ¶41—VENDOR AND PURCHASER ¶37(1)—CAVEAT EMPTOR—ABSENCE OF FRAUD.

The maxim of caveat emptor is applicable to contracts of purchase of both realty and personalty, and is adhered to, both by courts of law and of equity, in absence of fraud.

Appeal from Superior Court, Duplin County; Allen, Judge.

Suit by R. O. Pridgen and J. R. Barden against J. P. Long and N. P. Jarman. From judgment for defendant Jarman, plaintiff Barden appeals. New trial.

On the 12th day of February, 1911, John R. Barden, being the owner in fee simple of the tracts of land in controversy, conveyed the same to R. O. Pridgen, for the consideration of \$2,000, his wife joining in the deed, which was duly recorded on September 6, 1911; and on the 12th day of February, 1911, R. C. Pridgen reconveyed the same land, by way of mortgage, to John R. Barden, to secure ten notes of \$200 each, due at stated times from 1911 to 1920. This mortgage was registered the 9th day of March, 1911.

On September 5, 1911, R. C. Pridgen conveyed the same land to J. P. Long, in consideration of \$3,000, and the deed was recorded on the 7th of September, 1911. On September 5, 1911, J. P. Long and wife, Willie Long, reconveyed the land to R. C. Pridgen by a mortgage to secure \$2,500, evidenced by ten notes due on different dates between January, 1913 and 1922. R. C. Pridgen then, on the 15th day of September, assigned the ten notes and mortgage to J. R. Barden, who paid him for the same, but Pridgen did not transfer the legal title, which he held as mortgagee. Long took possession of the property, and remained there until about the 1st of November, 1911, and then surrendered the possession of the land to Barden under an agreement, as alleged by Barden, that Barden was to make improvements, and was to sell the land, Long to give him a deed for his equity of redemption, and under this agreement Barden went into the actual possession of the land, and remained in possession until the 11th day of November, 1915, when Barden and wife conveyed to the defendant Nelson P. Jarman and wife, Marie C. Jarman, and Barden put them in possession of the premises, and they have remained there ever since without being disturbed by any one.

On the 10th day of July, 1915, J. R. Barden and R. O. Pridgen instituted a suit, in the superior court of Duplin county, against J. P. Long and Willie Long, and duly filed their complaint on July 10, 1915, in the clerk of the superior court's office. Long and wife filed their answer on August 21, 1915, and at the March term, 1917, the case came on for trial between Pridgen and Barden, as plaintiffs, and Long and wife, as defendants, and at this term the court ordered a mistrial,

and made Jarman and wife parties to the action. On April 4, 1917, the defendants Jarman and wife filed their answer, and therewith commenced proceedings for arrest and bail against John R. Barden, alleging that they paid Barden \$3,500 for the land, and took his deed with full covenants of warranty and seizin, and, further, that Barden "specifically and emphatically" declared to them and to their attorney, Frank L. Potter, that he was the absolute owner of the lands in fee simple, and that there were no incumbrances or liens upon the same, which assurances and representations were relied upon by these defendants, and were false and fraudulent. The plaintiffs, Pridgen and Barden, filed replies thereto, denying that any false representations were made, and upon all these pleadings the case came on for trial at the August term, 1918, when the court submitted the three issues set out in the record, to which the plaintiff, John R. Barden, excepted.

This action, it is alleged, was brought by Pridgen and Barden for the purpose of foreclosing the mortgage made by Long and wife, and to acquire the equity of redemption of the mortgagors for the purpose of perfecting the title in Barden, and for the benefit of Jarman and wife. The defendants, Jarman and wife, filed an answer, setting up the fraudulent representations, and alleging that Barden was not seized and possessed of any interest whatever in the said lands, and also alleging that John R. Barden delivered to the defendant, Jarman and wife, the notes and mortgage given by J. P. Long to R. C. Pridgen, and assigned by the latter to him.

Among other instructions, the court charged the jury as follows:

"The deed from the plaintiff Barden to the defendant Jarman conveyed nothing, in so far as the land referred to therein is concerned, but only had the effect of transferring to the defendant Jarman his rights as owner of the notes in question, and no title to the land was conveyed thereby. So I charge you, upon the admitted facts in the pleadings, that in so far as Barden was not the owner of the said land at the time of the sale to Jarman, and inasmuch as he covenanted in the deed that he was seized of said lands, as set out in the answer of the defendant Jarman, there was a breach of said covenant immediately upon the execution of the said deed, that is, the said covenant of seizin, and that the defendant Jarman is therefore entitled to recover of the plaintiff, Barden, such damages as arose naturally from said breach of covenant just referred to. I charge you further that the defendant Jarman had a right to buy any outstanding title to said lands, in order to protect himself against incumbrances, and that the measure of damages in this case is the amount paid by Jarman in order to protect his title, so long as it does not exceed the total purchase price paid to plaintiff Barden."

The jury returned the following verdict:

"1. Did the plaintiff Barden, at the time of the sale of the lands in controversy to the defendant Jarman, falsely and fraudulently represent to the defendant Jarman that he was the absolute owner of the land in controversy, and that the same was free of all incumbrances? Answer: Yes.

"2. Did the defendant Jarman rely upon said representations and purchase said land, believing that Barden was the owner thereof in fee simple? Answer: Yes.

"3. What damage, if any, is the defendant Jarman entitled to recover of the plaintiff J. R. Barden? Answer: \$800, with interest."

Judgment upon the verdict, and appeal by John R. Barden, one of the plaintiffs. The other facts are stated in the opinion of the court.

Stevens & Beasley, of Warsaw, and Murray Allen, of Raleigh, for appellant Barden.

Grady & Graham, of Clinton, for appellees Jarman and wife.

WALKER, J. (after stating the facts as above). [1, 2] The court was trying an issue of fraud, whether the plaintiff John R. Barden had falsely and fraudulently represented that he had a good and indefeasible title to the land. The intent of Barden to deceive and cheat the defendant Jarman was an essential ingredient of the alleged fraud. This allegation of fraud was the only one submitted to the jury. The question, therefore, was whether there was a false assertion of title made, which was calculated to deceive, and with intent to deceive, the defendant, and upon the truth of which the latter relied, and was misled thereby to accept the title to his injury. The important element, as to the fraudulent purpose, required that all the relevant facts bearing on it should be submitted to the jury, and the court committed error when it excluded the evidence as to the dealings of the plaintiff with the defendant Long, in regard to the delivery of possession by him to Barden, for the purpose of selling the land and exercising a general control over it, as if he were the absolute owner. There was some evidence, too, of a settlement, or adjustment, between the parties; Jarman and his attorney agreeing to accept a transfer of the notes and mortgage by Barden to Jarman in full settlement, as appears in the statement of the case. Barden denied all fraud, and testified that he thought he had a good title, and had conveyed such a title to Jarman. It was not good in law, but he may have honestly believed that it was, being a layman and having no technical knowledge of the law, or of what was required to constitute a good title. It was not inexcusable ignorance of the law for him to suppose that a transfer of the notes, and the mortgage securing them, would vest the

legal title in him. This would be so in some jurisdictions, where a mortgage is regarded only as a security, and some of the profession may have taken this view prior to the decision in *Williams v. Teachey*, 85 N. C. 402, where this court held that an assignment of a mortgage, in terms which do not profess to act upon the land, does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. The question was even hotly contested in that case. We, therefore, must grant a new trial because of this error.

[3, 4] But the appellant contends that the court stated the wrong rule, as to the measure of damages, when it charged that the jury would allow, as damages, what the defendant Jarman had paid to Long, who held the equity of redemption. This was not the correct rule. Where a covenantee buys in an outstanding paramount title, the measure of damages, in an action for breach of the covenant of seizin in his deed, is the reasonable price which he has fairly and necessarily paid for such title, not to exceed the original consideration paid by him. 11 Cyc. p. 1162; *Price v. Deal*, 90 N. C. 290; *Wiggins v. Pender*, 132 N. C. 640, 44 S. E. 362, 61 L. R. A. 772; *Bank v. Glenn*, 68 N. C. 35. The usual recovery for breach of a covenant of seizin, or for one of right to convey, is the purchase money paid by the covenantor, and interest thereon; but, where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty. The action in such case is upon the fraud, not upon the covenants of the deed, and the rule of damages for breach of the covenant does not apply. 11 Cyc. 1163. The court applied the latter rule, where there is fraud, to the breach of an ordinary covenant of seizin, and then directed the jury to assess the damages at the amount paid by Jarman, which, of course, meant that this should be done whether it was, or not, a reasonable amount, which was fairly and honestly paid. If this were the rule, a covenantee might pay a very exorbitant price for the incumbrance or paramount title, and recover the full amount from his covenantor, without regard to the question whether he exercised prudence in making the purchase, or whether he could have acquired the title for a less sum. There is no finding here as to whether the price paid by Jarman to Long for the equity of redemption was excessive or moderate. There is evidence that it is far beyond what should have been paid, but only evidence; the plaintiff, Barden, having testified that Long had offered to take \$100 for his equity, and sign the Jarman deed. There is also other testimony that goes to show a lower value of the equity than \$800.

[5, 6] Reverting to the nature of these covenants, as bearing upon the damages for a breach, we find it to be generally settled that a plaintiff cannot recover, in an action for a breach of covenant for quiet enjoyment, without showing an eviction from the possession under a paramount title, and the measure of damages in such cases is the price paid for the land, with interest. *Williams v. Beeman*, 13 N. C. 483. But in an action upon a covenant of seizin, all the plaintiff need show is that defendant had no title or no right to convey. *Wilson v. Forbes*, 13 N. C. 30; *Rawle, Covenants for Title*, 66; *Brandt v. Foster*, 5 Iowa, 287. The reason of the distinction is that a covenant for quiet enjoyment is a covenant for possession, and that of seizin is a covenant for title; the word being used as synonymous with "right." In an action upon the former covenant, an eviction must be alleged in the complaint or declaration, but in an action on the latter, it is only necessary to negative the words of the covenant and to allege that the grantor had no seizin or title to the land. 4 Kent, Com. 479; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416. And, as a general rule, the measure of damages (purchase money and interest) is the same for a breach of covenant of seizin as for a breach of covenant of quiet enjoyment. *Wilson v. Forbes*, supra. This rule of damages is applicable to those cases where there is an eviction from the whole of the land conveyed, or a want of title to the same. But where there is an eviction from a want of title to only part of the land conveyed, and the plaintiff has been put to the necessity, as in this case, of advancing money to remove an incumbrance, the measure of damages is more difficult to be fixed. With reference to the last statement, it was said in *Price v. Deal*, 90 N. C. at page 295:

"We think his honor very properly refused to give the instructions asked for by the defendant, upon the question of damages, but we are also of the opinion that there was misdirection in the instruction which he did give to the jury. It is well settled that a party who purchases land with covenants for seizin or quiet enjoyment may protect himself by buying in the outstanding title. *Faucett v. Woods*, 5 Iowa, 400. When that is done the measure of damages, according to the best lights we have been able to obtain on the point, is that the damages in such a case would be limited to, or measured by, not the value of the land, but by the amount reasonably paid for that purpose, provided it did not exceed the purchase money"—citing *Faucett v. Woods*, supra; *Brandt v. Foster*, 5 Iowa, 287; *Wood's Mayne on Damages*, § 255; *Bank v. Glenn*, supra.

See, also, 7 *Ruling Case Law*, p. 1176; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; 11 Cyc. 1165, and the numerous cases in note 47.

The defendant relies on *Lane v. Richardson*, 104 N. C. at page 650, 10 S. E. 189, but the case is distinguishable, for there the court

was speaking of judgments as incumbrances, and not of a defect in the title to the fee. The amount of a judgment, mortgage, or other lien is easily ascertained, and, the amount being a certain one, it necessarily fixes the measure of the recovery.

[7] The covenant of seizin is broken when the deed is delivered, as it implies that the covenantor then had, not only the possession, but the right of possession and the right of property. This is the primary meaning of seizin; its secondary meaning is possession alone. 5 Modern Am. Law, § 593. It is a covenant of title in this state, and not merely one of possession, and is synonymous with the covenant of right to convey (*Id.* § 595), which also is broken, as soon as made.

The plaintiff Barden offered evidence to the effect that the defendant Jarman had undertaken to make an independent investigation of the title before he purchased, and that he did so, and he concludes, therefore, that he acted upon his own investigation, or information therefrom or from his attorney who made it, and not upon the representations of Barden. He claims that, because of this, he is discharged from blame, and cites, in support of this position, 12 R. C. L. § 111, p. 357, and also *Shappiro v. Goldberg*, 192 U. S. 232, at page 241, 24 Sup. Ct. 259, at page 261 (48 L. Ed. 419), where it is said by Justice Day:

"There are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that, had the plaintiff declined to believe the representations and investigated for himself, he would not have been deceived. *Mead v. Bunn*, 32 N. Y. 275. But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor"—citing *Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627, *So. Dev. Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, and other cases decided by the same court.

But whether this principle applies to this case will depend upon the facts regarding the investigation and other relevant matters, as they are developed at the trial, and plaintiff can raise the question by a prayer for instructions on the second issue, or, perhaps, more specifically and in another way, by asking for an issue presenting the precise matter, when it is properly pleaded.

Plaintiff Barden also contended that there had been a settlement between him and the defendant Jarman of their differences in regard to the fraud and breach of the covenant, the latter accepting the notes and mortgage, which were duly transferred to him, as a full accord and satisfaction. If there

has been a settlement between the parties, it may be pleaded, and a corresponding issue submitted, so that the jury may determine the question under proper instructions.

[8] Before parting with the case, it may be well to recall some general principles, recognized by this court, in regard to the liability of a party who practices such a fraud, as is alleged in this case, in the sale and purchase of land. *Walsh v. Hall*, 66 N. C. 233. The maxim of caveat emptor is a rule of the common law, applicable to contracts of purchase of both real and personal property, and is adhered to, both in courts of law and courts of equity, where there is no fraud in the transaction. Where land has been sold and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's only right of relief, either at law or in equity, for defects or incumbrances depends, in the absence of fraud, solely upon the covenants in the deed which he has received. *Rawle, Covenants for Title*, 450. If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for defects or incumbrances against his vendor, for it was his own folly to accept such a deed when he had it in his power to protect himself by proper covenants. But in cases of positive fraud, a different rule applies. The law presumes that men will act honestly in their business transactions, and the maxim of "*vigilanti-bus non dormientibus jura subveniunt*" only requires persons to use reasonable diligence to guard against fraud; that is, such diligence as prudent men usually exercise under similar circumstances. In contracts for the sale of land purchasers usually guard themselves against defects of title, quantity, incumbrances and disturbance of possession by proper covenants, and if they do not use these reasonable precautions the law will not afford them a remedy for damages sustained which were the consequences of their own negligence and indiscretion. But the law does not require a prudent man to deal with every one as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men or the transactions of business, trade, and commerce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled. If representations are made by one party to a trade which may be reasonably relied upon by the other party (and they constitute a material inducement

to the contract), and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice. *Walsh v. Hall*, supra. In that case, Justice Dick, after referring to those principles, says:

"No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties, and their means of information. Examples are given in the books which have established some general principles which will apply to most cases that may arise. If the falsehood of the misrepresentations is patent and a party accepts and acts upon it with 'his eyes open,' he has no right to complain. If the parties have equal means of information, the rule of caveat emptor applies, and an injured party cannot have redress, if he fail to avail himself of the sources of information which he may readily reach, unless he has been prevented from making proper inquiry by some artifice or contrivance of the other party. Where the false representation is a mere expression of commendation, or is simply a matter of opinion, the parties stand upon equal footing, and the courts will not interfere to correct errors of judgment. Where a matter which forms a material inducement is peculiarly within the knowledge of one of the parties, and he makes a false representation as to that fact, and the other party, having no reason to suspect fraud, acts upon such statement and suffers damage and loss, he is entitled to relief. Whenever fraud and damage go together, the courts will give a remedy to the injured party." *Broom, Leg. Maxims*, 739; *Adams, Equity*, 176; *Story's Eq. Jur. c. 6*; *Atwood v. Small*, 6 Ck. and Fin. 232; *Chitty on Contracts*, 681; *Broom's Com. on the Common Law*, 347.

For the reasons assigned, there must be a new trial of all the issues.

New trial.

(177 N. C. 31)

LITTLE v. FLEISHMAN et al. (No. 259.)

(Supreme Court of North Carolina. Jan. 3, 1919.)

1. RECEIVERS §67—PROPERTY VESTING IN RECEIVER.

Where a failing corporation had sold and delivered its stock and good will for benefit of creditors, and receiver for it was thereafter appointed, title to stock having passed to buyers, receiver had no right to take possession, but could only sue for price.

2. RECEIVERS §104—GOODS SOLD BY INSOLVENT—ACTION FOR PRICE.

Where failing corporation sold stock of goods for benefit of creditors, and thereafter receiver was appointed, who innocently seized and sold goods, though title had passed to buyers, the receiver could not recover from buyers

price of goods or any part of it; the seizure and sale having worked failure of consideration.

3. SALES §201(7)—PASSING OF TITLE.

Where failing corporation sold stock of goods and good will for benefit of creditors, title passed by delivery of the goods to buyers in seller's store, and by buyers' placing servant in charge, price being fixed, and parties having gone to another city to pay money to seller's creditors.

4. RECEIVERS §104 — WRONGFUL ACTS OF RECEIVER—DEFENSES.

Where receiver of failing corporation, which had sold its stock for benefit of creditors, wrongfully seized goods from possession of buyers, to whom title had passed, tender back to buyers could go only in mitigation of damages.

5. RECEIVERS §132—AUTHORITY — WAIVER OF BULK SALES—STATUTE.

Under Revisal 1906, § 964a (Bulk Sales Statute), receiver of failing corporation, which had contracted to sell its stock of goods and good will for creditors, could not waive compliance with statute and pass good title as against creditors, where buyers refused to comply with contract, and before receiver was authorized to tender goods all creditors had not waived objection, and conditions of statute had not been met.

6. RECEIVERS §104 — WRONGFUL ACTS OF RECEIVER—SEIZURE OF GOODS SOLD BY INSOLVENT—"GOOD WILL."

Where failing corporation sold stock of goods and good will, and thereafter receiver was appointed at suit of creditors, who seized the goods, the receivership and seizure thus impairing or destroying "good will," the probability that former customers would resort to the old stand, buyers had right to refuse tender by receiver.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Will.]

7. RECEIVERS §104 — WRONGFUL ACTS — SEIZURE OF GOODS SOLD — RETENTION OF LEASE.

Where failing corporation sold stock of goods and good will for creditors, and receiver was thereafter appointed, who seized the goods in possession of buyers, so that they rightfully rescinded, receiver cannot complain of retention of his corporation's lease by the buyers, it having been transferred to them.

Appeal from Superior Court, Wake County; Calvert, Judge.

Action by J. C. Little, receiver, against Benjamin Fleishman and others. From judgment for defendants, plaintiff appeals. Affirmed.

The action was brought by the plaintiff, as receiver of the Raleigh Department Store, Inc. (hereinafter called the Store), to recover of the defendants the sum of \$2,621.56, which he alleges to be due to him as receiver, it being the difference between the net proceeds of the sale of a stock of goods sold by him

officially, viz. \$7,427.10, and the price of the stock which, as he alleges, the defendant agreed to pay the Store for the same.

The defendants denied the liability, and averred that the contract of sale had not been completed; that the stock of goods were sold in bulk by the Store, and the provisions of Revisal, § 964a, were not complied with; that the creditors, by their own unauthorized and illegal action, defeated the consummation of the contract by taking the goods from the possession of the defendants' servant, who had been placed in charge by them; that while the parties, that is, the defendants and the Store, were engaged in closing up the contract, and before the purchase price had been paid, plaintiff, at the instance and request of some of the creditors, was appointed receiver, in an action commenced by them in the superior court of Wake county, and took the goods from the possession of defendants' caretaker, afterwards selling the same for a greatly reduced price at public auction. Defendants claimed that not only were the goods contracted to be sold to them, but also the good will of the Department Store, which at the time was a going concern, although somewhat embarrassed financially; that by the plaintiff's action, as above described, the main purpose of the parties in making the contract of sale was altogether frustrated, and the contract became valueless to the defendants, the consideration upon which it was based having utterly failed.

Plaintiff contended that he took possession of the goods for the purpose of tendering them to the defendants, in furtherance of a due execution of the contract, intending that, upon payment of the price by the defendants, to wit, \$10,308.68, to deliver the goods to them, and that afterwards, on the 11th or 12th of September, 1918, the court made an order to that effect. The price, by agreement of the parties to the contract, was to be paid in the city of Baltimore, and, while in that city for the purpose of arranging some matters with a view to the payment of the money, the suit was brought in Raleigh, and the receiver appointed; whereupon the defendants, as soon as notified of the receivership, renounced the trade, and refused to proceed further with the contract and rescinded the same. This was done on September 4, 1918, and it was afterwards, on September 11, 1918, that the court, by its order, appointed plaintiff permanent receiver, and directed him to tender the goods to the defendants. Plaintiff, as temporary receiver, had on August 31, 1918, been given "authority to take possession of the property, assets, and effects of the Raleigh Department Store, Inc., and hold the same subject to the further order of the court," and plaintiff, on September 1, 1918, qualified as receiver,

and took possession of the goods, as before stated.

The parties waived a jury trial, and consented that the judge should find the facts which was done, the findings being mainly in favor of the defendants, and the judgment being rendered, upon the facts, for them. Other facts will be found in the opinion of the court. Plaintiff appealed.

J. H. Pou and John W. Hinsdale, both of Raleigh, for appellant.

R. W. Winston and J. Crawford Biggs, both of Raleigh, and Baldwin & Sappington, of Baltimore, Md., for appellees.

WALKER, J. (after stating the facts as above). [1] The goods were delivered to the defendants at Raleigh, where the business of the Raleigh Department Store had been conducted, and remained in the store under the care of a servant of the defendants. The plaintiff contends, in two of its assignments of error and in its brief, that the title thereby passed to the defendants. If this be so, the receiver had no right to take possession of the goods, nor did the court have any power to make the order requiring him to do so. If the title was in defendants, even the plaintiff, acting as receiver and under an order of the court in a suit to which defendants were not parties could not seize the goods. He could not do so for the purpose of tendering them to the defendants under the contract of sale, because he could not tender defendants' own goods to them; and besides, when he seized the goods, no order of the court requiring a tender to be made had been granted. It may further be said that no tender was necessary, as the goods were already in the possession of defendants, and the defendants, as we have stated, contended that the title had thereby vested in them. The only remedy of the receiver was to demand payment of the price, and, if the demand was refused, to sue for its recovery. It was a very simple remedy, as the defendants were not only perfectly solvent, but, to use plaintiff's own description of their financial rating, as set forth in his brief, they were, as a firm, a "strong, wealthy, and successful concern."

[2] A court cannot, by ordering a thing to be done, such as the seizure of property, make it lawful for its receiver to do it, when the property belongs to another, and not to the insolvent concern whose assets only are subject to its custody. It exceeds its jurisdiction, and its order is invalid and confers no lawful authority to seize the property. In this view of the case, that the title passed to the defendants when it received possession of the goods of the Raleigh Department Store, Inc., the court, by its order and through its receiver, having caused the prop-

erty to be wrongfully taken, would not permit its receiver to recover the price of the goods, or any part of it, in a case like this, because, by seizing and selling them, it has destroyed the subject-matter of the contract, and worked a failure of the consideration upon which the promise to pay the price of the goods was based. It would be unjust and inequitable to permit a recovery under such circumstances. The property was taken innocently, as no wrong was intended, but in a legal sense it did not affect the defendants' right to it, though they lost the possession.

[3,4] Excluding from consideration, at present, the bulk sales law, and its effect upon this contract, we are disposed to agree with the plaintiff's contention, as stated in his brief, that the title did pass by the delivery of the goods to the defendants in the store at Raleigh, and their exercise of the right of ownership by placing their servant in charge of them, the price being fixed, and the parties having gone to Baltimore for the purpose of paying the money there to the creditors of the Department Store. *Phifer v. Erwin*, 100 N. C. 69, 6 S. E. 672; *Wittkowsky v. Wasson*, 71 N. C. 451; *McArthur v. Mathis*, 133 N. C. 143, 45 S. E. 530; *Foley v. Mason*, 6 Md. 37; *Leedom v. Phillips*, 1 Yeates (Pa.) 527. There was nothing to be done by the buyer or seller, as a condition precedent or concurrent, upon which the passing of the property in the goods depended. When there is such a condition, and it is unperformed, the title, of course, will not pass, even though the goods may have been left in the possession of the buyer; and this is according to the third rule of Mr. Benjamin in his Treatise on Sales, 318, as explained in *Hughes v. Knott*, 138 N. C. at page 110, 50 S. E. 536. The buyers had the goods and were ready to pay the price. This but exhibits more clearly the mistake in seizing the goods which belonged to the defendants, and which the receiver had no right to take and the court no power to order them into his possession. His plain and only remedy was to sue for the price, and in doing so he perhaps might have attached the goods, as defendants were nonresidents; but this he did not do, and one cannot gain possession of property belonging to another than the debtor, and apply it or its proceeds to the satisfaction of a debt due by the latter, who was the former owner; there being no fraud alleged or shown in the passage of the title. *Smith v. Young*, 109 N. C. 224, 13 S. E. 735. It may also be said that by seizing the goods he left the matter open to the defendants to accept it, if so minded, as an act of rescission, and the defendants did so treat it by refusing to complete the execution of the contract. It can make no difference what plaintiff's motive was in seizing the property of the defendants, for his motive, however good or commendable, can-

not change the legal quality of his act. Under certain circumstances not now presented, it could affect only the damages (38 Cyc. 1002 and 1003), and the tender of the goods likewise could only go in mitigation of damages, if there was a legal tender at all (*Ward v. Moffitt*, 38 Mo. App. 395).

[5-7] We will now consider the case upon the assumption that there was no vesting of the title to the goods in the defendants, but that the contract had not passed out of its executory stage, as the parties have dealt with it on this assumption in their briefs and the argument before us, and have devoted a large part of their attention and discussion to that feature of the case. The judge finds as facts that while the defendants were in Baltimore preparing to pay the price of the goods, for the purpose of its distribution among creditors, the receiver was appointed and took possession of them, without any notice to the defendants, and the latter did not acquire any knowledge of it, nor were they in any way notified of the receivership until September 4, 1918, when they at once repudiated the contract and refused longer to be bound by it. He also finds that what was done tended to discredit the business of a going concern, and would give to the property the reputation of a bankrupt stock of goods, and impair the good will and diminish the value of the stock as one to be thereafter sold in the retail trade, which was the understanding and purpose of the parties in making the contract; that is, that the goods were bought from a going concern to be sold by defendants, in continuation of the business at the same stand, as an active, solvent concern, with the advantage of the good will of the seller. The tender of the goods was not made, or ordered to be made, until several days after the defendants had repudiated the contract; and it also appears that the "bulk sales" statute, before cited, was not complied with, though plaintiff contends that a receiver could waive compliance with the statute and pass a good title, as against creditors, to the defendants. We are of the opinion that he could not, as at the time the defendants refused to comply with the contract, and before the plaintiff was authorized to tender the goods, all of the creditors had not waived objection to the sale, and the conditions set forth in the statute had not been performed. The judge expressly finds as a fact that before the appointment of plaintiff as temporary receiver no creditor had consented to the sale to defendants except the Baltimore Bargain House, and after he was appointed there was no objection to the sale except by two as to the payment of the price in Baltimore instead of in Raleigh. This is not what the law required. The finding means, at most, that there was merely an undisclosed purpose not to disapprove, and no formal and express waiver

of objection, as there should have been. Re-
 vival, § 964a, declares that a bulk stock sale
 shall be prima facie fraudulent and void,
 unless certain things are done by the seller,
 and these conditions precedent confessedly
 were not complied with, as we have said.
 The buyers were not required to rely upon
 the unexpressed intentions of the creditors,
 but were entitled to a positive waiver of
 these requirements, one upon which defend-
 ants could safely rely, if that would have
 been sufficient. But the plaintiff contends
 that the statute does not apply to receivers.
 That part of it reads:

"Nothing herein shall prevent voluntary as-
 signments or deeds of trust for the benefit of
 creditors as now allowed by law, or apply to
*sales by executors, administrators, receivers or
 assignees under voluntary assignments for the
 benefit of creditors, trustees in bankruptcy, or
 by any public officers under judicial process.*"
(Italics ours.)

It is manifest that the exceptions named
 in the section are restricted to sales made
 by those persons or officers. This sale was
 not made by the plaintiff, but by the De-
 partment Store, before he was ever appoint-
 ed, and is not exempted by that clause. The
 sale could then have been avoided by any
 one creditor, and therefore it was not, at the
 time the defendants repudiated it, a valid
 contract, or such a one as required them to
 accept a tender of the goods or to pay the
 price. Besides, at the time of the tender,
 the value of the goods and the good will,
 which clearly passed, and was clearly in-
 tended by the parties to pass, by the trans-
 actions, to the defendant, were so impaired
 —and by the conduct of the creditors in
 bringing suit, having a receiver appointed
 and seizing the goods—that, even if other-
 wise bound by the contract, the defendants
 had a right to refuse the tender and per-
 formance of the contract. 6 R. C. L. §§ 380,
 381; 13 Corpus Juris, §§ 721, 724, 733; 9 Cyc.
 631; Clark on Contracts (2d Ed.) pp. 474,
 475, 476, 479. The court finds that "the good
 will of the going concern was a valuable
 asset, and a material inducement to and
 consideration of the contract." Plaintiff in-
 sists that the destruction must be of all or
 a material part of the property, and that
 depreciation must be substantial, in order
 to give the purchaser the right to rescind.
 We think this was the case, even regardless
 of the special findings. Our common sense,
 observation, and experience teach us that
 much. It does not require technical knowl-
 edge or skill for that purpose. The conduct
 of the creditors, acting through the court
 and the receiver, was bound to seriously im-
 pair the benefits to be derived from the con-
 tract, including the good will, and was well
 calculated to entirely defeat its object and
 purpose, as understood by the parties. As to

the "good will," which evidently passed, as it
 was a general sale of the Store's assets, we
 may accept plaintiff's definition of it, as being
 "the probability that former customers will
 resort to the old stand," and we still think it
 was a thing of value. Bloom v. Home Ins.
 Agency, 91 Ark. 367, 121 S. W. 293, cited by
 plaintiff. But the latter's counsel contended
 that impairment of the good will was not suf-
 ficient ground for a rescission of the contract
 or its nonperformance. Granting this to be
 true, for the sake of argument, the virtual
 destruction of the good will and the property,
 by its complete and wrongful appropriation,
 must surely be sufficient. Again, we say
 that the plaintiff pursued the wrong course,
 for which the defendants are not responsible
 and should not be made to suffer. The cred-
 itors, through the plaintiff, will not be heard
 to assert that the good will was of no value
 when it was their own fault that it was
 rendered valueless. If they had not inter-
 fered, and prevented a complete execution
 of the contract, it would have been of value
 to defendants in the further prosecution of
 the business of the Store, which was a going
 concern, at the old stand. Everything that
 the plaintiff claims that defendants should
 have done, or should have proved, was pre-
 vented from being done, or being proved, by
 the creditors' own fault. That no man
 should be permitted to take advantage of
 his own wrong is not only a principle of the
 common law, but a maxim of general juris-
 prudence, which is well recognized and es-
 tablished. It is based on elementary prin-
 ciples, and is applied both in courts of law
 and of equity, the reasonableness and ne-
 cessity of the rule being manifest. It is of
 such general application that it admits of
 illustration from every branch of legal proce-
 dure, and is one of the basic principles which
 govern this case. Broom's Legal Maxims (6th
 Am. Ed.) p. 212, star p. 275, and cases. It
 applies even though the actual wrong was
 unconsciously committed, which we have no
 doubt was the case here.

We need not discuss the point as to the
 retention of the lease by the defendants.
 The Department Store is well rid of it. It
 would have been a burden and incumbrance
 if it had kept it, and there is not the slight-
 est prospect of its ever needing it. As we
 have said, it is a recognized principle in the
 law that a party cannot take any advantage
 from his own wrong. The creditors, by the
 receiver, have brought this unfortunate sit-
 uation upon themselves, and must abide the
 consequences. If they had sought the rem-
 edy in an action for the price, defendants
 being fully solvent according to their own
 estimate of them, there would have been no
 ground of complaint. They have the stock
 of goods, and have lost the good will, and
 the lease, if of any tangible value, by their

own act, and by no fault of plaintiffs, who are not parties to the other action.

We have not yet understood why a tender was at all necessary, as the goods were already in the possession of the defendants. Why take them out of their possession in order to put them back again? The more clearly the facts of this case are revealed to us, the more apparent it seems that the only remedy of the plaintiff, and, too, an effective one, was by a simple action to recover the price of the goods. If this had been brought, there would have been no confusion, difficulty, or delay, as defendants, it now appears, were willing to pay in Raleigh, though we do not think they were legally required to pay the price there. If some of the creditors wanted it paid in Raleigh, why could not the seller and buyer agree, just as well, for their convenience, or for any other good reason they had, that it should be paid in Baltimore? We perceive no practical difference it would make if it were paid in one place rather than the other. Proper provision, it seems, had been made for its distribution by a solvent concern and with adequate protection to the rights of the creditors.

Our decision upon these, the material questions in the case, renders it unnecessary to consider the remaining and very numerous exceptions. We think, though, that, as the stock of goods was sold to the defendants much below cost, and by the receiver nearly \$3,000 less than the defendants gave for it, it was some evidence of a loss in value, and even of a great depreciation.

The rulings, and final decision, of the court were in all respects correct.

Affirmed.

(177 N. C. 158)

DAWSON v. WOOD. (No. 220.)

(Supreme Court of North Carolina. March 5, 1919.)

1. REMAINDERS ⚡16 — **CONTINGENT REMAINDERS—SALE OF PROPERTY—CONSTITUTIONALITY OF STATUTE.**

Laws 1903, c. 99 (Pell's Revisal 1906, § 1590), as amended by Laws 1905, c. 548, and Acts 1907, cc. 956, 980, providing that property in which there is a vested interest, with contingent remainder over to persons not in being, or to others only upon happening of contingency, may be sold and proceeds reinvested by order of court after action in which service is obtained upon such contingent remaindermen by appointment of guardian ad litem to represent them, held constitutional; the fund being impressed with contingencies and limitations imposed on original property.

2. JUDGMENT ⚡719 — **CONCLUSIVENESS — MATTERS INVOLVED IN ISSUES.**

An adversary judgment will usually conclude the parties as to all matters involved in the issue as stated and defined in the pleadings.

3. JUDGMENT ⚡747(½) — **CONCLUSIVENESS — INTEREST IN PROPERTY.**

Judgment adjudging plaintiff's interest in property as that of a life tenant was conclusive as to plaintiff's interest in such property in her subsequent action for sale of the property.

4. JUDGMENT ⚡747(½) — **CONCLUSIVENESS — SALE OF PROPERTY.**

Judgment, denying order of sale of property in life tenant's action therefor in which sale was opposed by defendants required to be made parties, and where property was valued at from \$15,000 to \$18,000, did not preclude sale in subsequent action, where there was no opposition and a responsible bid of \$33,000 made for the property.

5. LIFE ESTATES ⚡27(1) — **SALE OF PROPERTY—DESIRABILITY OF SALE.**

Where property valued at \$33,000 was inadequately improved, was situated in progressive business town with ever-increasing taxes and assessments against it, and yielded return of only \$200 per year, court properly decreed sale in life tenant's action therefor under Revisal 1905, § 1590.

6. LIFE ESTATES ⚡27(1) — **SALE OF PROPERTY—STATUTE.**

Revisal 1905, § 1590, providing for sale of property in which there is a vested estate with contingent remainder "if the interest of all parties would be materially enhanced by it," does not require life tenant to acquiesce and suffer under such condition, where the entire income is absorbed by current costs and charges and for the benefit of contingent remaindermen alone, but question should be considered and determined with some sense of proportion, and in fair and reasonable adjustment of all parties interested.

7. LIFE ESTATES ⚡27(3) — **SALE OF PROPERTY—PURCHASER—RIGHTS OF PURCHASER.**

Where property is sold by order of court in life tenant's action therefor under Revisal 1905, § 1590, purchaser's title is not affected by provisions of decree as to apportionment of interest on proceeds.

Appeal from Superior Court, Lenoir County; Allen, Judge.

Controversy without action by John G. Dawson, commissioner, against D. E. Wood. From judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, under a decree of the court, in a cause duly constituted, of Laura A. Miller et al. v. Julia B. Faulkner et al., and as commissioner in the cause, having contracted to sell the land, the subject-matter of said suit, to defendant, D. E. Wood, at the price of \$33,000, and the payment of certain assessments for paying, etc., which said sale was fully approved, etc., the said purchaser, on demand made, declines to take the property or comply with the terms of the bargain, claiming that the commissioner is not in

a position to make a valid title. On the case presented, the court, being of opinion that the title offered was a good one, entered judgment for recovery of purchase price and the delivery of the deed on payment of same or compliance with the terms of the decree. From this judgment, the defendant appealed.

Rouse & Rouse, of Kinston, for appellant.
Dawson, Manning & Wallace, of Kinston, for appellee.

HOKE, J. From the facts properly presented it appears:

That the real estate in question belonged to one Richard F. Green, who has died, making disposition of the same by his last will and testament, as follows:

"Item IV. I give and bequeath to my wife, Eliza B. Green, my house and lot in the town of Kinston, N. C., in which I now reside, to go with all my household and kitchen furniture and all other improvements thereto belonging, to have and to hold during her natural life and, at her death, to go to my daughter, Laura A. Green, to have and to hold during her natural life and, at her death, to her nearest blood relative."

(2) That the wife, Eliza B. Green, is dead, and Laura A. Miller, having married, is the Laura A. Green referred to in the aforesaid devise, and that Julia B. Faulkner and Laura A. Harding were, at the time of the proceedings instituted, under which the present sale was had, and are now, the nearest of kin of said Laura A. Miller, and the former has six children now living, one of whom is a minor, and the latter also has now living children and grandchildren, resident and nonresident, and most of whom are minors.

(3) That the present life tenant, Laura A. Miller, in May, 1918, instituted an action to sell said property for reinvestment, under section 1590 of the Revisal, making the present nearest blood relations, Julia B. Faulkner and Laura A. Harding, parties defendant, and, in same proceedings, it was made to appear, by averment and otherwise, that this was a desirable, valuable lot in the business section of Kinston, N. C., subject to the taxes and assessments usually imposed on such property. "That the lot yields very little income, and is burdensome. That the buildings situated upon it are very old, have become in a bad and dilapidated condition, which are yearly growing worse, to the end that the said structures will soon be valueless, and are, in fact, at this time in a damaging condition, and the income yielded by the said property does not exceed \$200 per year. That on account of the condition of the title to the said lot of land as above set forth, no one feels justified in improving the structures situated upon said land, which consist only of a dwelling house and a small

outhouse, nor do they feel justified in placing new buildings upon the said lot of land, to the end that the revenue from the said lot may be increased, for the reason that if any one should make expenditures in the improvement of the said lot it might, by reason of the condition of the said title, result in a loss to them of any amount which they might expend," and praying for a sale of same for reinvestment, provided as much as \$30,000 could be obtained therefor, with a cash payment thereon of \$5,000.

The next of kin having accepted service did not answer the averments of the petition showing the necessity of sale, and made no resistance to the application. It was thereupon adjudged that J. G. Dawson, as commissioner in the cause, make inquiry as to the value, and obtain and submit bids for the property considered adequate and desirable; and it was furthermore adjudged, after due inquiry: That Y. T. Ormond be, and he was, appointed guardian ad litem in said action, "to represent in same, as contemplated by law, any persons under disabilities and any person not now in being or whose names and residences are not known, or who may, in any contingency, become interested in said land"; and, summons having been duly issued, said guardian voluntarily appeared in the cause, waiving service, etc., and accepting appointment as such guardian. That, at the January term, 1919, of superior court of Lenoir county, the said commissioner made his report, submitting that, after full advertisement and due inquiry, the present defendant, D. E. Wood, had bid for the property \$33,000, of which \$15,000 was to be paid in cash and the remainder with bond payable on or before 10 years, with interest and properly secured. The bid and security offered was set forth in the report, and the said bidder also agreed to pay eight-tenths of the amounts now due for paying assessments against the property aggregating \$750.65. The commissioner further reported that the price offered was the reasonable worth of the land, that it was the best price possible to obtain for it, and that the interest of all the parties would be materially enhanced by a sale at the amount stated, and recommended that the sale be made on the terms proposed. And the guardian ad litem, appointed after due inquiry, answered under oath, and admitted that the price offered was fair and reasonable worth of the property; "that the interest of all the parties on said proceedings required that the land should be sold, and same would be greatly enhanced in value by the sale to D. E. Wood at the price and on the terms stipulated." It was further made to appear that heretofore, in 1913, this present plaintiff had instituted an action against the defendants, Julia B. Faulkner and Laura A. Harding, then and now the nearest of kin, seeking a

sale of this property on allegation that she was absolute owner in fee under the terms of her father's will, and, if otherwise, asking for a sale for reinvestment under the statute. In that case, entitled *Miller v. Harding*, reported in 167 N. C. 53, 83 S. E. 25, there was judgment holding that plaintiff had only a life estate in the property, and that the right to a present sale had not been shown. In this jurisdiction and on the facts thus presented, the courts have not had the inherent power to decree a sale of property and pass a valid title to the purchaser, the remainder here being limited on a contingency that would prevent the ascertainment of the ultimate takers or any of them till the death of the life tenant. *Hodges v. Lipscombe*, 128 N. C. 57, 38 S. E. 281; *Aydlett v. Pendleton*, 111 N. C. 28, 16 S. E. 8, 32 Am. St. Rep. 776; *Williams v. Hassell*, 74 N. C. 434; *Watson v. Watson*, 56 N. C. 401. In other states, and generally, the power in question has been more broadly exercised. See *Bolfl v. Fisher*, 3 Rich. Eq. p. 1; *Baylor's Lessee v. Dejarquette*, 54 Va. (13 Grat.) 152; *Ruggles v. Tyson*, 104 Wis. 500, 79 N. W. 766, 81 N. W. 367, 48 L. R. A. 809, and like cases. And to remove the restrictions prevailing under our decisions and with a view of unfettering these estates to the end that the property might be more profitably employed, the General Assembly of 1903 (chapter 99; Pell's Revisal, § 1590) passed a statute conferring on the courts the power to order a sale and transfer of the title in all cases where there was "a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which shall determine who the remaindermen are." That the proceedings could be instituted by any person having a vested interest in the land and all persons in esse who are interested shall be made parties defendant and served with a summons and "where the remainder will or may go to minors or persons under disabilities or to persons not in being and whose names and residences are not known and who may, in any contingency, become interested in said land but because of such contingency cannot be ascertained, the judge of the superior court shall, after due inquiry of persons who are in no way interested in or connected with the proceedings, appoint some discreet person as guardian ad litem to represent such remaindermen upon whom summons shall be served as provided by law for other guardians ad litem and it shall be the duty of such guardians to defend such actions, and when counsel is needed, to make this known to the judge, who shall by order give instructions as to the employment of counsel and the payment of his fees and the court shall, if the interest of all parties require or would be materially enhanced by

it, order a sale of such property or any part thereof for reinvestment, either in purchasing or improving the real estate, less expense, etc., and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as the property ordered to be sold and the court may authorize the loaning of such money, subject to its approval until such time when it can be invested in real estate."

In Laws 1905, c. 548, this reinvestment in realty was required to be within 2 years, but such requirement was removed by the later Acts of 1907, cc. 956, 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered.

[1] Construing the statute as amended in the carefully considered case of *Hodges v. Lipscombe*, 133 N. C. 199, 45 S. E. 556, the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and, as to others more remotely interested, they could properly have their interest represented and protected by a guardian ad litem as the statute provides. It will be noted that the statute does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment and subject to the right to use a reasonable portion of the amount for the improvement of remainder, a case presented in *Smith v. Miller*, 151 N. C. 620, 66 S. E. 671, and approved when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. This being true and a reasonable provision being made for protecting the interest of the unascertained or more remote remaindermen by a guardian ad litem, carefully selected and duly notified, the statute is undoubtedly a constitutional enactment, and has been approved in this and other respects by numbers of decisions dealing directly with the subject. *Pendleton v. Williams*, 175 N. C. 248, 95 S. E. 500; *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402; *Smith v. Miller*, 151 N. C. 620, 66 S. E. 671; *Hodges v. Lipscombe*, 133 N. C. 199, 45 S. E. 556; *Springs v. Scott*, 132 N. C. 548, 44 S. E. 116.

In *Springs v. Scott* and *Smith v. Miller*, supra, the constitutionality of the statute was directly and fully considered, and in *Pendleton v. Williams*, speaking to this and other features of the act, the court said:

"It is very generally recognized that statutes of this kind, being no interference with the es-

sential rights of ownership, but operating rather in addition to those already possessed by the owners of such estates, are well within the legislative powers [citing *Lawson's Rights and Remedies*, § 3867], and the act we are presently considering has been repeatedly approved and applied by decisions of this court, the law being construed to authorize a sale of the property or the portion of it affected by the contingent interest, and not a sale of the contingent interest separately"—citing *Smith v. Witter*, 174 N. C. 616, 94 S. E. 402; *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272, 9 L. R. A. (N. S.) 1145; *Springs v. Scott*, *supra*, and other cases.

Under these authoritative interpretations and on perusal of the record in which this decree of sale was had, it will appear that the petitioner's case comes clearly within the statutory provisions. The methods required have been carefully pursued, the interest of the contingent remaindermen properly safeguarded, an advantageous sale has been effected, and we must concur in the view of his honor below that the present plaintiff, as commissioner, is in a position to offer a good title, and the contract of the purchaser must be complied with.

This being virtually an independent action by the commissioner to collect the purchase money, there is doubt if any of the objections urged against the validity of the sale are available to defendant while the decree in the principal suit remains unchallenged, either by appeal or motion in the cause. There seems to be nothing jurisdictional in these objections, but, if the contrary be conceded, we are of opinion that none of them can be sustained. It was chiefly urged that the petitioner in the principal proceedings is barred of his right to a sale for reinvestment by reason of a judgment denying such right in a former suit instituted by her for the same purpose in 1913 and reported in *Miller v. Harding*, 167 N. C. 53, 83 S. E. 25.

[2-4] It is undoubtedly the accepted principle here and elsewhere that an adversary judgment will usually conclude the parties as to all matters involved in the issue as stated and defined in the pleadings. *Holloway v. Dunham*, 176 N. C. 550-552, 97 S. E. 486, and authorities cited, but an examination of the former case will show that the matters there in issue were: First, whether the petitioner was the owner, as she claimed, of an absolute fee simple in the property; and second, whether, under the facts and conditions as alleged and then existent, a present sale was expedient and for the best interest of all the parties concerned, a comparison of the two cases will disclose that, while the quantity of the petitioner's estate, being a question fixed in its nature, was there finally determined against her, on the second, a variable question, as to the expediency of the sale, there are such pronounced differences in the conditions presented that the

judgment in the first case could in no sense be considered an estoppel of record in the second. In the former, the proposition was to have a sale at public auction without further inquiry, and at a suggested value of \$15,000 to \$18,000, with the persons required to be made parties by the statute in active resistance to the measure, while in the instant case, on careful inquiry, an adequate and responsible bill of \$33,000 is presented for consideration, together with relief from \$700 or \$800 of accumulated assessments, and with the proposed measure fully acquiesced in by all persons who are proper parties under the statute and recommended by reliable officials of the court who had the matter in special charge. On the case as now presented and the question of expediency, we must hold, as stated, that the former judgment denying a sale is no bar to such a decree in the present suit. It is further insisted that the decree should not be upheld for the reason that no proper inquiry has been shown as to the necessity and expediency of the present sale. As we have heretofore stated, we incline to the opinion that such an objection is not available in a suit for the purchase money, but, in any event, it is not open to defendant on the facts of this record, and we are clearly of opinion that full and adequate inquiry has been shown, it appearing that, before decree made, a conscientious, capable, and diligent commissioner, both by public advertisement and personal effort, has made painstaking inquiry into the facts, and has succeeded in presenting to the court a bid of \$33,000, \$15,000 of which is in cash and the remainder sufficiently secured; that the desirability of the sale at such a price is admitted by the parties of record, including a disinterested and intelligent guardian ad litem, appointed and acting in the interest of the contingent remaindermen.

[5-7] As a matter of fact, with property of this value inadequately improved in a progressive business town with ever-increasing taxes and assessments against it, and yielding a return of only \$200, the desirability of a sale for reinvestment would seem to be revealed by the objective facts. In providing that a sale could be made when the interest of all parties would be materially enhanced, the statute does not require that a life tenant should acquiesce and suffer, under such conditions where the entire income is absorbed by current costs and charges and for the benefit of the contingent remaindermen alone, but the question should be considered and determined with some sense of proportion and in fair and reasonable adjustment of the rights of all parties interested. Again, it is objected that the decree in the principal case provides that the interest on the fund shall be paid, one-half to the life tenant and one-fourth each to the contin-

gent remaindermen made parties under the statute. This might be a good ground of exception if it were made by the life tenant, but if she has seen proper to consent to such a disposition of the income, this assuredly is no concern of the purchaser, nor could it in any way affect the question of the title that is offered him. In the recent case of *Pendleton v. Williams*, supra, which is an authority apposite to several of the questions presented in this appeal, the court, in response to a similar objection, said:

"So far as the purchaser is concerned, the statute having given the power of sale and all the parties in interest being before the court, there is no reason why a good title cannot be conveyed to him, and he is in no way charged with the duty of seeing that the purchase money is properly distributed. When a purchaser has paid his bid into court or to the officers duly authorized to receive it, he is quit of all further obligation concerning it, and as to him the judgment must be affirmed"—citing *Wilkinson v. Brinn*, 124 N. C. 723, 32 S. E. 966, and 16 R. C. L., Title, Judicial Sales, sec. 83.

On the record, we are of opinion that the judgment directing the collection of the purchase money, according to the terms of sale, should be affirmed, and, on final judgment, proper provision be made for securing the fund according to the provisions of law and the course and practice of the court.

Affirmed.

(148 Ga. 793)

ROBINSON et al. v. PENN MUT. LIFE INS. CO. et al. (No. 848.)

(Supreme Court of Georgia. Feb. 14, 1919.
Rehearing Denied Feb. 24, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §327(5) — BILL OF EXCEPTIONS—PARTIES.

The Penn Mutual Life Insurance Company, holder of certain deeds to lands in Dougherty county, Ga., executed to secure the payment of money loaned by the company to one Kimsey, brought proceedings in Bibb county, Ga., for the foreclosure of the instruments, obtained judgment at the first term of the court, and had the execution levied on the lands in Dougherty county. Plaintiffs in error filed an equitable petition against the insurance company, Kimsey, and the levying officer, setting up claim to the lands and seeking to enjoin the levy, alleging that they had been deceived and by fraud induced to make the deeds to Kimsey; that the deeds were infected with usury; that Kimsey represented to petitioners that, if they desired to have a loan upon the lands, he could negotiate the same for them, and petitioners applied for the amount of \$1,800; that they executed warranty deeds to Kimsey, but did not know the nature of the instruments, and

thought they were making manual delivery of certain papers; that Kimsey gave bonds to reconvey the lands to petitioners; that Kimsey borrowed \$2,500 from the insurance company, but petitioners received only about \$150 from the entire transaction, which they are ready and willing to pay into the court. The petition contained, among others, the prayer that the deeds from plaintiffs in error to Kimsey, and from the latter to the insurance company be declared void and ordered canceled, and there was also a prayer for general relief. Upon the trial of the case the court directed a verdict in favor of the defendant, the insurance company, against the petitioners, but in favor of the petitioners against Kimsey "as to the excess of the fund after payment of the insurance company's *fi. fa.*" A decree in accordance with this was directed. A motion for new trial was made by the petitioners, which was overruled, and that judgment was brought here for review. *Held*, that Kimsey was a necessary party to the bill of exceptions.

2. EXCEPTIONS, BILL OF §58(1)—PERSONAL SERVICE—SERVICE ON ATTORNEY.

Kimsey did not reside in Dougherty county, but in Habersham county, Ga. He was not made a party to the bill of exceptions expressly, and the only service upon him was made by the sheriff by leaving a copy of the bill of exceptions at Kimsey's residence. The entry of service contained no recital that Kimsey was absent from the county. Kimsey was a party to the proceedings and appeared for himself as attorney at law, as is shown by the record. *Held*, that the service of the bill of exceptions was insufficient. It was not good as service upon Kimsey as a party; for that must be personal. It was not good as service upon him as attorney, for it did not show that he was absent from the county of his residence, and it is only in case the attorney is absent therefrom that service upon him can be perfected by leaving a copy at his residence. Civ. Code 1910, § 6160; *Anderson v. Albany*, etc., Ry. Co., 123 Ga. 318, 51 S. E. 342; *Lyons v. Winter*, 129 Ga. 416, 59 S. E. 270; *Akerman v. Neel*, 70 Ga. 728. The motion to dismiss the writ of error must be sustained.

Error from Superior Court, Dougherty County; W. M. Harrell, Judge.

Suit in equity by Bob Robinson and others against the Penn Mutual Life Insurance Company, one Kimsey and others. Decree for defendant Insurance Company against petitioners, and in favor of petitioners against defendant Kimsey, motion for new trial overruled, and plaintiffs bring error. Writ of error dismissed.

Milner & Farkas, of Albany, for plaintiffs in error.

West & Dasher, of Macon, R. J. Bacon, of Albany, and Willis H. Kimsey, of Cornelia, for defendants in error.

BECK, P. J. Writ of error dismissed. All the Justices concur.

(148 Ga. 766)

MAYOR and ALDERMEN of CITY OF SAVANNAH v. WADE.**WADE v. MAYOR AND ALDERMEN OF CITY OF SAVANNAH.**

(Nos. 976, 977.)

(Supreme Court of Georgia. Feb. 13, 1919.
Rehearing Denied Feb. 24, 1919.)*(Syllabus by the Court.)***1. EXECUTION §167—AFFIDAVIT OF ILLEGALITY—AMENDMENT.**

"Affidavits of illegality are, upon motion and leave of court, amendable instantaneously by the insertion of new and independent grounds: Provided, the defendant will swear that he did not know of such grounds when the original affidavit was filed." Civil Code 1910, § 5704. The defendant in execution will not be permitted to amend his affidavit of illegality by the addition of new and independent grounds, whether of fact or of law, thereto for causes which existed and were known, or in the exercise of reasonable diligence might have been known, at the time of the filing of the original affidavit. *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967 (2). An amendment which does not add a new and independent ground of illegality, but which merely amplifies or amends a ground in the original affidavit, need not be sworn to.

2. EVIDENCE §65 — PRESUMPTION — QUESTIONS OF LAW—KNOWLEDGE.

Applying the foregoing principles, the amendment to the affidavit of illegality in this case added new and independent grounds; and such new and independent grounds not having been verified as required by the statute, the court erred in allowing the same over timely objection, and in refusing to strike the same upon demurrer. In so far as the amendment raised only questions of law, the defendant in execution was conclusively presumed to have had knowledge of these grounds at the time of the filing of his original affidavit, and the court did not err in refusing to allow the same.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by Mayor and Aldermen of City of Savannah against W. H. Wade. Amendment to defendant's affidavit of illegality allowed in part and disallowed in part, and plaintiff excepts and brings error, and defendant takes a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

Robt. J. Travis and David S. Atkinson, both of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

PER CURIAM. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur, except ATKINSON, J., disqualified.

(148 Ga. 687)

VOLUNTEER STATE LIFE INS. CO. v. SPRATLING.**SPRATLING v. VOLUNTEER STATE LIFE INS. CO.**

(No. 905.)

(Supreme Court of Georgia. Nov. 16, 1918.
Rehearing Denied Feb. 24, 1919.)*(Syllabus by the Court.)***1. INSURANCE §360(3)—AUTOMATIC PREMIUM LOAN CLAUSE—LOAN VALUE—EXTENSION OF POLICY.**

A limited payment (20-payment) life insurance policy was issued on May 25, 1913. The insured paid the first premium on the date of issue, the second premium on May 25, 1914, and the third on May 25, 1915. The premium due on May 25, 1916, was not paid. The insured died on August 25, 1916. The insured had borrowed on the policy \$337.11, and the interest on the amount had been paid up to May 25, 1916. The premium, as stated in the face of the policy, was \$316.89, payable annually. The policy provided: "The company will, at any time after three full years' premiums have been paid, advance upon the sole security of this policy, when legally assigned, a sum equal to the amount specified in the table below, less any indebtedness to the company on account of this policy. The interest on such loan shall not exceed six per cent. per annum, and shall be payable annually in advance." The loan or surrender value of the policy, as stated in the table referred to, was \$396 after the policy had been in force three years; \$621 after four years. The policy further provided: "In the event the insured should, at any premium date or within the days of grace thereafter, after three full years' premiums have been paid hereon, fail to pay or cause to be paid the then current premium, if the policy be not surrendered by the insured with a choice of one of the options herein guaranteed, and if at the time of the nonpayment of premium there is a loan value hereon in excess of all indebtedness that may then exist against the policy, together with interest, the company will apply such available loan value towards the payment of the premium then due, with interest thereon at a rate not exceeding six per cent. (6%) per annum, chargeable annually in advance; and will continue to carry said policy in force, in the form as written and at the rate of premium as provided for in the face hereof, subject to its terms and such indebtedness, the same as if the premium had been paid in cash; and will continue to so apply such loan value as long as such value, at the rate of premium provided in the face hereof, will suffice to pay for even one day's premium. At any time while this policy is thus in force the insured may resume payment of premiums thereon without medical re-examination, and in that event any indebtedness against the policy may either be paid in cash or allowed to remain as a loan hereon. All such indebtedness shall be a first lien on the policy, and the policy will lapse unless premium payments are resumed by the insured within the actual

period of extension." The nonforfeiture provisions of the policy, other than the automatic premium-loan clause last above quoted, gave to the insured the option to surrender the policy to the company, after the policy has been in force three full years, and at any time prior to default in premium payment, or within the days of grace (one month) thereafter, and to take (1) the cash surrender value, as indicated by the table set out in the policy, less any indebtedness to the company on account of the policy; or (2) a nonparticipating paid-up life policy for a reduced amount, as indicated by the table; or (3) a nonparticipating paid-up term policy for the full amount insured by the policy, as indicated by the table, with a provision in (2) and (3) as to any indebtedness to the company on account of the policy. The insured did not surrender the policy, and did not elect to take any of the options last above referred to.

On June 26, 1916, the fourth annual premium having become due on May 25, 1916, the company offered to loan to the insured the full amount available after the policy had been in force four years, to wit, \$621, at the time tendering the insured a loan agreement to be executed by himself and his wife; the latter being the beneficiary named in the policy. Along with the loan agreement, the company furnished to the insured a statement of his indebtedness to it, showing former loan, \$337.11, premium due on May 25, 1916, \$316.89, and interest to May 25, 1917, \$37.26, making a total of \$691.26; and required the insured to pay the additional sum of \$70.26 to cover the total of his indebtedness to the company. On June 27, 1916, the insured signed the agreement and forwarded it from Macon, Ga., to the beneficiary at Atlanta, Ga., with the request that she also execute the agreement and deliver it to the company together with the sum of \$70.26. At the time of the receipt of the agreement by the beneficiary, she was "ill and bedridden and remained in this condition for several days, at which time she became wholly unconscious and remained in this condition until after the death of the insured; and for said reasons was unable to execute said loan agreement prior to the death of the insured." The insured died without knowing that the beneficiary had not complied with the "wrongful" demands of the company. After the death of the insured, the beneficiary completed the agreement and tendered it, together with \$70.26, to the company. One clause of the policy provided: "This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred upon him by this policy."

Held: Under the foregoing facts, the available loan value on the policy, to wit, \$58.89 (conceding, without deciding, that interest at 6 per cent. per annum in advance on the existing loan and on the amount appropriated to the payment of the premium due should not be first deducted), was, under the automatic premium-loan clause quoted above, insufficient to "carry the policy in force, in the form as written," to the date of the insured's death, August 25, 1916.

(a) The obligation of the company, under the

automatic premium-loan clause quoted above, was to apply such available loan value toward the payment of the premium due, and to carry the policy in force "in the form as written and at the rate of premium as provided for in the face" of the policy. In a strict technical sense no "rate of premium" is provided in the face of the policy. The reference is, however, to the contract as written, and the words quoted above are to be given their usual and ordinary signification. The parties were dealing with this contract of insurance, to wit, a limited payment life policy as distinguished from a purely protective policy or other form of contract.

2. INSURANCE — 392(8) — LIFE INSURANCE — AUTOMATIC PREMIUM-LOAN PROVISION — FORFEITURE.

The insurance company was not estopped from declaring a forfeiture of the policy (conceding, without deciding, that its demand that the loan agreement be executed by the beneficiary was wrongful and unauthorized); it affirmatively appearing that the sum of money necessary to pay the past-due premium, interest in advance upon the loan, and the existing loan upon the policy, was neither paid nor tendered the company until after the death of the insured.

Certified Questions from Court of Appeals.

Action by O. F. Spratling against the Volunteer State Life Insurance Company. Judgment for defendant, and plaintiff brings error, and defendant takes cross-exceptions, and the Court of Appeals certifies questions. Questions answered.

Little, Powell, Smith & Goldstein, of Atlanta, and W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

Jones & Chambers and Saml. Barnett, all of Atlanta, for defendant in error.

GEORGE, J. The rulings in the headnotes are in answer to the questions certified by the Court of Appeals.

All the Justices concur.

(148 Ga. 842)

VALDOSTA, M. & W. R. CO. v. ATLANTIC COAST LINE R. CO. (No. 826.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. RAILROADS — 159(9) — LIENS — "WAGES FOR SERVICES" — "EMPLOYÉ" — SWITCHING OF CARS — STATUTE.

A railroad company executed a "mortgage or deed of trust" on "the railroad, property, equipment, and franchises" of the railroad company to a trustee to secure the payment of a certain issue of bonds. The trustee instituted an equitable suit for the appointment of a receiver and to foreclose the lien provided in the mortgage or deed of trust. A receiver was appointed, who took charge of all of the assets of the railroad company, and operated the railroad. During the course of operation he applied cer-

(148 Ga. 766)

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Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

PER CURIAM. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur, except **ATKINSON, J.**, disqualified.

(148 Ga. 687)

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On June 28, 1916, the fourth annual premium having become due on May 25, 1916, the company offered to loan to the insured the full amount available after the policy had been in force four years, to wit, \$621, at the time tendering the insured a loan agreement to be executed by himself and his wife; the latter being the beneficiary named in the policy. Along with the loan agreement, the company furnished to the insured a statement of his indebtedness to it, showing former loan, \$337.11, premium due on May 25, 1916, \$316.89, and interest to May 25, 1917, \$37.26, making a total of \$691.26; and required the insured to pay the additional sum of \$70.26 to cover the total of his indebtedness to the company. On June 27, 1916, the insured signed the agreement and forwarded it from Macon, Ga., to the beneficiary at Atlanta, Ga., with the request that she also execute the agreement and deliver it to the company together with the sum of \$70.26. At the time of the receipt of the agreement by the beneficiary, she was "ill and bedridden and remained in this condition for several days, at which time she became wholly unconscious and remained in this condition until after the death of the insured; and for said reasons was unable to execute said loan agreement prior to the death of the insured." The insured died without knowing that the beneficiary had not complied with the "wrongful" demands of the company. After the death of the insured, the beneficiary completed the agreement and tendered it, together with \$70.26, to the company. One clause of the policy provided: "This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred upon him by this policy."

Held: Under the foregoing facts, the available loan value on the policy, to wit, \$58.89 (conceding, without deciding, that interest at 6 per cent. per annum in advance on the existing loan and on the amount appropriated to the payment of the premium due should not be first deducted), was, under the automatic premium-loan clause quoted above, insufficient to "carry the policy in force, in the form as written," to the date of the insured's death, August 25, 1916.

(a) The obligation of the company, under the

automatic premium-loan clause quoted above, was to apply such available loan value toward the payment of the premium due, and to carry the policy in force "in the form as written and at the rate of premium as provided for in the face" of the policy. In a strict technical sense no "rate of premium" is provided in the face of the policy. The reference is, however, to the contract as written, and the words quoted above are to be given their usual and ordinary signification. The parties were dealing with this contract of insurance, to wit, a limited payment life policy as distinguished from a purely protective policy or other form of contract.

2. INSURANCE — §392(8)—LIFE INSURANCE—AUTOMATIC PREMIUM-LOAN PROVISION—FORFEITURE.

The insurance company was not estopped from declaring a forfeiture of the policy (conceding, without deciding, that its demand that the loan agreement be executed by the beneficiary was wrongful and unauthorized); it affirmatively appearing that the sum of money necessary to pay the past-due premium, interest in advance upon the loan, and the existing loan upon the policy, was neither paid nor tendered the company until after the death of the insured.

Certified Questions from Court of Appeals.

Action by O. F. Spratling against the Volunteer State Life Insurance Company. Judgment for defendant, and plaintiff brings error, and defendant takes cross-exceptions, and the Court of Appeals certifies questions. Questions answered.

Little, Powell, Smith & Goldstein, of Atlanta, and W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

Jones & Chambers and Saml. Barnett, all of Atlanta, for defendant in error.

GEORGE, J. The rulings in the headnotes are in answer to the questions certified by the Court of Appeals.

All the Justices concur.

(148 Ga. 842)

VALDOSTA, M. & W. R. CO. v. ATLANTIC COAST LINE R. CO. (No. 826.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. RAILROADS — §159(9)—LIENS—"WAGES FOR SERVICES"—"EMPLOYE"—SWITCHING OF CARS—STATUTE.

A railroad company executed a "mortgage or deed of trust" on "the railroad, property, equipment, and franchises" of the railroad company to a trustee to secure the payment of a certain issue of bonds. The trustee instituted an equitable suit for the appointment of a receiver and to foreclose the lien provided in the mortgage or deed of trust. A receiver was appointed, who took charge of all of the assets of the railroad company, and operated the railroad. During the course of operation he applied cer-

tain money derived from the earnings of the road to the purchase of cross-ties, cost of repairs to the roadbed and equipment, and for "general betterment" of the railroad property, all of which was found necessary for the upkeep "of the roadbed and equipment," and amounted to not less than \$12,000. More than six months (approximately two years) after the commencement of proceedings to appoint the receiver a connecting railroad company filed an intervention in the suit for the recovery of certain amounts for which the defendant railroad company had become indebted to it within six months immediately preceding the institution of the suit and the appointment of a receiver, for services rendered in switching cars for the defendant company and for supplies, consisting of the rental of certain cars furnished by the intervener, and used by the defendant in the operation of its railroad, all of which services and supplies were alleged to be necessary to the operation of the defendant's road, the demand for which amounted to less than \$500. The case upon the intervention was, by consent, tried by the judge without a jury; and upon evidence tending to support the allegations of the intervention a judgment was rendered in favor of the intervener for the full amount claimed, the lien of which was declared to be superior to the lien of the mortgage or deed of trust. *Held:*

The amount claimed by the intervener for the switching of cars for the defendant railroad company was not wages for services rendered by an employé for the railroad company, within the meaning of the act of 1893 (Acts 1893, p. 91, Civil Code, § 2793), which provides: "The amounts due employés by any railroad company for wages earned by service rendered to said railroad company shall constitute a lien upon the railroad and other property of said railroad company, and shall be superior in dignity to the lien of any mortgage or other contract lien executed or created by said railroad company since December 13th, 1893: Provided, that no employé shall be entitled to said lien under this section to an amount exceeding five hundred dollars." Accordingly the intervener did not have a statutory lien for its demand based upon the switching of cars.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

2. RAILROADS §159(4)—"FURNISHING OF MATERIALS, SUPPLIES OR OTHER ARTICLES"—STATUTE—LIEN.

The supplying of cars as necessary to the operation of a railroad is the "furnishing of material, supplies, or other articles," within the meaning of the act of 1894 (Acts 1894, p. 68; Civil Code, § 2795), which provides: "All persons furnishing material, supplies, or other articles necessary to the operation of any railroad company which is operated in this state, and all persons having claims against such company for live stock killed by its engines or cars, shall have a lien upon the property of the company for the amounts due for such supplies, material, or other necessary articles furnished within six months preceding the institution of proceedings for the same, or for the amounts due to the company for the killing of such live

stock, which lien shall be superior in dignity to any mortgage or other contract lien created by said railroad company." But the intervener did not acquire a lien under this provision of the statute, because the supplies were not furnished within six months next before the intervener commenced the action to enforce its alleged lien.

3. CLAIM INFERIOR TO MORTGAGE.

Applying the principles announced in *Central Trust Co. v. Thurman*, 94 Ga. 735, 20 S. E. 141, and *Alexander v. Mercantile Trust & Deposit Co.*, 100 Ga. 537, 28 S. E. 235, the intervener did not have a claim superior to the mortgage which a court of equity will declare and enforce.

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Suit by trustee in mortgage deed of trust executed by the Valdosta, Moultrie & Western Railroad Company, in which a receiver was appointed, and in which the Atlantic Coast Line Railroad Company intervened. Judgment for interveners, declaring its lien superior to the lien of the deed of trust and the Valdosta, Moultrie & Western Railroad Company brings error. Reversed.

Whitaker & Dukes, Woodward & Smith, and E. K. Wilcox, all of Valdosta, for plaintiff in error.

Bennet & Branch, of Quitman, and Patterson & Copeland, of Valdosta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(148 Ga. 764)

SMITH v. CITIZENS' & SOUTHERN BANK. (No. 964.)

(Supreme Court of Georgia. Feb. 13, 1919. Rehearing Denied Feb. 24, 1919.)

(Syllabus by the Court.)

1. CORPORATIONS §30(5) — LIABILITY OF ORGANIZERS—CREDITORS.

"Persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock with interest." Civ. Code 1910, § 2220. The liability thus provided for is obviously for the purpose of creating a fund, when the subscriptions to the amount of the minimum capital stock shall have been paid, for the ultimate benefit of those who may extend credit to the corporation; and such persons have the right to presume that the statute has been complied with, and to rely, if necessary, upon the statutory liability of those failing to observe the law. Organizers of a company who transact business in its name before the minimum capital stock has been subscribed for are

considered as committing a fraud upon those who may extend credit to the company, and the statute imposes a liability upon them. *John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13 (3). Upon principle the statute applies to private corporations generally, including among others banking corporations chartered under Civ. Code 1910, § 2262 et seq.

2. BANKS AND BANKING *§*36, 47(1)—CAPITAL STOCK—STATUTE—"MAXIMUM AMOUNT"—"MINIMUM AMOUNT."

While it is provided that no bank shall be incorporated with less than a specified amount of capital stock (Civ. Code 1910, § 2269), that provision of the law does not purport to limit the power to incorporate a bank with a minimum capital stock greater than that specified in the statute. It is optional with the institution whether it will name a maximum amount of capital stock and a minimum amount of capital stock; and where but one amount is named, that is both the maximum and minimum amount of capital stock of the company, within the meaning of Civ. Code 1910, § 2220. *Rosenheim v. Horne*, 10 Ga. App. 582, 73 S. E. 953 (4).

3. RULINGS ON DEMURRERS.

The rulings announced in the preceding notes dispose of the controlling question in the case, and there was no error in overruling the demurrers, nor in refusing to grant a new trial upon any ground taken.

Error from Superior Court, Grady County; G. H. Howard, Judge.

Action between E. M. Smith and the Citizens' & Southern Bank and others. Judgment for the latter, motion for new trial denied, and the former brings error. Affirmed.

Titus, Dekle & Hopkins, of Thomasville, Pope & Bennet, of Albany, and E. E. Cox, of Camilla, for plaintiff in error.

Adams & Adams, of Savannah, W. V. Custer, of Bainbridge, W. T. Crawford, of Thomasville, and Bell & Weathers, of Cairo, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(148 Ga. 794)

HARRIS et al. v. STATE. (No. 858.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(*Syllabus by the Court.*)

COMPANION CASE.

This case is ruled by the decision in *Mack v. Westbrook*, 98 S. E. 339.

Error from Superior Court, Ben Hill County; D. A. R. Crum, Judge.

Action between Arthur Harris and others and the State of Georgia. Judgment for

the latter, and the former bring error. Affirmed.

Otis H. Elkins, of Fitzgerald, for plaintiffs in error.

BECK, P. J. Judgment affirmed. All the Justices concur.

(148 Ga. 799)

BANK OF DOERUN et al. v. FAIN.
(No. 925.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(*Syllabus by the Court.*)

JUDGMENT *§*432—SETTING ASIDE JUDGMENT—FAILURE TO MAKE LEGAL DEFENSE.

A party cannot successfully ask for relief in equity to set aside a judgment at law against him, on the ground that he failed or omitted to make a legal defense, unless he was prevented by fraud or accident, unmixed by any fraud or negligence by himself, from setting up such defense.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Equitable action by D. A. Fain against the Bank of Doerun and others. General and special demurrers to petition by defendant Bank overruled, and the Bank excepts and brings error. Reversed.

Parker & Gibson, of Moultrie, for plaintiff in error.

James L. Dowling and Erle B. Askno, both of Moultrie, for defendant in error.

FISH, C. J. D. A. Fain brought an equitable action against the Bank of Doerun. The allegations of the petition were to the following effect:

In 1914 the firm of D. A. Fain & Son, composed of petitioner and his son, J. A. Fain, was engaged in the business of selling livestock, vehicles, fertilizers, etc. J. A. Fain had general charge and supervision of the business. In that year, acting for the partnership, J. A. Fain obtained two loans from the Bank of Doerun, one for \$3,500, the other for \$1,800, and, as collateral security for the notes, delivered to the bank a large number of notes payable to the firm, aggregating more than \$13,000; and to further secure the loan he executed to the bank his mortgage on certain described realty belonging to him individually. Soon after these transactions he disappeared, and his whereabouts from that time have been unknown to petitioner. By reason of his disappearance the affairs of the firm became "entangled and confused," and the firm became insolvent; and by reason of the insolvency the petitioner had to pay a large amount of the firm's indebtedness from his individual means. A sufficient amount has been collected by the bank on the collateral notes to pay off the loans due it by the firm, but the bank has failed to credit the firm's notes with

the collections. "After both of the notes executed by J. A. Fain for the partnership of D. A. Fain & Son to said Bank of Doerun became due, W. M. Smith, who is cashier of said defendant bank, and at the time acting for said bank, approached your petitioner and stated that, although one of said notes had been paid in full and a greater portion of the other had also been paid, and that said bank had a sufficient number of said collateral notes on hand which were solvent to pay the balance of said indebtedness, the said W. M. Smith urged your petitioner to let the Bank of Doerun sue said notes to judgment and obtain an execution thereon, and levy on the land above described as belonging to the said J. A. Fain, and sell the same at sheriff's sale, and that your petitioner could buy in said land and protect himself for any loss that he might sustain on account of the indebtedness of D. A. Fain & Son that he might be called upon to pay. Petitioner shows further that the said W. M. Smith urged your petitioner not to file a defense to said suit, for the reason that the sole purpose of instituting said suit and obtaining the judgment aforesaid would be to sell the land of said J. A. Fain, so that your petitioner might protect his own interest as aforesaid, that said defendant would not hold said judgment against your petitioner, and that the same would not operate as a general judgment against the property of petitioner, but that said judgment would be enforced only to the extent of selling the land of the said J. A. Fain as above described, and that the said W. M. Smith, acting for said bank, did then and there fully warrant, promise, and agree that the judgment would not be enforced by said bank, or otherwise, against the property of this petitioner, but that the same would be enforced only against the property hereinabove described as belonging to J. A. Fain. This petitioner further shows that on or about the time stated in this paragraph, and prior to the filing of the suit by said bank, the said W. M. Smith, acting for said bank, agreed with this petitioner that, when the judgment should be obtained upon said note, petitioner and the said bank could get together on a settlement, at which time all notes which had been paid should be credited upon the said \$3,500 note and the \$1,800 note; and if more of said collateral notes were paid than would be sufficient to pay the notes of said partnership, then and in that event the said bank would pay the overplus to this petitioner and return to him the unpaid collateral notes. Petitioner shows that, yielding to the persuasion and promises of the said W. M. Smith, he consented for said Bank of Doerun to institute suit on the notes, and yielding to the persuasion and promises of said W. M. Smith, and confiding in the statements made to petitioner by said W. M. Smith, petitioner did not file a defense to the notes sued upon, but allowed a judgment by default to be entered up against the partnership of D. A. Fain & Son, and each of the partners thereof, which said judgment was obtained at the July,

1916, term of this honorable court for the sum of \$4,382.60." Execution was issued upon the judgment, and in disregard of the bank's agreement it was levied, not on the land of J. A. Fain, but upon certain described property of the petitioner, as well as certain property belonging to the firm, and other property which has been claimed by third persons; and the property of petitioner levied upon has been advertised for sale. Petitioner has endeavored to have a full and complete accounting between the bank and petitioner's firm with reference to the collateral notes, but the bank has refused to have such an accounting, or to give petitioner any information in reference to the collateral notes, or the amounts collected thereon.

Among other things, it was prayed that the judgment against the firm and the members thereof be set aside, and the enforcement of the execution based on the judgment be enjoined.

The bank demurred to the petition generally and specially; one ground of demurrer being that it appeared from the petition that the plaintiff entered into a fraudulent scheme and device the object of which was to defraud J. A. Fain, his son and partner in business, and that, according to the petition, the plaintiff was equally at fault in fraud with the defendant, and did not come into a court of equity with clean hands. The demurrers were overruled, and the bank excepted.

The court erred in overruling the demurrer on the grounds above set out.

"The judgment of a court of competent jurisdiction may be set aside by a decree in chancery, for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant." Civil Code, § 5965.

"When both parties are at fault, and equally so, equity will not interfere, but leaves them where it finds them. The rule is otherwise if the fault of one overbalances, decidedly, that of the other." Civil Code, § 4534.

From the allegations of the petition it is clear that the plaintiff in the present action voluntarily and knowingly entered into a scheme the effect of which would necessarily be a fraud upon the plaintiff's partner, and, in all likelihood, upon the creditors of the insolvent firm of which the plaintiff was a member; and in accordance with the provisions of law above quoted, and many decisions of this court in line with them, not necessary to cite, equity will not grant him the relief sought.

Judgment reversed.

All the Justices concur.

(148 Ga. 778)

NATIONAL BANK OF SAVANNAH et al. v.
ELLIS et al. (No. 750.)

(Supreme Court of Georgia. Feb. 14, 1919.)

*(Syllabus by the Court.)***1. BANKS AND BANKING** ¶77(4)—**SUIT BY
RECEIVER OF INSOLVENT BANK—PLEA OF
LIENHOLDERS.**

Where a receiver appointed for an insolvent bank brought a petition against various parties, including creditors and the holders of certain liens upon property of the bank, and prayed, among other things, that the holders of the liens be made party defendants, that the status of these and other liens be ascertained, and the amount due upon them determined, and where two of the alleged lienholders, nonresidents of the county in which the petition was brought, who were the grantees in deeds executed to secure debts due from the insolvent bank, filed a plea to the jurisdiction of the court, raising, among other defenses, the contention that they could not be made parties to the petition, inasmuch as they were the holders of the title to the property covered by their deeds, and that the court had no jurisdiction of them in the proceedings instituted, it was error to overrule this plea; it not appearing that the debts due to the grantees in the security deeds had ever been paid, or that tender of the amount of the debts had ever been made, or that there was any contest as to any genuineness or amount of the debts to secure which the deeds had been executed. And this is true, even though the petition filed by the receiver alleged that there were certain taxes to be paid, and prayed that the plaintiffs in error and other creditors of the bank be brought in, so that the amount of their debts could be fixed, the property sold free from the liens, and the valid liens be allowed to take precedence to the extent of said liens. Civ. Code 1910, § 6038; *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10; *First National Bank of Commerce v. McFarlin*, 146 Ga. 717, 92 S. E. 69.

2. OTHER QUESTIONS.

As the foregoing ruling controls the case, it is unnecessary to consider the other questions raised.

Error from Superior Court, Appling County; H. A. Mathews, Judge.

Suit by John Ellis, receiver, etc., and others against the National Bank of Savannah and others. Plea of certain defendants to jurisdiction overruled, and defendants bring error. Reversed.

Garrard & Gazan, G. H. Richter, and E. S. Elliott, all of Savannah, for plaintiffs in error.

Thomas & Walker, of Jesup, Clifford Walker, Atty. Gen., and Padgett & Watson, of Baxley, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur.

(148 Ga. 843)

RELIANCE LIFE INS. CO. v. HIGH-
TOWER. (No. 832.)

(Supreme Court of Georgia. Feb. 24, 1919.)

*(Syllabus by the Court.)***INSURANCE** ¶78, 90, 93, 137(2), 141(2, 3)
—**POWER OF AGENT—PREMIUMS—RECEIPT—
LIABILITY.**

An insurance company may limit the power of its agent, and when notice that the agent's power is limited is brought home to the insured in such manner as would put a prudent man on his guard, the insured relies at his peril on any act of the agent in excess of his power.

(a) The insured is bound by plain and unambiguous limitations upon the power of the agent contained in his policy.

(b) Where the application for a policy of life insurance and the policy itself stipulate that the insurance shall not become effective until the first premium shall have been actually paid while the applicant is in good health, and that agents are not authorized to modify the policy or extend time for paying a premium, the actual payment of the first premium during the good health of the applicant is a condition precedent to the liability of the insurer; and a local agent of the company could not waive such condition.

(c) The formal acknowledgment of the receipt of the first premium in a policy of life insurance containing the provisions above stated is not conclusive of payment, so as to estop the company from denying the validity of the policy, except in a case of due or unconditional delivery of the policy by the company.

Certified Questions from Court of Appeals.

Action by Mamie Hightower against the Reliance Life Insurance Company. Judgment for plaintiff, and defendant brings error, and the Court of Appeals certifies questions. Questions answered.

Dorsey, Brewster, Howell & Heyman, of Atlanta, and C. N. King, of Chatsworth, for plaintiff in error.

Bryan, Jordan & Middlebrooks and Leo Sudderth, all of Atlanta, for defendant in error.

FISH, C. J. The certified questions, which are sufficiently indicated herein, are based upon the following facts gathered from the questions: An application for life insurance, signed by the applicant, contained a provision as follows:

"I hereby declare and agree that all statements and answers written in this application * * * are true, full, and complete, and are offered to the company as a consideration for the contract of insurance, which I hereby agree to accept, and which shall not take effect until the first premium shall have been actually paid while I am in good health and the policy shall have been signed by the duly authorized officers of the company and issued."

The policy itself contained, among others, the following provisions:

"Agents are not authorized to modify this policy or to extend the time for paying a premium. * * * All insurance provided by this policy is based upon the application therefor, a copy of which is hereto attached and made a part of this policy."

And it recited:

"The payment of the first annual premium being [is] hereby acknowledged."

The insurance company, with knowledge that the first annual premium had not in fact been paid, issued the policy and sent it to the company's state agency, which in turn forwarded it to the local agent for delivery to the applicant. The local agent made manual delivery of the policy upon the promise of a third person to pay to the local agent the first annual premium; the third person accepting the note of the applicant for the amount of the premium. The premium was not actually paid by the third person until after the death of the applicant; no demand for payment having been made upon him while the applicant lived. After the death of the applicant the first premium was paid to the local agent, and (less the commission of that agent) was forwarded to the state agency, which retained the amount so received, without an offer to return it, until after suit on the policy, when the company in its plea tendered the amount so received by its state agency to the plaintiff, the beneficiary named in the policy.

Applying to the facts above stated the principles recognized in *Reese v. Fidelity Mutual Life Association*, 111 Ga. 482, 36 S. E. 637, it must be ruled: (1) It was within the power of the insurance company, as between itself and its agent, to define and limit the powers of the latter. Limitations upon the power of the agent affect all third persons dealing with him who have knowledge or notice thereof, and any notice of limitations upon the agent's power which a prudent man is bound to regard is the equivalent of knowledge to the insured; (2) the stipulation in the signed application that the insurance "shall not take effect until the first premium shall have been actually paid while I am in good health," coupled with the words in the policy, "Agents are not authorized to modify this policy or to extend the time for paying a premium," were sufficient to charge the applicant with notice that he was dealing with a special agent with limited powers; (3) the actual payment of the first premium during the good health of the applicant was a condition precedent to liability under the policy, and the agent of the company could not waive such condition. We do not overlook the fact that conclusions different from those stated above, upon the facts given, have been reached by many

courts. According to the view held by these courts, such condition in the application and policy will be deemed to have been intended to apply only to matters arising after the issuing of the policy, or, in all events, the company will be held to be estopped from relying upon the condition. In this view, if the agent has authority to deliver the policy, the condition of the policy and application to the effect that the policy is not to become effective until the first premium is actually paid is construed as applying to the payment of premiums after the first, and as having no application to the payment of the first premium, which is considered waived by the delivery of the policy to the insured. See the monographic note to *Johnson v. Aetna Ins. Co.*, 107 Am. St. Rep. 92, 99, and especially the authorities cited at page 135 (123 Ga. 404, 51 S. E. 339). It might appear at first blush that the view last above referred to has been approved by this court in *Supreme Lodge v. Few*, 138 Ga. 778, 784, 76 S. E. 91. That decision is really not in conflict with any prior decision of this court. In *Reese v. Fidelity Mutual Life Association*, supra, it was recognized that the insurer, by the use of proper terms and provisions in the application or policy, may validly provide that the policy shall not become of force until actual payment of the first premium, and may further impose limitations upon the power of the agent to waive such provision, and that a contract of insurance issued by the company and delivered by the agent to the insured, contrary to such provision, and without compliance therewith by the insured, is void, unless the circumstances attending the delivery, or the custom of doing business, shows that the insurer is estopped from relying upon the condition. That decision was approved in the following cases: *Mutual Life Ins. Co. v. Clancy*, 111 Ga. 865, 36 S. E. 944; *Mutual Reserve Ass'n v. Stephens*, 115 Ga. 192, 194, 41 S. E. 679, where it was held that an amendment seeking "to hold the association liable upon an alleged waiver which, by the express terms of the policy, the agent in question had no power to make," was improperly allowed; *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S. E. 1000, where it was ruled that an insurer may qualify the authority of a general agent, and "will not be bound by the acts of his agent beyond the scope of his authority, where the person dealing with the agent had notice of such limitations;" *Johnson v. Aetna Ins. Co.*, supra (a fire insurance case), where it was said, with respect to life insurance contracts, "Unquestionably, as to a matter concerning the time when the contract is to become of force, * * * the insured, by accepting the policy, would be bound by its terms, and could not set up a waiver which he was bound to know the company's agent

had no power to make;" *Atlanta Buggy Co. v. Hess Spring Co.*, 124 Ga. 338, 341, 52 S. E. 613, 4 L. R. A. (N. S.) 431; *Clark v. Mutual Life Ins. Co.*, 129 Ga. 571, 59 S. E. 283; *Brown v. Mutual Benefit Life Ins. Co.*, 131 Ga. 38, 40, 61 S. E. 1123; *Few v. Supreme Lodge*, 136 Ga. 181, 71 S. E. 130; *Williams v. Empire Life Ins. Co.*, 146 Ga. 246, 248, 91 S. E. 44. See, also, *Royal Benefit Society v. Naylor*, 14 Ga. App. 202, 204, 80 S. E. 545; *Metropolitan Life Ins. Co. v. Thompson*, 20 Ga. App. 706, 93 S. E. 299 (5). This court, in *Stephenson v. Empire Life Ins. Co.*, 139 Ga. 82, 86, 76 S. E. 592, upon review declined to overrule *Reese v. Fidelity Mutual Life Ass'n*, supra. In view of our own cases, upon the facts given, it must be held that a delivery of the policy by the company to the insured did not result. The recital in the policy to the effect that the first premium had been paid, and the formal acknowledgment of the receipt thereof, will not operate to estop the insurer from contesting the validity of the policy as a contract of insurance. It would be otherwise if the policy had been duly delivered by the company. In that event such recital would become a covenant of the contract, and it would not be open to the insurer to deny the payment of the first premium for the purpose of avoiding the policy, although the insurer might deny and disprove the recital merely for the purpose of enforcing payment of the first premium. See *Ill. Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251, and cases cited in note; *Mass. Benefit Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137; *Mutual Life Ins. Co. v. French*, 30 Ohio St. 253; *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Basch v. Humboldt Mutual Co.*, 35 N. J. Law, 429, 431; *Dobyns v. Bay State Beneficiary Ass'n*, 144 Mo. 95, 45 S. W. 1107; *Grier v. Mutual Life Ins. Co.*, 132 N. C. 542, 44 S. E. 28; *Kendrick v. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, and cases cited in note at page 597. We do not overlook the fact that some courts have held such recital in a policy of insurance to be conclusive on the insurer so far as the validity of the contract is concerned, even where the delivery of the contract was made under circumstances similar to those above stated. The sounder view, in our opinion, is that such recital is not to be given this effect where the possession of the contract was procured by fraud, accident, or mistake, or where the delivery of the policy was made in the teeth of a plain provision therein which the insured was bound to know the agent had no power to waive, and is to be given effect only where the policy has been unconditionally or duly delivered by the company.

In view of what we have said, the mere fact that the "state agency" received the

first premium after the death of the insured and did not offer to return it until after suit on the policy did not amount to ratification by the company.

All the Justices concur.

(148 Ga. 820)

STRICKLAND v. HAMILTON. (No. 1024.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(Syllabus by the Court.)

BASTARDS \S 93 — ERRORS OF JUSTICE OF THE PEACE—CERTIORARI.

The writ of certiorari will not lie to correct errors committed by a justice of the peace in proceedings under Pen. Code 1910, \S 1331 et seq., against the putative father of a bastard child, where judgment is rendered requiring the defendant to give security for the support of the child, and binding him over to the superior court upon his failure to give such security. Such is the ruling in the case of *Hyden v. State*, 40 Ga. 476, and upon formal review of that decision this court declines to overrule it.

Certified Question from Court of Appeals.

Bastardy proceeding by Lettie Hamilton against Henry Strickland. Judgment for plaintiff, and defendant brings error, and the Court of Civil Appeals certified a question. Question answered.

David S. Atkinson, of Savannah, for plaintiff in error.

H. Roy Lang, of Waverly, and T. M. Scarlett, Jr., of Brunswick, for defendant in error.

BECK, P. J. The ruling in the headnote is in answer to a question certified by the Court of Appeals.

All the Justices concur.

(148 Ga. 840)

FROST et al. v. SMITH et al. (No. 818.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS \S 124 — PLEA — PARTIES.

The suit was instituted against William Frost, and after suggestion of his death of record in 1910, William J. Frost, as administrator upon his estate, was made a party defendant. By amendment to the petition in 1911, William J. Frost individually was made a party defendant, and duly served. The character of the case will appear from the decision made when it was before this court on a former occasion. *Smith v. Frost*, 144 Ga. 115, 86 S. E.

235. At a subsequent trial, which occurred in 1917, William J. Frost in his individual capacity offered to file an answer setting up title to a part of the land in himself under a deed executed by William Frost in 1900 (which was three years before the institution of the suit), and possession thereunder for a period of more than seven years before William J. Frost individually was made a party defendant. The judge declined to allow the answer filed, on the ground that it came too late. In the judgment it is stated that no entry of default appears on the docket, nor has there been any judgment of default entered against W. J. Frost, and "that at least one motion for continuance has been made by the defendant W. J. Frost." *Held*, treating as true the allegations of the answer which was rejected, prescription would run in favor of William J. Frost individually as to the part of land claimed by him, until he was made a party defendant and served (*Bower v. Thomas*, 69 Ga. 47 [2]; *Powell on Actions for Land*, § 124), and the plea was meritorious.

2. PARTIES ¶56 — PLEADING ¶85(3) — DEFENSES — CONDITIONS — STATUTE.

The provisions of Civil Code 1910, § 5628, requiring the judge at each regular term to call the cases on the appearance docket, and hear and decide all objections made to the sufficiency of petitions, pleas, etc., and section 5653, requiring the judge at each term to call the appearance docket upon some day previously fixed or on the last day of the term, and in all cases in which the defendant has not filed a demurrer, plea, answer, or other defense, to mark the case "in default," have reference to the filing of defenses, etc., by defendants in original suits filed under section 5551 et seq., and section 5662 et seq., and do not apply to defendants who are subsequently brought in by the plaintiffs by amendment. Where a new party defendant is added by amendment to the petition, upon motion of the plaintiff, and at the trial of the case at some subsequent term such new defendant offers for the first time to file a meritorious plea, whatever may be the right of the court to impose reasonable terms, the court should not disallow the plea unconditionally.

(a) It would seem that section 5628 and section 5653, supra, were applicable; that under application of their provisions the proposed answer was not offered too late. *McKenzie v. Consolidated Lumber Co.*, 142 Ga. 375, 82 S. E. 1062 (1); *Hodnett v. Stewart*, 131 Ga. 67, 61 S. E. 1124; *American Central Ins. Co. v. Albright*, 145 Ga. 515, 89 S. E. 487.

(b) The judgment disallowing the plea was erroneous.

(c) On another hearing, evidence tending to support the plea duly offered should be admitted.

3. TRIAL ¶191(4)—EXPRESSION OF OPINION.

One issue in the case was whether the defendant's possession was wrongful. While instructing the jury on the subject of mesne profits, the language employed by the trial judge amounted to an expression of opinion that the defendant's possession was wrongful.

4. PARTIES ¶59(3) — AMENDMENT — PLEADING.

There is no merit in the assignment of error upon the allowance of an amendment which alleges the death of one of the original plaintiffs and prays that the petitioners, as his heirs at law, recover his interest in the land.

5. APPEAL AND ERROR ¶1078(1)—ASSIGNMENTS OF ERROR—BRIEFS.

Some of the assignments of error were not discussed in the brief of counsel for the plaintiffs in error, and, under the rules of this court, will be considered as abandoned.

6. MOTION FOR NEW TRIAL.

None of the other special grounds of the motion for new trial, which complain of rulings on admissibility of evidence and of certain excerpts from the charge of the court, when considered in connection with the pleadings, the evidence, and the charge in its entirety, show cause for reversal, nor are they of such character as to require elaboration.

7. SUFFICIENCY OF EVIDENCE.

As the judgment of the trial court is reversed upon other grounds, no ruling is made as to the sufficiency of the evidence to support the verdict.

Error from Superior Court, Washington County; R. N. Hardeman, Judge.

Suit by O. P. Smith and others against William J. Frost, administrator, and others, in which, after defendant's death, William J. Frost, his administrator, was made a party defendant. Judgment for plaintiffs, and defendants bring error. Reversed.

B. T. Rawlings, of Sandersville, and J. K. Hines, of Atlanta, for plaintiffs in error.

A. R. Wright, of Sandersville, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(148 Ga. 712)

WOODBERRY et al. v. ATLAS REALTY CO.
(No. 1046.)

(Supreme Court of Georgia. Feb. 12, 1919.)
Rehearing Denied Feb. 24, 1919.)

(Syllabus by the Court.)

1. TRUSTS ¶134—CONSTRUCTION OF DEED—TITLE OF TRUSTEE.

"Where the terms of a conveyance by deed to a trustee are large enough to embrace the fee in the premises described, and this fee is carved up into an estate for life in favor of one beneficiary and a remainder in behalf of other beneficiaries, who are uncertain and unascertained, the instrument should be construed as clothing the trustee with full title, and the title as to the remainder should be considered as abiding in him so long, at least, as the identical persons who are to take and enjoy it are

not ascertainable. Up to that time, the trust is executory, and the remainder is an equitable, not a legal, estate."

2. TRUSTS §169(1)—REMOVAL OF TRUSTEE—APPOINTMENT TO VACANCY.

There being a valid trust as to the entire fee, the removal of the trustee created a vacancy which the judge of the superior court was authorized to fill by the appointment of a successor at chambers. Civ. Code 1910, § 3744; *Heath v. Miller*, 117 Ga. 860, 44 S. E. 13.

3. TRUSTS §159, 192—QUALIFICATION OF TRUSTEE—POWER OF SALE.

The life tenant, though one of the beneficiaries, was legally qualified to be trustee, at least for the other cestuis que trust, under the appointment of the judge of the superior court. *Robertson v. De Brulatur*, 188 N. Y. 901, 80 N. E. 939; *Burbach v. Burbach*, 217 Ill. 547, 75 N. E. 519; *Lozey v. Stanley*, 147 N. Y. 560, 42 N. E. 11; *Lewin on Trusts*, 41, § 17; 39 Cyc. 248 (3); *Weeks v. Frankel*, 197 N. Y. 304, 90 N. E. 969, and cases therein cited. For physical precedents, see *Vernoy v. Robinson*, 133 Ga. 654, 66 S. E. 928 (4); *Wadley v. Le Cato*, 139 Ga. 177, 77 S. E. 47. In a deed where power is given to a trustee to sell the real estate with the written consent of the life tenant, such consent is for the benefit of the life tenant only, and as to such consent the life tenant does not occupy a fiduciary position to the remaindermen. *Farwell on Powers* (3d Ed.) 630; 2 *Chance on Powers*, 358, § 2430.

4. APPEAL AND ERROR §909(1)—PRESUMPTION—MATTERS NOT SHOWN BY RECORD—REMOVAL AND APPOINTMENT OF SUCCESSOR.

Where the contrary does not appear from the record, it will be presumed that the judge of the superior court, in removing such a trustee and in appointing a successor, acted with all necessary jurisdictional requisites. *Winn v. Lunaford*, 130 Ga. 436, 439, 61 S. E. 9. See *Lamar v. Pearre*, 82 Ga. 360, 9 S. E. 1043, 14 Am. St. Rep. 163 (4).

5. TRUSTS §203—POWER OF SALE—CONVEYANCE BY TRUST DEED.

The power of sale contained in the deed authorized the trustee to sell the entire estate in the land, and therefore the substituted trustee conveyed fee-simple title to her grantees under her deed of September 1, 1877.

(Additional Syllabus by Editorial Staff.)

6. DEEDS §95—CONSTRUCTION—INTENTION.

In construing a deed, the entire instrument must be looked at, and all parts construed together, in order to determine the intention of the maker, without special regard to the formal arrangement of the deed.

7. DEEDS §93—CONSTRUCTION—REASON.

Under Civ. Code 1910, § 4187, that interpretation should be such as will effectuate the intention, and it is proper to seek for a rational purpose by construing the deed consistently with reason and common sense.

8. DEEDS §95—CONSTRUCTION—AVOIDANCE OF INJUSTICE.

If there is any doubt as to the real intention, an interpretation which plainly leads to injustice should be rejected, and one which conforms more to the meaning of the grantor, and does not produce unusual and unjust results, should be adopted.

9. DEEDS §95—CONSTRUCTION—REDUNDANT WORDS.

In deeds, as in all other contracts, none of the words are to be considered as redundant, if a reasonable intentment can be given them.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Joseph F. Woodbery and others against the Atlas Realty Company. Judgment for defendant upon a directed verdict, and plaintiffs except and bring error. Affirmed.

In September, 1858, Joseph F. Woodbery, "for and in consideration of the natural love and affection which he has and bears to and for his present and beloved wife, Mrs. R. Emma Woodbery," conveyed described land in the city of Atlanta to H. H. C. Holcombe in trust, "with all the rights, members, and appurtenances in any way or manner belonging, for the sole and separate use and benefit of the said R. Emma Woodbery [wife of the grantor] during her natural life, * * * and after her death to her children; but should there be no child or children, then to Josephine Frances Woodbery and William Albert Woodbery." The habendum clause was:

"To have and to hold said property unto him, the said Hosea Henry C. Holcombe, in trust for the purposes mentioned, forever, with the right and power to the said trustee or his successor as trustee, by and with the written consent of said R. Emma Woodbery, as often as she and her trustee may think and deem best, to sell and reinvest the proceeds or to exchange the same and to execute titles therefor and to receive and accept titles, all to be done without any order for that purpose from the court. The trust property or trust fund is to remain and continue in trust for the sole and separate use and benefit of her, the said R. Emma Woodbery, for and during her natural life, * * * and the trust property or trust fund, after the death of the said R. Emma Woodbery, to her children; but should there be no child or children or representative of said child or children, then to Josephine Frances Woodbery and William Albert Woodbery."

At the date of the making of this conveyance there were no children born of the life tenant. Between that date and the 28th of June, 1877, there had been born to the life tenant and the grantor five children, three of whom were then above the age of 14 years, the other two being under that age. All of these children are plaintiffs in the

(148 Ga. 766)

MAYOR and ALDERMEN of CITY OF SAVANNAH v. WADE.

WADE v. MAYOR and ALDERMEN OF CITY OF SAVANNAH.

(Nos. 976, 977.)

(Supreme Court of Georgia. Feb. 13, 1919.
Rehearing Denied Feb. 24, 1919.)*(Syllabus by the Court.)*1. EXECUTION \S 167—AFFIDAVIT OF ILLEGALITY—AMENDMENT.

"Affidavits of illegality are, upon motion and leave of court, amendable instantaneously by the insertion of new and independent grounds: Provided, the defendant will swear that he did not know of such grounds when the original affidavit was filed." Civil Code 1910, § 5704. The defendant in execution will not be permitted to amend his affidavit of illegality by the addition of new and independent grounds, whether of fact or of law, thereto for causes which existed and were known, or in the exercise of reasonable diligence might have been known, at the time of the filing of the original affidavit. *Baker v. Smith*, 91 Ga. 142, 16 S. E. 967 (2). An amendment which does not add a new and independent ground of illegality, but which merely amplifies or amends a ground in the original affidavit, need not be sworn to.

2. EVIDENCE \S 65 — PRESUMPTION — QUESTIONS OF LAW—KNOWLEDGE.

Applying the foregoing principles, the amendment to the affidavit of illegality in this case added new and independent grounds; and such new and independent grounds not having been verified as required by the statute, the court erred in allowing the same over timely objection, and in refusing to strike the same upon demurrer. In so far as the amendment raised only questions of law, the defendant in execution was conclusively presumed to have had knowledge of these grounds at the time of the filing of his original affidavit, and the court did not err in refusing to allow the same.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by Mayor and Aldermen of City of Savannah against W. H. Wade. Amendment to defendant's affidavit of illegality allowed in part and disallowed in part, and plaintiff excepts and brings error, and defendant takes a cross-bill of exceptions. Reversed on main bill of exceptions, and affirmed on cross-bill.

Robt. J. Travis and David S. Atkinson, both of Savannah, for plaintiff in error.

Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

PER CURIAM. Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

All the Justices concur, except ATKINSON, J., disqualified.

(148 Ga. 637)

VOLUNTEER STATE LIFE INS. CO. v. SPRATLING.

SPRATLING v. VOLUNTEER STATE LIFE INS. CO.

(No. 905.)

(Supreme Court of Georgia. Nov. 16, 1918.
Rehearing Denied Feb. 24, 1919.)*(Syllabus by the Court.)*1. INSURANCE \S 360(3)—AUTOMATIC PREMIUM LOAN CLAUSE—LOAN VALUE—EXTENSION OF POLICY.

A limited payment (20-payment) life insurance policy was issued on May 25, 1913. The insured paid the first premium on the date of issue, the second premium on May 25, 1914, and the third on May 25, 1915. The premium due on May 25, 1916, was not paid. The insured died on August 25, 1916. The insured had borrowed on the policy \$337.11, and the interest on the amount had been paid up to May 25, 1916. The premium, as stated in the face of the policy, was \$316.89, payable annually. The policy provided: "The company will, at any time after three full years' premiums have been paid, advance upon the sole security of this policy, when legally assigned, a sum equal to the amount specified in the table below, less any indebtedness to the company on account of this policy. The interest on such loan shall not exceed six per cent. per annum, and shall be payable annually in advance." The loan or surrender value of the policy, as stated in the table referred to, was \$396 after the policy had been in force three years; \$621 after four years. The policy further provided: "In the event the insured should, at any premium date or within the days of grace thereafter, after three full years' premiums have been paid hereon, fail to pay or cause to be paid the then current premium, if the policy be not surrendered by the insured with a choice of one of the options herein guaranteed, and if at the time of the nonpayment of premium there is a loan value hereon in excess of all indebtedness that may then exist against the policy, together with interest, the company will apply such available loan value towards the payment of the premium then due, with interest thereon at a rate not exceeding six per cent. (6%) per annum, chargeable annually in advance; and will continue to carry said policy in force, in the form as written and at the rate of premium as provided for in the face hereof, subject to its terms and such indebtedness, the same as if the premium had been paid in cash; and will continue to so apply such loan value as long as such value, at the rate of premium provided in the face hereof, will suffice to pay for even one day's premium. At any time while this policy is thus in force the insured may resume payment of premiums thereon without medical re-examination, and in that event any indebtedness against the policy may either be paid in cash or allowed to remain as a loan hereon. All such indebtedness shall be a first lien on the policy, and the policy will lapse unless premium payments are resumed by the insured within the actual

period of extension." The nonforfeiture provisions of the policy, other than the automatic premium-loan clause last above quoted, gave to the insured the option to surrender the policy to the company, after the policy has been in force three full years, and at any time prior to default in premium payment, or within the days of grace (one month) thereafter, and to take (1) the cash surrender value, as indicated by the table set out in the policy, less any indebtedness to the company on account of the policy; or (2) a nonparticipating paid-up life policy for a reduced amount, as indicated by the table; or (3) a nonparticipating paid-up term policy for the full amount insured by the policy, as indicated by the table, with a provision in (2) and (3) as to any indebtedness to the company on account of the policy. The insured did not surrender the policy, and did not elect to take any of the options last above referred to.

On June 26, 1916, the fourth annual premium having become due on May 25, 1916, the company offered to loan to the insured the full amount available after the policy had been in force four years, to wit, \$621, at the time tendering the insured a loan agreement to be executed by himself and his wife; the latter being the beneficiary named in the policy. Along with the loan agreement, the company furnished to the insured a statement of his indebtedness to it, showing former loan, \$337.11, premium due on May 25, 1916, \$316.89, and interest to May 25, 1917, \$37.26, making a total of \$691.26; and required the insured to pay the additional sum of \$70.26 to cover the total of his indebtedness to the company. On June 27, 1916, the insured signed the agreement and forwarded it from Macon, Ga., to the beneficiary at Atlanta, Ga., with the request that she also execute the agreement and deliver it to the company together with the sum of \$70.26. At the time of the receipt of the agreement by the beneficiary, she was "ill and bedridden and remained in this condition for several days, at which time she became wholly unconscious and remained in this condition until after the death of the insured; and for said reasons was unable to execute said loan agreement prior to the death of the insured." The insured died without knowing that the beneficiary had not complied with the "wrongful" demands of the company. After the death of the insured, the beneficiary completed the agreement and tendered it, together with \$70.26, to the company. One clause of the policy provided: "This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred upon him by this policy."

Held: Under the foregoing facts, the available loan value on the policy, to wit, \$58.89 (conceding, without deciding, that interest at 6 per cent. per annum in advance on the existing loan and on the amount appropriated to the payment of the premium due should not be first deducted), was, under the automatic premium-loan clause quoted above, insufficient to "carry the policy in force, in the form as written," to the date of the insured's death, August 25, 1916.

(a) The obligation of the company, under the

automatic premium-loan clause quoted above, was to apply such available loan value toward the payment of the premium due, and to carry the policy in force "in the form as written and at the rate of premium as provided for in the face" of the policy. In a strict technical sense no "rate of premium" is provided in the face of the policy. The reference is, however, to the contract as written, and the words quoted above are to be given their usual and ordinary signification. The parties were dealing with this contract of insurance, to wit, a limited payment life policy as distinguished from a purely protective policy or other form of contract.

2. INSURANCE — 392(8)—LIFE INSURANCE—AUTOMATIC PREMIUM-LOAN PROVISION—FORFEITURE.

The insurance company was not estopped from declaring a forfeiture of the policy (conceding, without deciding, that its demand that the loan agreement be executed by the beneficiary was wrongful and unauthorized); it affirmatively appearing that the sum of money necessary to pay the past-due premium, interest in advance upon the loan, and the existing loan upon the policy, was neither paid nor tendered the company until after the death of the insured.

Certified Questions from Court of Appeals.

Action by O. F. Spratling against the Volunteer State Life Insurance Company. Judgment for defendant, and plaintiff brings error, and defendant takes cross-exceptions, and the Court of Appeals certifies questions. Questions answered.

Little, Powell, Smith & Goldstein, of Atlanta, and W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

Jones & Chambers and Saml. Barnett, all of Atlanta, for defendant in error.

GEORGE, J. The rulings in the headnotes are in answer to the questions certified by the Court of Appeals.

All the Justices concur.

(148 Ga. 842)

VALDOSTA, M. & W. R. CO. v. ATLANTIC COAST LINE R. CO. (No. 826.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. RAILROADS — 159(9)—LIENS—"WAGES FOR SERVICES"—"EMPLOYE"—SWITCHING OF CARS—STATUTE.

A railroad company executed a "mortgage or deed of trust" on "the railroad, property, equipment, and franchises" of the railroad company to a trustee to secure the payment of a certain issue of bonds. The trustee instituted an equitable suit for the appointment of a receiver and to foreclose the lien provided in the mortgage or deed of trust. A receiver was appointed, who took charge of all of the assets of the railroad company, and operated the railroad. During the course of operation he applied cer-

grantor a purpose to permit a reduction in the use of the life estate by carving out of it another remainder and withholding it from the wife, his love for whom was the sole consideration for the deed. "It is a well-recognized fact that the uncertainty of life gives a life estate a more or less speculative value." In the case of *Gunby v. Alverson*, 146 Ga. 536, 91 S. E. 556, the trust deed conveyed the property to the daughters of the grantor or their children, and also provided a power of sale for purposes of re-investment. This court held that the trust projected over the entire estate, and declined to place the decision "on the narrow technicality of the absence of the word 'to' in the conveyance to the grantor's grandchildren." In that case it was also said:

"We wish to note that we have not overlooked the line of decisions, of which *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791, may be cited as a type, that a conveyance to a trustee in trust for one for life, with remainder to the surviving children of the life tenant, and, in default of such children, with remainder over to others, passes to the trustee the legal title of the life estate only. In such cases there were no complications as to indeterminate remaindermen, implied power of sale, and other indicia reflecting the grantor's intention to convey the whole fee to the trustee."

It was also noted in the *Gunby* Case that the deed contained no language restricting the trust to the life tenants, as was the case in the devices under consideration in *Bull v. Walker*, 71 Ga. 195, *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866, and *McDonald v. McCall*, 91 Ga. 304, 18 S. E. 157. A trustee may have and exercise a power of sale as to property or an interest therein to which he has not the legal title. *Simmons v. McKinlock*, 98 Ga. 743, 26 S. E. 88; *Henderson v. Williams*, 97 Ga. 709, 25 S. E. 395; *Headen v. Quillian*, supra. In *Coleman v. Cabaniss*, 121 Ga. 281, 48 S. E. 927, it is held that this may be done when the trustee has neither the equitable nor the legal title. See, in this connection, *Clarke v. East Atlanta Land Co.*, 113 Ga. 21, 38 S. E. 323 (4); *Baille v. Carolina B. & L. Ass'n*, 100 Ga. 20, 28 S. E. 274; *Cabot v. Armstrong*, 100 Ga. 438, 28 S. E. 123.

Judgment affirmed.
All the Justices concur.

(148 Ga. 802)

STUBBS v. MENDEL et al. (No. 939.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(Syllabus by the Court.)

1. PLEADING — 335 — DEMURRER AND ANSWER—"FILED."

W. B. Stubbs, as administrator of R. K. Walker, filed his petition against W. K. Smith

and Carl Mendel, for a reformation of deeds which the plaintiff had made to them, and later, by amendment, for rescission. Upon the call of the docket at the appearance term of the cause (October term, 1916), the case was marked in default as to W. K. Smith, and at the June term, 1917, on the 7th day of June, Smith made an oral motion that the court open the default, and that he be allowed to file his demurrer and answer; to which motion the plaintiff objected, on the grounds that it was too late to open the default, that the court had no jurisdiction to open it at that term, and that the defendant was not proceeding in the manner prescribed by the law for opening defaults. After a hearing the court passed the following order: "Upon motion of counsel for W. K. Smith, one of the defendants in the above-stated case, it appearing that at an interlocutory hearing of said case at Hinesville, Georgia, on the 18th day of September, 1916, Honorable Walter W. Sheppard, judge presiding, a demurrer and answer were filed with the court and marked 'Filed' by the court; that after argument the court took said answer and demurrer for the purpose of making a decision therein, and later forwarded the same by mail to the clerk of the superior court of Chatham county; that the same were lost and never reached the office of the clerk of said court; that at the appearance term of said case default was entered: It is ordered that the default entered therein be opened, and that the copy plea and demurrer, this day tendered, be marked 'Filed' as of September 18, 1916." On the trial of the case a verdict was rendered for the defendants. The plaintiff moved for a new trial. The motion was dismissed as to Smith, and overruled as to Mendel. The plaintiff excepted, assigning error upon the judgment opening the default, as well as upon the ruling on the motion for new trial.

The marking of the demurrer and answer of Smith "Filed," by the judge of another circuit on an interlocutory hearing before him in his circuit, and retaining the demurrer and answer for the purpose of making a decision in the case, and later forwarding them by mail to the clerk of the superior court, who never received them, was not a legal filing in the office of the clerk of the superior court of Chatham county. "A paper is said to be filed, when it is delivered to the proper officer, and by him received, to be kept on file." *Peterson v. Taylor*, 15 Ga. 483, 60 Am. Dec. 705; *Jordan v. Bosworth*, 123 Ga. 879, 51 S. E. 755.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, File.]

2. COURTS — 114 — PLEADING — 85(1), 190 — TIME FOR FILING — "NUNC PRO TUNC."

As the demurrer and answer of Smith had not been filed at the interlocutory hearing on September 18, 1916, the court erred in ordering copies of the demurrer and plea presented at the June term, 1917, to be marked "Filed" as of September 18, 1916. "A nunc pro tunc entry is for the purpose of recording some action that was taken or judgment rendered previously to the making of the entry, which is to take effect as of the former date. Such an entry cannot be made to serve the office of correcting a decision, however erroneous, or of supplying non-

action on the part of the court." *Pendergrass v. Duke*, 147 Ga. 10, 92 S. E. 649.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Nunc Pro Tunc*.]

3. JUDGMENT \S 153(4), 159, 174 — OPENING DEFAULT—TIME—EFFECT.

The judgment of default as to Smith was entered at the appearance term (October, 1916). The court allowed the default to be opened at the June term, 1917, which was the second term after the trial term, the terms of Chatham superior court being fixed by statute for March, June, October, and December. "At the trial term the judge in his discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of a plea, or for excusable neglect, or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instant, and announce ready to proceed with the trial." Civ. Code 1910, § 5656. "While under the Civil Code, * * * a trial judge is vested with a wide discretion as to opening a judgment of default, on motion made at the trial term of a case, there is no provision of law authorizing him to entertain and grant a motion to open a default presented at any subsequent term at which the case is called for trial. *Thornton v. Coleman*, 104 Ga. 625, 627 [30 S. E. 782]. To move to open a default at the term at which a case regularly stands for trial is purely a matter of grace; and this privilege must be exercised, if at all, within the time prescribed by the statute whereby it is conferred. *Ingalls v. Lamar*, 115 Ga. 298, 299 [41 S. E. 573]. The present case differs from the case of *Davis v. South Carolina Railroad Co.*, 107 Ga. 420 [33 S. E. 437]." *Cauley v. Wadley Lumber Co.*, 119 Ga. 648, 46 S. E. 852. See *Caldwell v. Freeman*, 146 Ga. 469, 91 S. E. 544.

Moreover, it appears that the motion to open the default was oral, and not made under oath. Accordingly, it is clear that the court had no jurisdiction at the second term after the trial term to open a default, even if the motion to do so had been properly made. The error in opening the default and allowing the defendant Smith to file a demurrer and answer at the second term after the trial term of the case, rendered all subsequent proceedings as to him nugatory, since the plaintiff was thereby deprived of a substantial right. *Cauley v. Wadley Lumber Co.*, *supra*.

4. JUDGMENT \S 174 — SETTING ASIDE JUDGMENT—EFFECT ON COPARTY.

From the pleading it appears that there was really no issue between the plaintiff and Mendel, who in effect joined with the plaintiff in seeking to have his deed to Smith reformed or rescinded, as the land conveyed in that deed was also conveyed in the plaintiff's deed to Mendel; and if it should be decreed that Smith, under his deed, did not have title to the land also conveyed to Mendel, then neither the plaintiff nor Mendel desired the deed to Mendel to be reformed or rescinded. It appears, therefore, that

Mendel's right to hold the land conveyed to him depended upon whether it should be decreed that Smith had no title to it. In view of the course the case took, the erroneous judgment in opening the default as to Smith makes it proper that the verdict in favor of Mendel should be set aside, but without taxing him for costs. The judgment is therefore reversed as to both defendants.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Suit by W. B. Stubbs, as administrator of R. K. Walker, deceased, against W. K. Smith and Carl Mendel. Verdict and judgment for defendants, motion for new trial dismissed as to defendant Smith, and overruled as to defendant Mendel, and plaintiff excepts and brings error. Reversed as to both defendants.

Geo. H. Richter, of Savannah, for plaintiff in error.

U. H. McLaws, of Savannah, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(148 Ga. 774)

LANDRUM v. RIVERS. (No. 756.)

(Supreme Court of Georgia. Feb. 14, 1919.
Rehearing Denied Feb. 24, 1919.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE \S 86—CONTRACT TO MAKE A WILL—DECREE—EVIDENCE.

Specific performance of a contract to make a will in favor of another, where the party claiming the right to specific performance has performed his part of the contract, will be decreed, where the contract to make the will is shown with the requisite degree of certainty and definiteness.

2. SPECIFIC PERFORMANCE \S 86—TRIAL \S 240—INSTRUCTIONS—ARGUMENTATIVENESS.

The court did not err in refusing to give in charge a lengthy written request, which in certain parts was argumentative in character, and which also instructed the jury that specific performance of a contract like that referred to in the first headnote would not be enforced, where refusal to enforce it would not amount to a fraud on the party seeking the equitable relief or specific performance.

3. TRIAL \S 260(1)—REQUESTED CHARGES—GIVEN CHARGES.

Other portions of the requests to charge examined, and *held* to have been sufficiently covered, where pertinent and legal, by the charge as given.

4. TRIAL \S 260(9)—REQUESTED CHARGE—GIVEN CHARGE—SPECIFIC PERFORMANCE.

The court's charge in submitting the terms of the contract in question was full, apposite, and correct, sufficiently covering the subject,

and there was no error in refusing to give the charge requested upon this subject.

5. TRIAL ⚡260(9)—REQUESTED CHARGE—GIVEN CHARGE—SPECIFIC PERFORMANCE.

The court's charge as to the main issue in the case—that is, as to what the contract was, and whether the contract as alleged was made or not—was sufficiently full and comprehensive, and the court did not err in refusing to give the charge requested upon this subject.

6. SPECIFIC PERFORMANCE ⚡123—CONTRACT TO MAKE A WILL—TERMS OF CONTRACT—CHARGE.

The portions of the court's charge, in which he states the issues as to the agreement upon the part of the decedent as to what he would leave by his will to the petitioner upon certain considerations stated, were not misleading, but correctly presented the real issue.

7. WITNESSES ⚡140(9)—COMPETENCY—HUSBAND.

The husband of the plaintiff was not a party to this suit, nor was he a party to the contract in such a sense as to render him incompetent as a witness.

8. SPECIFIC PERFORMANCE ⚡120—CONTRACT TO MAKE A WILL—EVIDENCE.

The testimony of the physician attendant upon the decedent in his last illness, tending to show that he then desired to make a will in favor of the petitioner in the case, was competent, relevant, and material, and the court did not err in admitting it over objection.

9. JUDGMENT ⚡256(1)—TRIAL ⚡365(1)—VERDICT—CONSTRUCTION.

The construction of a verdict may be aided by a consideration of the pleadings; and giving to the verdict in this case the scope which it should have, under the allegations in the petition and the issues made by the pleadings, it cannot be said that the decree rendered was not authorized by the verdict.

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Suit by Mrs. N. C. Rivers against Mrs. E. E. Landrum, individually and as administratrix of the estate of L. A. Brown, deceased. Verdict and decree for plaintiff, motion for new trial, exceptions to decree and motion to set aside decree overruled, and defendant brings error. Affirmed.

Mrs. N. C. Rivers brought her equitable petition against Mrs. Exer Ellen Landrum as an individual and as administratrix of the estate of L. A. Brown, in which she prayed, among other things, specific performance of an oral contract to make a will, and for injunctive relief. This petition was filed on May 13, 1915. The allegations of the petition show that Mrs. Landrum's intestate owned a valuable estate, consisting of realty and personality; that at the time of the making of the contract, specific performance of which was sought, Brown's aged mother was living in the house with him; that he was

unmarried and was about 53 years of age; that petitioner and her husband and their two children were keeping house in the same county in which Brown lived, he being her uncle. She was engaged in the discharge of her duty, looking after and taking care of her children, waiting on and assisting her husband in making a living, and trying to accumulate property. Brown had no person in his house who could take care of him and look after his mother; and, approaching petitioner, he proposed to her that if she would change her place of residence, procure the consent of her husband to allow her to live in the house with him, and bring her children, live in his house, and be a comfort to him and his mother, treating them kindly and affectionately during their lives, and would look after and nurse the mother during her life, and cook for and wait on him and his mother, he would on his part, as compensation for such services to be rendered by petitioner, execute his last will and testament before his death, and in such will bequeath to her all of the property of every kind which he then owned and which he might acquire between that date and the date of his death. In the same paragraph in which these allegations just set forth are contained it is alleged that the decedent, L. A. Brown, stated to petitioner especially "that the compensation for all this service would be made by him by willing and leaving to her all the property he had at the date of his death of every kind and character." The death of Brown and of his mother is alleged, and that he died without having executed his last will and testament. Certain money, the proceeds of a life insurance policy taken by Brown and payable to his estate, it is charged, was sufficient to pay all the debts of the estate, and that plaintiff was willing that the debts should be paid with this money. Full performance of the contract on the part of petitioner was shown, and she prayed that specific performance be decreed, and that the court decree that the property owned by Brown at the time of his death, as set out in the exhibit attached to the petition, is the property of petitioner, and that the defendant be enjoined from administering on it as the property of Brown, or in any way disposing of it or changing the status. There was also a prayer for general relief. Mrs. Landrum, the defendant, was a sister and sole heir at law of Brown.

Upon the hearing of the case the jury returned a verdict in favor of the plaintiff. Upon this verdict the judge rendered a decree. The defendant filed certain exceptions to the decree, and also a motion to set aside the decree, and made a motion for a new trial. The motion for a new trial was overruled. The exceptions to the decree and the motion to set aside the decree were also

overruled. The defendant sued out a writ of error, bringing the case to this court, and in the bill of exceptions assigned error upon the judgment of the court overruling the motion for a new trial, and overruling the exceptions to the decree and the motion to set aside the decree.

Brewster, Howell & Heyman, of Atlanta, and J. H. Longino, of Fairburn, for plaintiff in error.

J. F. Golightly and L. S. Camp, both of Fairburn, and S. Holderness, of Carrollton, for defendant in error.

BECK, P. J. [1] 1. The plaintiff in error submitted a large number of written requests to charge, which the court refused to give, and error is assigned upon the refusal to give in charge these requests. Among them was the following:

"It is not every parol contract which the court will specifically enforce. It will never enforce any parol contract for the sale of land, or the making of a will, or the testamentary disposition of property, unless the party who is seeking such performance will be defrauded if the contract is not enforced, even if all other elements are shown to exist which would entitle a party to such relief."

The court did not err in refusing to give this charge. This charge is not in harmony with the doctrine laid down in other cases decided by this court, that a contract to make a will will be specifically performed where the evidence establishes the contract with the requisite degree of certainty (a subject to which we will allude further on in this opinion), and it is shown by the evidence that the party claiming the right to specific performance fulfilled and performed his part of the contract.

[2] 2. Another written request to charge, which the court refused to give, was as follows:

"The court instructs you that, since the law has provided what disposition shall be made of the estate of one who dies, the court favors the disposition fixed by the law, and will not, except when a strict compliance is had, permit it to be diverted from the channel so prescribed by the law. The law is very strict in requiring that its provisions for the proper disposition of the estate of the dead shall be observed, and the safety of the estate of every one depends upon their observance. So long as one lives, he is presumed to be able to look after his estate; when he is dead, the law steps in and undertakes to care for it, and see that it is legally and properly disposed of. It will see it reaches his heirs at law, or go to his legatees under his last will and testament. The law has thrown around the estates of those who die every safeguard to protect them. It is in the faith of this fact we all labor and toil to accumulate property, feeling that when we die our estates will be safe. It is the duty of the court and jury to exercise great care and extreme caution in the effort to see that the estate of one who is dead shall not be diverted from the channels and re-

moved from the safeguards of law. You see this suit is an effort to take this estate out of the channels prescribed by the law, and that by a parol contract. While such an effort, under the law, may succeed, it can do so only when, under the evidence, which is so strong and convincing and satisfactory that the jury to a reasonable moral certainty are convinced of its truth, and not to enforce it would result in a fraud on the plaintiff, because it is not practical to make her whole by awarding in money the value of her performance or part performance. It is a very serious proposition, after one dies, for an outsider, one who under the law would have no rights or interest in the dead man's estate, to set up a parol agreement, had with the man who is now dead and unable to speak, whereby not a part of his estate, but his whole estate, belongs to her, and not to those upon whom the law cast it. You must realize, gentlemen of the jury, such an effort is a very dangerous thing, and one that threatens all estates. While the law does not declare such a thing may not succeed, but, on the contrary, it is the law such a contract may be made, and may be specifically enforced, yet in its wisdom it has imposed on the party who seeks to enforce such a contract a very heavy burden, in that the contract must be so certain, definite, and clear, and so precise in its terms, as that neither party can reasonably misunderstand them, and prove it by evidence so strong and cogent as to convince the jury to a reasonable moral certainty it was made, and not to enforce it specifically would be a fraud on the plaintiff, because she could not be easily and adequately compensated in money for the performance or part performance of the contract by the plaintiff. In other words, the court will not enforce such a contract, save in cases where specific performance is the only remedy that will afford the plaintiff adequate relief, and prevent a wrong and injustice to the plaintiff. Therefore, gentlemen of the jury, you see that, under the law, unless the evidence is so strong and convincing as to satisfy you to a reasonable moral certainty the contract was made as alleged, that the plaintiff cannot be compensated easily and adequately in money for the performance or part performance, and that it would result in a fraud upon her, if not specifically enforced, then you should not interfere with the laws disposing of this estate, but let it go as the law directs, and leave the plaintiff to her remedy to recover the compensation for the services she claims she rendered, in money."

The court did not err in refusing to give this charge. It would have been error for the court to have instructed the jury in the language just quoted. In the first place the charge is argumentative—strongly so. In the next place it is in conflict with the doctrine which is briefly stated in the preceding division of this opinion. Thirdly, it is not law in this state that a contract to make a will will not be enforced specifically, unless the refusal to specifically enforce it would be a fraud on the plaintiff, on the ground that she could not be easily and adequately compensated in money for the performance or part performance of the contract by the plaintiff; nor is it law that the court will not enforce such a contract, save in cases where

specific performance is the only remedy that affords the plaintiff adequate relief and prevents a wrong and injustice to the plaintiff. The case of *Heery v. Heery*, 144 Ga. 467, 87 S. E. 472, in all the controlling features, is nearly identical with the present case. The differences on the facts of that case and the instant case are differences that do not tend in any way to weaken the claim of defendant in error, but rather to strengthen it, as appears from a careful reading of the record in that case. Among the cases there cited is that of *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438, and apparently it is one of the cases upon which the court based the decision in the *Heery Case*. It was said in the *Banks Case*:

"Contracts under which one of the contracting parties agrees with the other, for a valuable consideration, that he will make a will giving to the other property, either real or personal, have been sustained and enforced in America from the earliest times, and the validity of such contracts seems now to be beyond all doubt."

In the case of *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749, Ann. Cas. 1918A, 852, it was ruled:

"An oral contract to devise lands falls within the operation of the statute of frauds; but where the party in whose favor the will is to be made has performed his part of the contract, and the other party dies leaving a will in which no devise is made pursuant to the oral contract, the disappointed party may apply to a court of equity for specific performance of the contract, if it is one of such a nature that a court of equity would require specific performance."

[3] 3. Requests to charge were also made in writing as follows:

(5) "Here the law is very strict. It does not look with favor on such a contract, and therefore it requires the very strictest proof to establish such a contract; proof that is convincing and so strong as to convince you to a reasonable moral certainty that it was made, as alleged."

(6) "Not only must such be the character of the proof, but it must be accurate and definite and certain. It must establish the contract which is alleged. That is, the evidence must establish substantially the exact terms and conditions, every detail as it is laid in the declaration or petition; and unless you are satisfied to a reasonable moral certainty that the evidence of this character the court has referred to, that L. A. Brown, in his lifetime, made such a contract, then that would end your investigation and you should find in favor of the defendant."

(8) "Then, further, that the plaintiff 'was to cook for her [his mother] and him, and nurse him if he should become sick, make his beds or have it done by her children, look after mending his clothes and seeing they were properly laundered and ironed.' Now, these, like those just referred to, are not loose allegations, which make no difference whether they are proved or not, but are parts of a parol contract, and they must be established just as alleged, or substantially

so, by such evidence as the court has heretofore called your attention to."

(9) "Then, further, during the life of his mother and his life, this, like the other features of the contract to which the court has alluded, is an important part of the contract, and must also be established by the same character of evidence."

So far as the requests just quoted are legal, they are sufficiently covered by the general charge. So far as relates to the character of proof required in cases of this kind, the court instructed the jury as follows:

"This is a suit in which the plaintiff asks for the specific performance of a contract, and being a suit in reference to the sale or disposition of land, before a contract, a parol contract, for the sale or other disposition of land can be required to be specifically performed, the contract should be made out by the evidence, clearly, satisfactorily, and specifically to the satisfaction of the jury, to a moral and reasonable certainty, and must be substantially the contract as set out in the petition of the plaintiff; and the performance of the contract, the performance of it by the plaintiff, should be shown by the evidence with the same degree of certainty. The court instructs you as to this particular part of the case, gentlemen of the jury, that the law relating to the preponderance or greater weight of the evidence does not apply, but the evidence must show to your satisfaction clearly and specifically the contract and its terms as set out and alleged in the petition to a moral and reasonable certainty, and that the same was carried out and performed on the part of the plaintiff; that is, the evidence must show to a moral and reasonable certainty as to the contract itself and its terms, and as to its having been carried out by the plaintiff. Evidence has been admitted for your consideration upon the question of the feelings of L. A. Brown towards his relatives, of his feeling towards the family of Mrs. Landrum, and also towards the plaintiff, and evidence as to what he said about what he wanted done with his property, and what he expected to do with it and all that kind of thing. This evidence, gentlemen of the jury, was admitted and is admitted for your consideration, in order for you to determine whether a contract was made and entered into or not. If there was no contract made as alleged, then whatever he said about what his desires were as to where his property would go, or whatever his feelings might have been towards any of the other parties at interest, would not authorize you to find for the plaintiff simply because he desired it to go to her; but, as I stated to you, that evidence is admissible to your consideration, only that you may consider all of the facts and circumstances surrounding the situation, in order that you may arrive at the truth as to whether or not there was such a contract as that made, and, if so, as to whether or not such contract was carried out by the plaintiff in this case, the question for your consideration being as to whether any such contract was made, and, if so, whether it was ever complied with by the plaintiff in this case. If the deceased, Mr. L. A. Brown, made such a contract as the one set out in the plaintiff's petition, and if the plaintiff carried out and performed the duties and

services she was required to render under such contract, the plaintiff would be entitled to recover, although it might appear that, pending the continuance of such contract, the deceased, Mr. L. A. Brown, sold part of the property he had in possession at the time the contract was made. Now, gentlemen of the jury, if you believe from the evidence in this case, under the circumstances which I have given you, that the contract as set out and set up in the plaintiff's petition was actually entered into and made between the plaintiff and Mr. L. A. Brown, clearly and substantially as set out and described in the petition, and then you believe that the plaintiff in this case, Mrs. N. C. Rivers, carried out and performed completely her part under such contract, if such contract was made, and that the deceased, L. A. Brown, failed to carry out his part of the contract, if such a contract was made, that he was to make a will, giving to her all of his property, but that he failed to do so, and died without making any will, and you believe all this to a moral and reasonable certainty, then, gentlemen of the jury, you would be authorized to find for the plaintiff in this case, and the form of your verdict would be, 'We, the jury, find in favor of the plaintiff on the issues in the case.'"

[4] 4. The court was also requested in writing to charge as follows:

"That he would compensate her for such services [that is, the services which the alleged contract set out] by executing a will and bequeath unto her all the property he then owned and which he would acquire between that date and his death. This, you will observe, is a very important portion of the alleged contract, and that same kind of evidence which the court called your attention to is demanded in regard to this portion of the contract. You will observe this is a provision of the contract which will not be satisfied by establishing a contract, no matter how strong and conclusive the evidence may be, that he would make a will and bequeath to her all his property at his death. There is a wide difference between a contract to make a will, and bequeath unto her all the property of every kind and character which he then owned and which he would acquire between that date and the date of his death, and a contract 'to make a will and bequeath all his property at his death.' In the one case L. A. Brown would, from the date of the contract, lose all power of disposition of his property he owned or any he might thereafter acquire. The only right he would have over the property he then had or might thereafter acquire would be to use it for the balance of his life. He would have no right to sell it, give it away, or will it to any one except the plaintiff. In the other case, it would only be what property he might own at his death he was obligated to bequeath to the plaintiff, having the right to sell, trade with, and dispose of any and all of the property he then owned or might thereafter acquire. Now, you look to the evidence, and determine whether L. A. Brown made a contract with the plaintiff as she alleges he made. You have a right to consider the character and kind of a man, as disclosed by the evidence, the reasonableness or unreasonableness of such a contract. While its reasonableness or unreasonableness would not affect the contract, if made, it may be con-

sidered by you in weighing the evidence, whether a man of the character of L. A. Brown, as shown by the evidence, would or would not be likely to enter into such a contract. In other words, gentlemen, you may and should consider every circumstance, fact, the situation, conditions, character of any and all parties, as shown by the evidence, in determining what is the truth. If you should believe L. A. Brown did not make this alleged contract, that very contract, with all its terms and conditions, just as alleged, then that would end your investigations."

We do not think the court erred in refusing to give this charge. It is argumentative, at least to this extent: That it unduly stresses the importance, or alleged importance, of certain parts of the contract, and impinges, in some parts of it, upon the correct principle that, before the jury could find in favor of the plaintiff, they should believe that the evidence had shown with the requisite degree of certainty that a contract, substantially in its terms and conditions identical with the one alleged, had been made as alleged in the petition; and it would have been laying too much emphasis upon the identity of terms and language of the contract for the court to charge that:

"If you should believe that L. A. Brown did not make this alleged contract, that very contract, with all its terms and conditions, just as alleged, then that would end your investigations."

If the plaintiff alleged a definite contract, and showed by evidence, sufficient under the correct rules of law, that a contract substantially the same as the one alleged was made, that would be sufficient, so far as regards the establishment of the contract which constitutes the basis of her claim in the case. As a part of his instructions to the jury the court stated fully and clearly the contentions in the petition as to what the contract was. The language employed by him was as follows:

"He stated that, if petitioner would change her place of residence, and would move from the place where she was then living" (this being followed by a full statement of the terms of the contract so far as related to what the complainant was to do), he, "the said L. A. Brown, for such service, would on his part, as compensation for such care and such service to be rendered by her, execute his last will and testament before his death, and in such will and testament would bequeath to her all property of every kind and character which he then owned, and which he would acquire between that date and the date of his death, stating to her at the time, that while he had considerable property, * * * and especially stating to her that her compensation for all this service would be made by him willing and leaving to her all the property he had at the date of his death of every kind and character."

This part of the charge states the allegations of paragraph 3 of the petition, and the

charge of the court as given required the jury to find from the evidence that this contract had been substantially proved. If there be a substantial difference between the allegation that the decedent would leave her by will all of his property and the other allegation, made in the same paragraph, that he would leave her all of the property he then had and all that he might acquire, there was no demurrer on the ground of conflicting allegations and that the two contracts could not be declared upon in the same count. The charge of the court submitted allegations as to the contract as it was made in the petition, and covered the subject fully.

[5] 5. The other requests to charge, so far as they were legal and pertinent, were sufficiently covered by the charge as given by the court, and other requests besides those which we have specifically referred to were properly refused, both in view of what we have said above, and for the further reason that they would have tended, had they been given to the jury, to lead them to believe that the court disapproved of contracts like that which it was here attempted to set up, and viewed the same with great suspicion. It is not improper here to say that it may be true that there is always great danger in the law allowing such contracts to be specifically enforced, where the contracts rest solely in parol and parol evidence alone is adduced to sustain them; and it may be forcibly argued in such instances that there is great inducement to perjury, whereby the property of a man, after his death, will be diverted from the course which the law has prescribed for it. But the validity of these contracts has been recognized by the courts for a long time, and whether they should be allowed to stand and should be enforced is not now a question for this court, but for the Legislature. The law-making body knows what the courts have held on this subject, the doctrine that has been repeatedly laid down; and if it is dangerous to the public welfare and is not a salutary doctrine, it is within the province of the law-making body of the state to change it and lay down a different rule.

[6] 6. Certain charges of the court are excepted to upon the ground that they tend to convey to the jury a mistaken and confused idea as to what the real contract was, and the real agreement upon the part of the decedent as to the property that he would bequeath in his will to the petitioner. It appears from a reading of the charge upon this subject that this question was fully and fairly submitted to the jury. The jury must have understood from the instructions, and no doubt did understand, that if they believed that it was established with the requisite degree of certainty and definiteness by the evidence that the decedent, L. A. Brown, agreed, in consideration of certain things to be performed by the petitioner, he would be-

queath her in his will all the property that he then had or that he might acquire between that date and his death, or that if he agreed upon the consideration stated that "he would leave her all of his property at his death," they should find in favor of the petitioner; and in view of the allegations in the third paragraph of the petition the court did not err in submitting this issue to the jury.

[7] 7. The seventh ground of the motion for a new trial is as follows:

"The husband of the plaintiff, Urma Rivers, being sworn as a witness for the plaintiff, testified in regard to the alleged contract as follows: 'By Counsel for Plaintiff: Q. How came you to move to Mr. Brown's house? A. We were living on his mother's place. I was farming. He came down there to get me to help him cut some stock; he said he wanted to build more rooms to the house; he made a contract with Clyde to move to his house. He said he told her, if she would move to his house and take care of his mother her lifetime, take care of him his lifetime, he would make his will, and will her what he had and all he would get before he died. My wife was there at home when he told me that; she heard it. I told her it would be right smart on her, but, if she thought she could do the work and wait on him, we would move there. He was present. We moved there after we got the crop gathered.' On cross-examination, in answer to the questions propounded by counsel for defendant, as follows: 'Q. Tell the jury just what he said the contract was. A. Well he came down to my house in August to get me to help him to cut some stock; he wanted to build some to the house. He said he had made a contract with Clyde to move to his house. He said, if she would move to his house and take care of his mother her lifetime, and stay on and take care of him his lifetime, that he would make his will, and will her all he has got and all he would get before he died. Q. That was all, he stated, of the contract that he made; that was all of it, wasn't it? A. That is all I remember he said. Q. You made an affidavit in this case didn't you, written by your lawyers? A. Yes, sir. Q. Well, I will read you the affidavit as quoted in the bill of exceptions: 'In the month of August, 1910, L. A. Brown came to the house of affiant, and in the presence of affiant's wife stated to affiant that he, the said L. A. Brown, desired to have some stock cut in order to add to the house that he was then living in, in order to make it large enough for affiant and his wife and children to move into the house and live in, and he wanted affiant to come and help him cut stock for that purpose, and he then stated to affiant as follows: 'That he had agreed with Clyde, he called her, affiant's wife, that if she would move into the house with him, and wait on his mother in sickness, and stay with her during her life, and stay on with him during his lifetime, and to wait on him and keep the house and do the cooking, and he stated that he would expect her to mend his clothes and keep them up and do his sewing, and stay there and do that work as long as his mother lived, and then until he died, that he would execute his will before he died, and will her all of his property of every kind.' And he went on to state in the presence

of affiant's wife that this was an agreement he had made with her, and that he wanted to enlarge the house, and add five rooms to the house, so there would be ample room there for affiant and his family and L. A. Brown, and he stated to affiant that it would be expected that affiant would work the land and pay the rent just like he had been paying heretofore; that is to say, affiant had been working on the place of Mrs. Elizabeth Brown, and paying the rent over to L. A. Brown; and he stated to affiant that if affiant would go on and pay the rent, and act just like he had been acting so far as the rent was concerned, he expected Clyde, affiant's wife, to move into the house after it was fixed, and to wait on his (L. A. Brown's) mother during her lifetime and then to wait on him, to do his mending and sewing and cooking, and live in the house with him until his death. He further stated that he would not require her to furnish the provisions, but he expected to pay for half the provisions and put them at the house, and that he would be charged no board, but that she would do all the cooking, and that she would be at no expense about the family, except he would really buy and place at the home half of the provisions to be used, and he stated that affiant's wife and affiant's children would live in the house with him, and she would do this waiting on him, and waiting on his mother, that no rent would be charged for the house, except he stated that affiant would be expected to pay rent for the place the same as he had been paying, that is to say, that affiant would pay him the third and fourth of what he made, but that Clyde would not be expected to pay anything; and he stated to affiant that it was impossible for him and his mother to stay there together any longer, unless they got somebody to stay with them, that she was getting feeble and needed waiting on, and somebody to stay with her, and he really needed somebody to help wait on him and do his cooking; and he further stated to affiant, 'I have got plenty to take care of me and my mother in her lifetime, but yet I am dependent; I have got nobody to wait on her and nobody to stay with her when I am gone, and nobody to look after me, and I want to make some permanent arrangement, so somebody will be in the house and wait on her when she is sick, and wait on me when I am sick, and mend my clothes and sew for me, and I want to get Clyde to come and do this for me, and at my death I will make my will and will her all of my property of every kind.' Wasn't that what you swore, that that was the contract; isn't that what the contract was? A. I was to run a crop, but he didn't make that contract with her; he made it with me. Q. Isn't that the contract he made with her, and didn't you swear it, and didn't your lawyer write it; ain't that the contract? I ask you, didn't he make this contract? A. I made a contract to make a crop over there. Q. State whether this was the contract or not— You swore once. Tell the jury whether that was the contract or not. A. I made a contract to make a crop. Q. Was that all the contract was made? A. Yes, sir; to make a crop, all that I made. Q. Was this the contract he made with your wife? Tell me whether this is the contract. A. He told me she was to do the cooking, wait on his mother. Q. How were all the provisions to be furnished at the house to support the family? A. I was

to furnish half. Q. You were to furnish half of the provisions, and Mr. Brown was to furnish the other half? A. Yes, sir. Q. That was in it? A. Yes, sir. Q. That was a part of the contract, wasn't it? A. Yes, sir. Q. Another part of the contract was that Mrs. Rivers was to wait on his mother? A. Yes, sir. Q. And another part of the contract was that she was to wait on him? A. Yes, sir. Q. And another part of the contract was that she was to do the cooking, wasn't it? A. Yes, sir. Q. And another thing, she was to keep the house? A. Yes, sir. Q. Well, let us see if we can't find just exactly what this contract was; what was he to do on his part? He was to fix up the house? A. Yes, sir. Q. You were to help him? A. I did help him. Q. And you agreed to do it? A. Yes, sir. Q. He went to see you? A. Yes, sir. Q. You agreed to go and help him cut stock? A. Yes, sir. Q. And another thing was, he was not to be at any expense in the house-keeping except to furnish one-half of the provisions, that was all. You were not to charge him any board. You were to furnish the other half, wasn't you? A. Yes, sir. Q. You did furnish half of the provisions, approximately one half, and he furnished the other half, didn't he? A. I furnished over half, I think. One year he didn't kill a hog. I furnished the meat for the whole year. Q. So you did more than you agreed to do? A. Yes; I did that year. Q. Another thing, you were not paying any rent for the house you lived in? A. No sir. Q. That was a part of the agreement, wasn't it? A. Wasn't anything said about house rent; I don't think there was; there might have been. Q. Didn't you expressly say it, didn't you swear it, that you were not to pay any rent for the house, but all you were to pay was to pay your third and fourth for the crop? A. Yes, sir; I was to pay the third and fourth. Q. You didn't pay any rent did you? A. No, sir. Q. And wasn't that part of the agreement? A. It might have been; I don't remember now. Q. You have not any very clear recollection of what the contract was, have you? A. Why, he might have said that he was not going to charge any rent for the house. Q. Didn't he expressly say so? You didn't pay any. That was a big item, adding four or five or six rooms to the house; wasn't that expressly understood, that you were not going to pay any rent for that house, and you would not have gone there unless you had had that contract? A. People don't rent houses when they farm; that is, pay extra rent for the house. Q. That is what you contracted to do, to work down there on a farm? A. Yes, sir. Q. Well, now, do you think you understand the contract? Ain't it a good deal more than you swore it was awhile ago? A. Well, I didn't say that was all. Q. I asked you if that was all, and you said that was all you could remember. You can remember a great deal more now? At the conclusion of the testimony of this witness, Urma Rivers, the husband of the plaintiff, and the above-quoted testimony in regard to the alleged contract and all he testified to touching the making of said contract, both on the direct and cross-examination, in which recital is given both the questions and answers, the defendant moved the court to exclude all this evidence of the said witness, Urma Rivers, from the consideration of the jury, because he was a party to this contract, and, this suit being defended

by the administratrix of L. A. Brown, that he is an incompetent witness under our law; which motion the court refused to grant, saying: "Taking the testimony all together, there was other testimony than that of Mr. Rivers as to the separate contract between Mrs. Rivers and Mr. Brown, the dead man, with the consent of Mr. Rivers; and taking all the testimony together, as it appears in the record, this motion is overruled." The defendant contends that the court erred in overruling said motion to exclude said testimony, for the reason assigned in said motion, to wit, that, L. A. Brown being dead, and the suit being defended by his administratrix, the said witness, Urma Rivers, the husband of the plaintiff, by the said testimony delivered by himself, clearly shows he was a party to said contract, and, being a party thereto, under the law he was incompetent as a witness to establish by his testimony the contract sued on, when the other party thereto, viz. L. A. Brown, was dead, and his administratrix was defending said suit. The defendant says the fact, if it be a fact (which the defendant says is not a fact), that 'there was other testimony than that of Mr. Rivers as to a separate contract between Mrs. Rivers and Mr. Brown, the dead man, with the consent of Mr. Rivers, and taking all the testimony together as it appears from the record,' did not in any way have the effect of rendering him competent to testify, if he was a party to the contract with the dead man, intestate of the defendant administratrix."

The court did not err in refusing to exclude the testimony of this witness on the grounds urged. He was not a party to the suit, and was not a party to the contract sued upon. Intermingled with his testimony regarding the contract sued upon, and connected with that contract, is evidence of what might be called a collateral undertaking upon the part of the husband of the petitioner. This did not render him incompetent as a witness.

[8] 8. The testimony of the physician attendant upon the decedent in his last illness, tending to show that he then desired to make a will in favor of the petitioner in the case, was competent, relevant, and material, and the court did not err in admitting it over objection.

[9] 9. Under the charge of the court the jury returned a verdict in favor of the petitioner, the verdict being in the following language:

"We, the jury, find for the plaintiff on all the issues in this case."

The court thereupon rendered its judgment, decreeing that the plaintiff recover from the defendant all the estate of L. A. Brown which had come into the hands of the defendant, Mrs. Landrum, as the administratrix of the estate of the decedent, or which might come into her hands as such administratrix, less such costs as might be taxed in the case. The court further decreed that title to the realty constituting a part of the estate be in the plaintiff as against the defendant and the

estate of the decedent. It was further decreed that the personal property belonging to the estate of the decedent which had not been sold be turned over to the plaintiff; that the defendant make a deed conveying the realty described in the decree to the plaintiff, this being the realty which constituted a part of the estate of the decedent; that the proceeds of the sale of any of the property of the estate, and any other money that might come into the hands of the defendant as a part of the estate of the decedent, be delivered to the clerk of the superior court of Campbell county; that if the defendant had paid any debt of the decedent, which was a just claim against the estate, she deliver to the clerk of the court the receipts, canceled notes, or other evidence of the payment of any money on account of such estate; and that, if these claims were just, they be taken and held in lieu of any money which she would have to pay over had those claims not been paid. It was further decreed that the administratrix should keep and retain nothing on account of any services she had rendered, or should hereafter render, as administratrix of the estate, or for any money she had paid or agreed to pay out to any person as administratrix or otherwise, except such money as had been paid out on obligations due by L. A. Brown at the date of his death, and that she make a statement to the court, verifying the same by oath, showing just what money she had received, and from what source, and how it had been distributed, and to whom, and paying over to the clerk of the court the balance in her hands. The decree further makes provision for the payment of all debts of the decedent at the date of his death, payment of costs in certain cases, payment of the cost of carrying this case to the Supreme Court on a previous writ of error, for the presentation of all claims against the estate of the decedent by intervention or otherwise; also that the counsel who filed the suit shall be a tenant in common with the plaintiff, having one-fourth interest in the property (this latter provision being to secure the fee of counsel), and that plaintiff shall be liable for all the just claims of the decedent. Numerous exceptions to this decree were filed, on the ground that it does not follow the verdict and was not authorized thereby, specifying wherein it was not authorized; also a motion to set aside the decree was made. The exceptions and the motion were overruled. We are of the opinion that the court properly so ruled. We have set forth above the substance of the decree. The jury had been instructed that they should return a general verdict, and that, if they found in favor of the plaintiff on all the issues of the case, their verdict should so state. Under this charge the jury returned a verdict finding

in favor of the plaintiff "on all the issues in the case." And when we consider the scope of the pleadings, the issues involved, it is apparent that the verdict, properly construed, authorized the decree rendered. When this suit was instituted in 1915 the defendant in error had not been granted permanent letters of administration, but was temporary administratrix. Subsequently to the filing of the suit permanent letters of administration were granted. The effect of the verdict and decree was to put the title to this property in the plaintiff. The meaning of the verdict and the decree in the case is that there is specific performance of a contract on the part of the decedent to leave by his will all of his property to the plaintiff in the case. Had this contract been carried out, the plaintiff would have had title to the property from the date of the death of the intestate; and we do not think it should be taxed with the cost of the administration and the litigation which had been carried on by the defendant, who was the sole heir at law of L. A. Brown.

It is cogently argued in the briefs of counsel for plaintiff in error that she was entitled to this cost and compensation, and also reasonable counsel fees for the attorneys at law who represented her in this litigation. We cannot agree with this contention. Mrs. Landrum was, as said above, the sole heir of the decedent, and she was as an individual made a party defendant in the original petition. She was stricken from the cause as an individual, and the case proceeded against her as administratrix. The claims of creditors of the estate were not in jeopardy. The estate was apparently worth several times the amount of any valid claims against it. The great bulk of the estate would not have been touched by debts. The proceeds of a small quantity of personalty and of an insurance policy on the life of the decedent were sufficient to pay off the debts of the estate. While nominally the litigation was in behalf of Mrs. Landrum as administratrix, the contest upon her part was actually carried on in protection of her personal interest. Her loss or her gain was to be the result of the suit; and the property involved, which under the decree for specific performance became the property of the defendant, cannot be taxed with any fee payable to the counsel for Mrs. Landrum. In the case of *Belt v. Lazenby*, 126 Ga. 767, 56 S. E. 81, it was said:

"An agreement to devise, if founded upon sufficient consideration, is, after death of the party who agreed to devise, enforceable against his sole heir at law, by treating the heir as a trustee and compelling him to convey the property in accordance with the contract; and where the agreement is entire, and embraces both real and personal property, and the estate of the decedent is unrepresented and owes no debts, and the heir is in possession of all such property, it is not

necessary, in order to enforce the contract in its entirety, to have an administrator for such estate appointed and made a party defendant to the suit. In such a case, equity, having obtained jurisdiction over the subject-matter and over the heir for the purpose of enforcing the contract as to the land against him, may enforce the whole of the contract against him."

The issues which were made in this case could have been fought out between Mrs. Landrum as an individual and Mrs. Rivers. Each is responsible according to the contract for the fees of her own counsel. That the fee for the counsel for Mrs. Rivers was provided for in the decree is not a matter of which the plaintiff in error can complain.

Judgment affirmed. All the Justices concur.

(148 Ga. 861)

CENTRAL OF GEORGIA RY. CO. v.
TOUCHSTONE & WILBANKS.
(No. 980.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

CARRIERS ⇐182—LIABILITY—VENUE.

The Central of Georgia Railway Company, a corporation chartered under the laws of Georgia, has its principal office in Chatham county. It did not have an agent, office, line of railway, or place of business in Tift county, Ga., but had a line of railway operating between Alexander City, Ala., and Albany, Ga., at which latter point it connected with another common carrier, the Atlantic Coast Line Railroad Company, which operated a railroad between Albany in Dougherty county and Tifton in Tift county. On October 13, 1917, the Central of Georgia Railway Company received, at Alexander City, Ala., a carload of cattle to be transported to Tifton, Ga. The shipper and carrier entered into a written contract, which contained the following clauses: "Received by Central of Georgia Railway Company at Alexander City, Alabama, * * * from Smith Wilbanks, the live stock described, consigned and destined as indicated below, which said carrier agrees to carry to said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination. * * * And it is further agreed, that the responsibility either as common carrier, or as warehouseman, of each carrier over whose lines the property shipped hereunder shall be transported shall cease as soon as delivery is made to the next carrier, or consignee; and the liability of the said lines contracted with is several, and not joint. Neither of the said carriers shall be responsible or liable for any act of negligence of the other carrier over whose lines said property is or is to be transported." The cattle were not shipped with reasonable promptness by the initial carrier and its connecting carrier, and arrived at Tifton with the loss of some, and the others in a damaged condition. The consignor instituted a suit for damages in Tift county against the Central of Georgia Railway Company. To the petition, which alleged facts as

just set forth, the defendant filed a demurrer on the ground, among others, that the petition showed upon its face that the court in Tift county was without jurisdiction. The demurrer was overruled, and the defendant excepted. *Held:*

1. The Carmack Amendment (Comp. St. §§ 8604a, 8604aa), which fixes a liability on the initial carrier for loss or injury to goods, does not purport to deal with the venue of actions to enforce such liability; and the question of venue, which is determined by state laws, is not affected thereby.

(a) Irrespective of whether the present action be construed to be for a breach of the contract of carriage, or one in tort for loss and damage to the shipment, the allegations of the petition do not make a case where the contract was to be performed, or the damage occurred, in Tift county, within the purview of any of our statutes relating to venue in cases against railroad companies, so as to give jurisdiction over the defendant corporation in that county by having a second original issued and served upon it in the county where its home office is located.

(b) The case differs from *Adair v. Atlantic Coast Line R. Co.*, 21 Ga. App. 564, 94 S. E. 840, which was a suit by attachment against a foreign corporation.

(c) The ruling announced above being controlling, it is unnecessary to pass upon other questions raised by demurrer.

Error from City Court of Tifton; Jas. H. Price, Judge.

Suit by Touchstone & Wilbanks against the Central of Georgia Railway Company. Demurrer to petition overruled, and defendant excepts and brings error. Reversed.

Pottle & Hofmayer, of Albany, for plaintiff in error.

Fulwood & Hargrett, of Tifton, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(148 Ga. 821)

**REAL ESTATE BANK & TRUST CO. v.
BALDWIN LOCOMOTIVE WORKS.**
(No. 767.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. DEED OF TRUST—CONSTRUCTION.

The evidence authorized the finding that the deed of trust executed to the plaintiff in error by the Eden Manufacturing Company did not convey title to the locomotive, the property in controversy. See the former decision in this same case, 145 Ga. 831, 90 S. E. 49.

2. RAILROADS —171(6)—SALE OF EQUIPMENT—LEASE OF EQUIPMENTS—REGISTRATION.

Sections 2791 and 2792 of the Civil Code of 1910 apply not only to railroads which are oper-

ated by corporations duly chartered, but to all railroads, whether chartered or not, in the operation of which cars and locomotives are essential.

3. RAILROADS —171(6)—SALE OF EQUIPMENT—LIEN OF VENDOR.

As this action was converted into one equitable in its nature, by amendment to the original pleadings both of the plaintiff and the defendant, the issues were to be decided under the application of equitable principles; and the jury were authorized to find, in the application of such principles, that the plaintiff in error, by reducing its claim to judgment, did not obtain a lien superior to the claim of the Baldwin Locomotive Works for the balance of the unpaid purchase money.

4. REFUSAL OF NEW TRIAL.

The rulings in the foregoing headnotes, in connection with the rulings made when the case was formerly before this court, decide the controlling questions; and the court below did not err in refusing to grant a new trial.

Gilbert, J., dissenting.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Action by the Baldwin Locomotive Works against the Real Estate Bank & Trust Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 145 Ga. 105, 88 S. E. 534.

Geo. H. Richter and Edward S. Elliott, both of Savannah, for plaintiff in error.

H. W. Johnson, of Savannah, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except

GILBERT, J. (dissenting). The written instrument executed by Bourne to Baldwin Locomotive Works in the purchase of the locomotive is a contract of conditional sale. *Hays v. Jordan*, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; *Cottrell v. Merchants Bank*, 89 Ga. 508 (2), 519, 15 S. E. 944; *North v. Goebel*, 138 Ga. 739, 76 S. E. 46. It does not appear that the vendee under the conditional sale was a railroad company, or a person owning or operating a railroad; and as to recordation of the contract sections 3318, 3319, and 3259 of the Civil Code apply. There was a failure to record the instrument in the county of the residence of the vendee, as required by these sections. If, however, the vendee can be classified as a person operating a railroad, then section 2792 of the Civil Code requires that the contract be recorded in the county where the principal office is located. There was a failure to comply with this law, because it does not appear that the vendee maintained any office in a county other than Chatham,

where he resided. While good as between the parties thereto, the contract of sale, as against lawfully acquired rights of third parties, was ineffectual to retain title, because of the failure to comply with the law as to recordation. *Civil Code*, § 3260; *Cambridge Tile Co. v. Scafe Co.*, 137 Ga. 281, 73 S. E. 492; *Pickard v. Garrett*, 141 Ga. 831, 82 S. E. 251; *Farmers Bank v. Avery*, 145 Ga. 449, 89 S. E. 409. A record other than that required by law is a nullity. *McCandless v. Yorkshire Corporation*, 101 Ga. 180 (4), 182, 28 S. E. 663.

(148 Ga. 805)

KRAMER v. SPRADLIN et al. (No. 965.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(Syllabus by the Court.)

1. WITNESSES ⇨150(4) — COMPETENCY — CASE OVERRULED.

Where a testator bequeathed and devised to his widow a promissory note payable to him, and all his interest in a deed to certain realty, executed by the maker of the note to secure its payment, and in his will expressly authorized his widow to sue on the note if it should not be paid, and to reconvey the land to the grantor in the deed (as provided by statute) in order to have the land sold under a judgment on the note as the property of the defendant, and the executor expressly consented to the legacy and devise, the widow was the assignee or transferee of the title of the testator to the note, and of his interest and rights under the deed; and where an execution issued upon a judgment on the note obtained by the widow against the maker was levied upon the land conveyed in the security deed, and a statutory claim to a part of the land was interposed, the maker of the note and security deed was an incompetent witness to testify, on the trial of the issue in the claim case, to transactions and communications between himself and the testator, relative to the note and the deed, and tending to the direct benefit of the witness and to the injury of the plaintiff in *fi. fa.* The decision in *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434, in so far as it conflicts with what is here ruled, is, upon review, overruled.

2. WITNESSES ⇨158 — COMPETENCY.

Certain testimony objected to was not inadmissible on the sole ground that the witness was incompetent because of the death of the testator of the plaintiff.

Error from Superior Court, Heard County; J. R. Terrell, Judge.

Suit by Ruth Kramer against one Vaughn. Judgment for plaintiff, and execution issued against Vaughn, upon which J. W. Spradlin, Sr., interposed a statutory claim to a specified part of the land. From a directed verdict finding the land claimed not subject to

execution, plaintiff excepts, and brings error. Reversed.

C. E. Boop and S. Holderness, both of Carrollton, for plaintiff in error.

Hall & Jones, of Newnan, and Willis Smith and J. L. Smith, both of Carrollton, for defendants in error.

FISH, C. J. Kramer made a loan of money to Vaughn, and took from him a promissory note therefor, payable to Kramer, and a deed to described land to secure the debt. Kramer died, leaving a will whereby he gave to his widow the note and all of his interest in the land conveyed as security for its payment. The will specifically stated the transaction between the testator and Vaughn, and authorized the widow to sue on the note in the event of its nonpayment, and to reconvey the land to Vaughn for the purpose of its sale under the judgment obtained upon the note, according to the statute in such cases (*Civ. Code*, § 6037). The executor expressly consented in writing to the legacy, both as to the note and the security deed. The note was not paid, and the widow brought suit thereon against Vaughn, and obtained a judgment. She reconveyed the land to Vaughn by a quitclaim deed, which was duly and properly filed and recorded; and afterward the execution issued upon the judgment was levied upon the land as Vaughn's property. Spradlin interposed a statutory claim to a specified part of the land; and on the trial of the issue made in the claim case the court permitted Vaughn to testify that, subsequently to the execution of the security deed to Kramer, Vaughn, for a valuable consideration, sold and conveyed to Spradlin by a warranty deed the portion of the land claimed, and that the sale and conveyance were made with the actual knowledge and expressed consent of Kramer, who really advised Vaughn and Spradlin to make the trade, and aided them in carrying it out in the execution of the conveyance. This testimony was objected to by the plaintiff in execution, on the ground that, as to the title to Vaughn's note and to the testator's interest in the security deed, the plaintiff was the assignee and transferee of her deceased husband, Kramer, who in his will gave and bequeathed to her Vaughn's note and all of the testator's interest in the land held by him at the time of his death under the deed executed to him by Vaughn to secure the payment of the note, and that Vaughn was directly interested in the result of the case, for the reason that he had conveyed to the claimant a part of the land by a warranty deed, and if it should be found subject to the plaintiff's execution, Vaughn would then be liable on his warranty to the claimant. A verdict was directed finding the land claimed not subject to the execution, and the plaintiff excepted.

[1] 1. Our statute (Park's Ann. Civ. Code, § 5858) declares:

"1. Where any suit is instituted or defended by a person insane at time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person, whether such transactions or communications were had by such insane or deceased person with the party testifying or with any other person."

And:

"4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent."

The controlling question in the case is whether Mrs. Kramer, the plaintiff in execution, who is the legatee and devisee, under the will of her husband, of Vaughn's promissory note, and of all the interest of the testator in the deed given to secure the note, which the testator held at the time of his death, is the assignee and transferee as to such property within the meaning of the evidence act above quoted, so as to exclude the testimony of Vaughn, who is interested in the result of the suit, as to transactions and communications he had with the testator.

In *Hendrick v. Daniel*, 119 Ga. 358, 46 S. E. 438, it was held:

"Under Civil Code, § 5269 [C. C. 1910, § 5858] par. 1, in an action of ejectment the opposite party to the grantee of a deed from a deceased person is not competent to testify in his own behalf to conversations and transactions with such deceased person, affecting adversely the title conveyed by the deed; and under paragraph 5 the agent of such a party is likewise incompetent."

We quote liberally from the able opinion rendered by Mr. Justice Oandler in that case. He said:

"The literal meaning of the word 'indorsee' is easily ascertained by reference to its etymology. Indorsement applies to such written entries as may be made on the back of notes, checks, etc., and may transfer title to the paper on which it is made. The literal meaning of the word 'assignment' is much broader. In its most general sense it applies to the transfer of interest in all classes of property, real, personal, or mixed. Bouvier gives as the definition of the verb 'assign' to make or set over to another, and of 'assignment' a transfer or making over to another of the whole, of any property, real or personal, in possession or in action, or of any estate or right therein; a transfer by writing, as distinguished from one by delivery. Black's Law Dictionary (page 97) defines the word as 'the act by which one person transfers to another, or causes to vest in that other, the whole of the right, interest, or property which he has in any realty or personalty, in

possession or in action, or any share, interest, or subsidiary estate therein; * * * in a narrower sense, the transfer or making over of the estate, right, or title which one has in lands and tenements.' The same authority defines the verb 'assign,' as used in conveying, as follows: 'To make or set over to another; to transfer; as to assign property, or some interest therein.' It seems clear that, technically speaking, the word 'assignment' refers to a transfer of interest in land alone, and that to apply it to a transfer of a note or similar paper is to give it a broad, rather than a technical, meaning. Literally, it most assuredly covers a conveyance of land by deed. The word 'transfer,' in its literal meaning, is broader than 'assignment,' and all the authorities agree in a definition which in effect covers any act by which the owner of anything delivers or conveys it to another with the intent to pass his rights therein. In like general terms a transferee is one to whom a transfer is made. Following the former decisions of this court, therefore, and giving to the words 'assignee' and 'transferee,' as used in the Code, a literal construction, we are forced to the conclusion that they cover the grantee in a conveyance of land. *These words are the broadest that could possibly have been used. A literal construction of either necessarily includes a vendee, grantee, or donee. That such was the meaning intended to be given them by the lawmaking power we think can easily be established by an application of any or all of the well-known rules for the construction of statutes.* [Underscoring ours.] The act of 1889 and the amending act of 1893 are both remedial statutes. The evil sought to be cured was that the living took advantage of the dead, the sane of the insane, by giving testimony the power to contradict which was buried in the tomb or obscured by dethroned reason. By the decision of this court in the case of *Woodson v. Jones*, supra [92 Ga. 662, 19 S. E. 60], it was brought to the attention of the General Assembly that the act of 1889 failed of its full purpose, and it was accordingly amended by the act of 1893. To use a homely metaphor, by inserting in the law as it stood the word 'indorsee' the Legislature healed the particular malady pointed out by the decision in the case cited, and then, to guard against a relapse, or the possibility of a similar attack in the future, it inoculated the patient with the words 'assignee' and 'transferee.' The mischief as it existed prior to the passage of the act of 1889 was plain. *That act did not accomplish its full purpose, and so, in 1893, the General Assembly amended it so as to cover all possible cases where the same mischief threatened, and where estates, real, personal, or mixed, of deceased or insane persons, might otherwise be obtained or damaged by allowing parties to suits affecting such estates to testify to communications and transactions with such deceased or insane persons. With the full nature and extent of the evil clearly apparent, we cannot believe that the General Assembly intended to protect the estate of a deceased indorsee of a note against the testimony of the living maker, at the same time allowing it to be wronged by nullifying his warranty deed to a tract of land. On what theory it can be supposed that the General Assembly sought to protect the purchaser of a note and leave unprotected the grantee of*

a piece of real estate we are at a loss to conceive. [Underscoring ours.]”

In *Hendricks v. Allen*, 128 Ga. 181, 57 S. E. 224, the decision in *Hendrick v. Daniel*, supra, holding that the grantee in a conveyance of land was an assignee or transferee was followed. In *Turner v. Woodward*, 136 Ga. 275, 71 S. E. 418, it was held that the grantee or donee in a deed of gift who was the defendant in the action was an assignee or transferee of the title within the meaning of the Civil Code, § 5858, par. 1, and that the plaintiff was incompetent as a witness to testify to transactions between himself and the deceased grantor or donor of the defendant. In *Hudson v. Broughton*, 147 Ga. 547, 94 S. E. 1007, it was held:

“On the trial of an action to recover a house and lot, brought by a vendee in a warranty deed against a donee in possession under claim of a parol gift from the same transferor to an undivided half interest in the lot, with valuable improvements made thereon by the donee, and with actual notice to the plaintiff by the donee prior to and at the date of the deed from the vendor to the vendee, where at the time of trial the vendor and donor was dead, it was not error to refuse to permit the plaintiff and her agent to testify as to alleged conversations and transactions with the vendor relative to the transfer of the house and lot to the plaintiff.”

Considering the beneficent purpose of the General Assembly in passing and amending the evidence act as set forth in section 5858 of the Civil Code, and as was so clearly and forcibly expressed by Mr. Justice Candler in *Hendrick v. Daniel*, supra, and the ruling in that case and the subsequent cases approving and following it, to the effect that a grantee and a donee in a conveyance of land are assignees and transferees in contemplation of that act, we reach the confident conclusion that a legatee and a devisee are also assignees and transferees within the contemplation of that act; and therefore, in the circumstances of this case, it was error to permit the witness Vaughn, who was interested in the result of the case, to give the testimony objected to, as to transactions and communications between himself and the testator of the plaintiff.

In *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, it was held that the devisees of a testator are his assignees within the meaning of a statute of that state declaring that—

“A party shall not be examined in his own behalf in respect to any transaction or communications had personally with a deceased person, against parties who are the executors, administrators, heirs at law, or next of kin, or assignees of such deceased person, where they have acquired title to the cause of action from or through such deceased person, or have been sued as such executors, administrators, heirs at law, next of kin, or assignees.”

In the opinion it was said:

“It has been held in New York, upon the construction of a statute similar to ours, that the devisees of real estate are the assignees of the testator within the meaning of their statute, and we think properly so; and therefore the devisees of the real estate under the will of Shepherd McMechen are the assignees of said Shepherd McMechen within the meaning of section 23, c. 130, of our Code. *Buck v. Stanton*, 51 N. Y. 624; *Cornell v. Cornell*, 12 Hun [N. Y.] 314.”

In *Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634, it was held that the legatee of a debt was an assignee for the purpose of suing thereon. In *Joss v. Mohn*, 55 N. J. Law, 407, 28 Atl. 987, an action against devisees to recover a sum of money which the plaintiff claimed to have loaned to their decedent, it was held that the devisees were the representatives of the deceased debtor, and that the plaintiff was incompetent to testify to any transaction with or statement made by the decedent. As to the statute of that state on the subject, the court said:

“The import of” the statute, “as judicially construed, is to exclude any testimony concerning any transaction with or statement by any testator or intestate represented in an action, by a party to the action, where either of the parties sues or is sued in a representative capacity, unless the representative offers himself as a witness in his own behalf, and testifies to such transactions or statements.”

On the subject see 40 Cyc. 2304, and 5 O. J. 838, § 4, to the effect that an assignee is “one to whom rights have been transmitted by particular title, such as a sale, gift, legacy, transfer, or cession”; *Bouvier's Law Dic. "Assignee."* In *McAleer v. McNamara*, 140 Iowa, 112, 117 N. W. 1122, it was held that a mere donee should not be held to be an assignee under the statute of that state in reference to the competency of witnesses. This decision is, however, in conflict with the decisions of this court on our statute, heretofore cited. We are aware that a ruling contrary to what we hold in this case was made in *Hight v. Sackett*, 34 N. Y. 447, as to the meaning of the word “assignee”; but we are not at all impressed with the correctness of that decision.

This court, in *Austin v. Collier*, 112 Ga. 247, 37 S. E. 434, held that legatees under a will were not indorsees, assignees, or transferees, or personal representatives of the deceased, so as to render the plaintiff, who sued to recover land from them, an incompetent witness as to transactions and communications between the plaintiff and the testator. Counsel for the plaintiff in the present case have requested that the decision just cited be reviewed and overruled. After mature consideration, we are of the opinion that the decision so rendered was erroneous; and we over-

rule the same in so far as it conflicts with the ruling here made.

[2] 2. The witness Street, to whose testimony the plaintiff in execution objected, was not incompetent to testify that he purchased from Vaughn with the consent of Kramer, a portion of the land which Vaughn had conveyed to Kramer in the security deed; it not appearing that the land which Street claimed to have purchased was any part of the land Vaughn sold to Spradlin; it, moreover, not appearing that the conveyance that Vaughn may have executed to Street contained a warranty of title. Street's testimony was not objected to on the ground that it was irrelevant. It was admitted, but it did not authorize the judge to direct the verdict. The direction of the verdict was error.

Judgment reversed.

All the Justices concur.

(148 Ga. 839,

BOYD et al. v. SANDERS et al. (No. 807.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. DEEDS \S 38(1), 41, 112(1)—VALIDITY—DESCRIPTION.

The third item of the will of Phil. M. Byrd devised to his wife, Mary, for life, all of his "estate both real and personal or mixed." The ninth item provided: "I give and bequeath to my beloved niece Emiline M. Chapman, for her sole and separate use for and during her natural life, all the estate, both real and personal or mixed, conveyed by the third item of this will to my wife Mary, after her estate therein is over. The estate in this item contained, at the death of my said niece Emiline M. Chapman, shall pass to and become the property in equal shares of the children or representatives of children, including Joseph L. Chapman, the husband of the said Emiline M. Chapman." The testator died seized and possessed, among other properties, of a city lot in Gainesville, Hall county, Ga., and lots of land 26, 27, 28, 29, 30, 40, 47, and 14 in the Twelfth district of Hall county, Ga. When the will was probated Emiline M. Chapman had a daughter, Fannie Suddeth. On the assumption that she had a vested interest in these lands under the will, Fannie Suddeth executed to Quillian a bond for title, and afterward died, Emiline M. Chapman being still in life. After the death of Fannie, her husband and children as heirs at law received the agreed consideration specified in the bond for title, and executed a deed which, after reciting the bond for title and payment of the consideration to them, described the land as follows: "All the lands in Hall county, Georgia, of which Phil. M. Byrd, late of Hall county, deceased, died seized and possessed, being all the interest to which said Mrs. Fannie M. Suddeth had or may be entitled under the will of said Byrd, or which said Fannie M. Suddeth had or may be other-

wise entitled in and to said land, whether more or less than one-seventh, or which we as heirs at law as aforesaid have or may be otherwise entitled in and to said lands, whether more or less than one-seventh, including lots of land Nos. 26, 27, 28, 29, 30, 40, 47, and 14 in the Twelfth district of Hall county, Georgia, subject to the life interest of Emiline M. Chapman." The deed concluded as follows: "To have and to hold the said bargained premises * * * forever in fee simple. And the said parties of the first part, their heirs, executors, and administrators will warrant and forever defend the right and title of the above-described property unto the said party of the second part, his heirs and assigns, against the claims of all persons whomsoever." *Held:*

A deed to land is not void for uncertainty of description, if it furnishes the key to the identification of the land intended to be conveyed by the grantor. *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958; *Swint v. Swint*, 147 Ga. 467, 94 S. E. 571(2). Under this rule, when considered in connection with the will and extrinsic evidence identifying the land of which the testator died seized and possessed, the deed is not void for uncertainty of description. *Yopp v. A. C. L. R. Co.*, 148 Ga. 539, 97 S. E. 534; *Hayes v. Dickson*, 148 Ga. —, 98 S. E. 345.

(a) Properly construed, the deed conveyed all of the interest of the grantors in the land acquired under the will of the testator, including the lot in Gainesville.

(b) The requisites as to matters of description in a deed are the same whether based upon a valuable or a good consideration. Civil Code 1910, \S 4179.

2. ASSIGNMENTS OF ERROR.

The assignments of error relating to admissibility of evidence, so far as sufficient to present any question for consideration are without merit.

3. SUFFICIENCY OF EVIDENCE — ASSIGNMENTS OF ERROR.

The evidence was sufficient to authorize the jury to find for the defendant upon the issue of fraud, accident and mistake in the execution of the deed. The remaining assignments of error do not relate to the controlling questions in the case, and do not show cause for a reversal.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Action between J. H. Boyd and others and F. A. Sanders, executrix, and others. Judgment for the latter, and the former bring error. Affirmed.

W. B. Sloan, of Gainesville, O. R. Faulkner, of Bellton, and T. J. Shackelford and Jno. J. & R. M. Strickland, all of Athens, for plaintiffs in error.

H. H. Dean and W. A. Charters, both of Gainesville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(148 Ga. 854)

BARTLETT et al. v. TAYLOR et al.
(No. 940.)

(Supreme Court of Georgia. Feb. 24, 1919.)

*(Syllabus by the Court.)***1. RULINGS ON PLEA IN ABATEMENT AND DEMURRERS.**

The demurrer to the plea in abatement was properly sustained, and the court did not err in overruling the general and special demurrers to the petition.

*(Additional Syllabus by Editorial Staff.)***2. CORPORATIONS —557(1)—MARSHALING ASSETS—APPOINTMENT OF RECEIVER.**

A corporation as plaintiff cannot maintain an equitable suit to marshal its own assets, and the appointment of receivers under such a proceeding, over duly made objection of the stockholders and creditors, is error.

3. BANKS AND BANKING —225—RECEIVERSHIP—INJUNCTION AGAINST CREDITOR.

The directors of a solvent bank or a majority of them cannot have a receivership for the bank and its assets, an injunction against its creditors and other equitable relief, although the action in which such relief is sought may have been authorized by the directors and stockholders of the bank.

4. BANKS AND BANKING —77(2)—RECEIVERSHIP—LIABILITY OF STOCKHOLDERS—COLLATERAL ATTACK.

Where directors of bank, to prevent a run and to preserve its assets for its creditors and stockholders, petitioned for appointment of receivers, and bank, its stockholders, and creditors against whom injunctive relief was sought were made parties, such stockholders by collateral attack cannot question court's jurisdiction to appoint receivers and to marshal and distribute bank's assets.

5. BANKS AND BANKING —77(2)—RECEIVERSHIP—LIABILITY OF STOCKHOLDERS—ESTOPPEL.

Where bank directors, to prevent a run and to preserve assets for creditors and stockholders, petitioned for appointment of receivers, and the bank and stockholders were made parties, and assets were reduced to possession and distributed under order of court, the stockholders who had had benefit of receivership, when sued by receivers to enforce their liability for benefit of depositors under Civ. Code 1910, § 2249, could not first attack court's jurisdiction to appoint receivers, etc.

6. BANKS AND BANKING —77(6)—SUIT FOR RECEIVERSHIP—PARTIES—PRESUMPTION.

In entire absence of allegation to contrary of plea in abatement in receivers' suit against stockholders alleging that all stockholders were parties, court will assume that all stockholders were parties, duly served with process, or had actual notice of directors' suit for appointment of receivers, authorized to be brought against bank, its stockholders and others.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Suit by R. J. Taylor and others, receivers, against C. L. Bartlett and others. Demurrer to plea in abatement sustained, and general and special demurrers to petition overruled, and defendants bring error. Affirmed.

C. L. Bartlett, Roland Ellis, C. H. Hall, Jr., Hall & Roberts, and Noltingham & Holliman, all of Macon, for plaintiffs in error.

Miller & Jones and Hardeman, Jones, Park & Johnston, all of Macon, for defendants in error.

ATKINSON, J. [1] Taylor et al., as receivers of the Exchange Bank of Macon, brought suit against certain stockholders of that bank, to enforce, on behalf of unpaid depositors in the bank, the individual liability of the stockholders under the charter. The defendants, who appear as plaintiffs in error in this case, at the first term after which they were made parties to the litigation, filed a special plea in the nature of a plea in abatement, and demurred generally and specially to the petition. Many of the questions raised by demurrer in this case were adjudicated against the plaintiffs in error in the case of Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085. The grounds of demurrer not so adjudicated were ruled upon adversely to them in the case of Harris v. Taylor, 97 S. E. 860, except as hereinafter noted.

In the petition filed by the receivers it was alleged that they were appointed in the case of Schofield et al. v. Exchange Bank of Macon and others (including named creditor and the stockholders of the bank), commenced in the superior court of Bibb county on July 8, 1907; that the petitioners in that case alleged themselves to be a majority of the directors of the bank; that the cause so commenced is still pending; that the petition in that cause, of file in said court, is made a part of the record in this case; that the present petition is auxiliary to the main cause; and that petitioners, under authority and direction of the court, since August 20, 1907, have administered the assets of the bank. The further allegations of the petition are in substance set forth in the report of the cases of Lamar v. Taylor, supra, Turpin v. Taylor, 143 Ga. 224, 84 S. E. 547, and Harris v. Taylor, supra. It appears from the original petition in the case of Schofield et al. v. Exchange Bank of Macon et al., that the plaintiffs in that case were authorized by resolution of the directors to bring that action against the Exchange Bank, the stockholders, and the creditor named as defendant therein, for the appointment of receivers, for injunction against threatened suits, and for distribution of the assets of the bank to depositors, creditors,

and stockholders, according to their respective rights and priorities, as a necessary measure to prevent a "run" on the bank, which was alleged to be imminent, and the consequent wrecking of the bank, which was in fact solvent, according to the allegations there made.

The special plea, and so much of the demurrer not heretofore considered in the cases mentioned, raised the contention that the court was without jurisdiction and authority to appoint receivers for the Exchange Bank upon the petition of the directors thereof. It was insisted that the directors could not legally invoke the appointment of receivers to take charge of and administer the assets of the bank, a solvent corporation; that the duty of managing the affairs of the bank devolved upon the directors; that the appointment of receivers was null and void; and that the receivers had no legal right to administer the assets of said bank and to prosecute the present action. The court sustained a demurrer to the special plea, and overruled the general and special demurrer filed by the defendants, and they excepted.

[2-4] It is conceded that under the rule of force in this state a corporation cannot, as plaintiff, maintain an equitable suit to marshal its own assets, and that the appointment of receivers under such a proceeding, over the objection of creditors or stockholders, duly made, is error. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329, 24 S. E. 755; *Gresham v. Crossland*, 59 Ga. 270; *Martin v. Brown*, 129 Ga. 562, 569, 59 S. E. 302. It is also conceded that the directors of a solvent bank, or a majority of them, cannot have a receivership for the bank and its assets, an injunction against the creditors of the bank, and other equitable relief, although the action in which such relief is sought may have been authorized by the directors and stockholders of the bank. *Bank of Soperton v. Empire Realty, etc., Co.*, 142 Ga. 34, 82 S. E. 464. But where, as in this case, the directors of a bank, in order to prevent a run upon the bank and to preserve its assets for its creditors and stockholders alike, petition the court of equity for the appointment of receivers, and the bank itself, its stockholders, and creditors against whom injunctive relief is sought are duly made parties to the proceeding, such stockholders will not be heard to question, by collateral attack, the authority and jurisdiction of the court to appoint the receivers, and to marshal and distribute the assets of the bank.

[5] It will be noted that the receivers were appointed in 1907. Practically all the assets of the bank were reduced to the possession of the receivers so appointed, and by them distributed under orders of the court. Five years thereafter, the stockholders, who,

with one exception, were parties defendant in the case in which the receivers were appointed, invoked the decisions of this court cited above, and insisted that the court was without jurisdiction in the premises. The proceeding was undertaken primarily for the benefit of the stockholders. They had full notice and knowledge of the appointment of the receivers, and they cannot now be heard to question the jurisdiction of the court when they are called upon to pay to the receivers, for the benefit of depositors, the respective amounts for which they are liable under the charter. They cannot in such circumstances accept the possible benefit of the receivership, and at the same time deny the power and authority of the court to fully administer the assets of the corporation, including the charter liability of the stockholders, for the benefit of depositors. Had they interposed a timely objection to the appointment of the receivers, a different question would be presented. Attention is also called to the fact that these receivers, after having distributed practically all the assets of the bank, made application to the court for direction and authority with respect to filing the present suit against the stockholders. The petition was prepared and presented to the court, and in open court an order was passed directing and authorizing the receivers to file the same against the stockholders. At the date of this order the bank was admittedly insolvent; there were unpaid depositors; these depositors under the charter of the bank had the right to look to the stockholders for the payment of their deposits. Under Civil Code, § 2249, the charter liability of the stockholder is expressly made an asset of the corporation, to be recovered by the assignee, receiver, or other person having the legal right to enforce the same. To the date of the filing of the suit against the stockholders, under the order thus granted, no question was raised by any creditor or stockholder touching the jurisdiction of the court of equity to appoint receivers upon the application of the bank's directors and for the purposes hereinbefore indicated. Without regard to the character of the attack upon the authority and jurisdiction of the court, it must be held that the objection now comes too late.

[6] We have said that the stockholders here complaining, with possibly one exception, were parties to the original proceeding in which the receivers were appointed. We have thus conceded that one of the stockholders may not have been served with process in that suit. The record upon this question is, however, by no means clear. So far as appears from the allegations of the plea in abatement, all the complaining stockholders were made parties in the main case, and were duly served with process therein. In the entire absence of allegation to the con-

trary, we must assume that all the stockholders were parties and were duly served with process, or else had actual notice of the filing of the suit by the directors on behalf of the stockholders. We are of the opinion that the court did not err in sustaining the demurrer to the plea in abatement, and in overruling the general and special demurrers to the petition.

Judgment affirmed.

All the Justices concur.

(148 Ga. 857)

KLOPFER v. TAYLOR et al. (No. 1044.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

COMPANION CASE.

This case is ruled, upon the controlling issues, by the decision in the cases of Bartlett v. Taylor, 98 S. E. 491, this day decided, and Buttrill v. Taylor, 148 Ga. —, 97 S. E. 860.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Suit by R. J. Taylor and others, receivers, against F. L. Klopfer. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hall & Grice, of Macon, for plaintiff in error.

Miller & Jones and Hardeman, Jones, Park & Johnson, all of Macon, for defendants in error.

BECK, P. J. Judgment affirmed.

All the Justices concur.

(148 Ga. 817)

ROWE et al. v. GASKINS.

GASKINS v. ROWE et al.

(Nos. 999, 1000.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS Ⓒ388(5)
—VENDOR AND PURCHASER Ⓒ235—**BONA FIDE PURCHASER—PAYMENT OF PURCHASE PRICE—EVIDENCE.**

It is well settled that the actual payment, before notice, of the purchase price, is essential to the maintenance of the claim that one is a bona fide purchaser of property for value and without notice; and, applying that rule to the present case, as it should be under the evidence, the verdict directed by the court was the only one that could have been rendered under the facts contained in the record, and the court did not err in so directing.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Suit by P. H. Gaskins against M. Rowe and another. Judgment for plaintiff, and defendants except and bring error, and plaintiff takes a cross-bill of exceptions. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

E. K. Wilcox, of Valdosta, and J. P. Knight, of Nashville, for plaintiffs in error. Quincey & Rice, of Ocilla, and C. A. Christian, of Nashville, for defendant in error.

BECK, P. J. P. H. Gaskins brought his petition to recover certain lands and have certain deeds canceled against M. Rowe and against H. C. Reynolds as administrator de bonis non cum testamento annexo of the estate of John Reynolds. The petitioner showed, and it was not controverted, that John Reynolds became the owner of the property by a grant from the state of Georgia, and both Gaskins and Rowe derived title from John Reynolds. The petition shows a deed from John Reynolds, dated in 1839, to James M. Davison, and then a series of conveyances from Davison, finally vesting the petitioner with title. The defendants show that H. C. Reynolds became administrator de bonis non of the estate some 50 or 60 years after the date of the deed from John Reynolds to Davison, and an administrator's deed from H. C. Reynolds to defendant Rowe. The deed from John Reynolds to Davison was never recorded, and Rowe claims as a bona fide purchaser without notice of the deed from John Reynolds to Davison.

If Rowe was a bona fide purchaser for value from H. C. Reynolds without notice of the prior conveyance of John Reynolds, H. C. Reynolds' intestate, or if the evidence required the submission to the jury of the question as to whether he was a bona fide purchaser for value, the direction of the verdict was error. But we are of the opinion that the uncontroverted evidence shows that Rowe was not a bona fide purchaser. He took the deed under which he claims from the administrator of John Reynolds, who had been dead when H. C. Reynolds was appointed administrator, some 60 years after the death of John Reynolds and 25 years after the death of the executor named in the will of John Reynolds; and while the deed which he took from H. C. Reynolds recited a consideration of \$3,000, as a matter of fact he paid in cash \$5 and gave his note and a mortgage on the land for the remainder. In the petition it is charged that there was an understanding and an agreement between Rowe and H. C. Reynolds, the administrator de bonis non, that the remainder of the purchase money should not be paid in the event the title conveyed to Gaskins should not

stand the test of a lawsuit. There were one or two small payments made by Rowe after the first cash payment of \$5, amounting to some \$200. Rowe did not undertake to testify in the case to meet this charge, contained in the petition, that he was not to pay the balance of the purchase money unless it should appear in any litigation that should be instituted to recover the land that he had a valid title. Reynolds, however, was not entirely silent on this question. He testified on the trial, in part, as follows:

"Mr. Rowe has not paid me anything. I have never received anything for the lot of land; as far as the money transaction is concerned, I know nothing about what agreement was made, and could not refer to it intelligently. The matter was referred to Mr. Davison. He knew better than I do. I believe I had a letter from Mr. Rowe. I turned the letter over to Col. Davison. I corresponded with no one. I supposed Rowe was to pay for it; that was left up to my attorney. There was no understanding whatever on Rowe's part, but my understanding was that, if there was a lawsuit, and it was won, it would help me; if not, I would not be. About the other transaction I was ignorant. I understood that I would get something out of it, if it was won."

In view of such testimony, coming from the grantor in the deed to Rowe, the charge made in the petition, and the silence of Rowe at the trial, we think the court was authorized to assume as uncontroverted that there was an understanding between Rowe and the administrator that the place should not be paid for, if it should appear on the trial of any action brought to recover the land that Rowe did not have a valid title. Whether such agreement on the part of such administrator could have been set up as a defense by Rowe need not be decided. In the case of Colquitt v. Thomas, 8 Ga. 258, 278, it was said:

"When a purchaser goes into equity for relief against a prior incumbrance, upon the ground that he is a bona fide purchaser without notice, he will not be relieved, if he has notice before he pays all the purchase money, although he has paid a part. The rule in such a case goes thus far, to wit: Notice before actual payment of all the purchase money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding the money be actually paid, is equivalent to notice before the contract."

In the case of Whiddon v. Whiddon, 148 Ga. 255, 96 S. E. 431, it was said:

"In order to defeat the legal title in the plaintiffs, it was necessary, under the pleadings in this case, for the defendant to show that he was a bona fide purchaser for value without notice; and where it appears that he had not paid the

consideration, but at most had only paid a part of the consideration, before he received knowledge of the outstanding legal title, he could not occupy the position of an innocent purchaser for value, so as to entirely defeat the outstanding legal title. Whether under proper equitable pleadings he could have secured, and have had the court to frame, a decree which would have protected his interest, and interest proportionate to the part of the consideration which he had paid, need not be discussed, as he did not file equitable pleadings seeking to have such a decree framed and granted."

The counsel for the plaintiff in error insist that this rule, which deprives the subsequent purchaser of the position of a bona fide purchaser for value and without notice, where a prior purchaser had failed to record his deed, or did not record it for any reason, is not applicable to cases of sales by administrators, and they base this contention upon the ground that the doctrine of caveat emptor applies in administrators' sales, and that a purchaser with deferred payments of property at an administrator's sale would be compelled to comply with his contract of purchase. Without deciding whether, as a general rule, the doctrine that one who has not paid the purchase money for land does not occupy the position of a bona fide purchaser is applicable to administrators' sales, we think the doctrine is applicable to a sale made under the circumstances shown here, as against Rowe and the administrator; for Rowe, the court was authorized to hold, had taken a deed with the understanding that he would not pay the purchase money if it should appear that he did not get a good title. Under the uncontroverted facts shown in this record, we think the rule applies with all its force. As laying down the doctrine that the purchase money for land must be actually paid before notice, where one seeks to set up and maintain the character of a bona fide purchaser, see *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; *Barney v. McCarty*, 15 Iowa, 510, 83 Am. Dec. 429; *Trice v. Comstock*, 57 C. C. A. 647, 121 Fed. 620, (6) 61 L. R. A. 176; *Davis v. Ward*, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; *Macauley v. Smith*, 132 N. Y. 524, 30 N. E. 998; *Bell v. Pleasant*, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61; *Boone v. Chiles*, 10 Pet. 179, 9 L. Ed. 389; 3 *Washburn on Real Property*, § 2200. It follows from what has been said that the judgment refusing a new trial should be affirmed; and the judgment of the court below having been affirmed on the main bill of exceptions, the cross-bill of exceptions is dismissed.

Judgment on main bill of exceptions affirmed; cross-bill dismissed.

All the Justices concur.

(14' C. a. 828)

EISFELDT v. CITY OF ATLANTA et al.
(No. 780.)

(Supreme Court of Georgia. Feb. 24, 1919.)

*(Syllabus by the Court.)***1. INNKEEPERS — ROOMING HOUSE—LICENSE FROM MUNICIPALITY.**

The business of keeping a rooming house is one so far affecting the public health, morals, or welfare that it is competent for municipal authorities to require persons conducting such a business to obtain a license, where the Legislature in the exercise of the police power has conferred upon the municipality the necessary authority to pass ordinances upon this question.

2. INJUNCTION — EVIDENCE—REFUSAL TO GRANT LICENSE.

The evidence objected to in this case tended to illustrate material issues involved, and the court did not err in overruling the objections.

3. REFUSAL OF INJUNCTION.

There was no abuse of discretion in refusing an injunction.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action for injunction by Mrs. Julia Eisfeldt against the City of Atlanta and others. Judgment for defendants refusing an injunction, and plaintiff brings error. Affirmed.

J. H. Leavitt, Richard B. Russell, and Holbrook & Corbett, all of Atlanta, for plaintiff in error.

J. L. Mayson and S. D. Hewlett, both of Atlanta, for defendants in error.

BECK, P. J. Mrs. Julia Eisfeldt filed her petition against the city of Atlanta and the chief of police of that city, alleging as follows: She is a resident, and conducts a rooming house located at 135 Ivy street in that city. She holds the premises thus designated under a lease for a term of years, and pays an annual rental of \$1,380. She has spent a large sum in putting the premises in habitable condition and in furnishing the house, her savings for many years being invested therein; and she is unable to make a livelihood by any other business. She made application to the mayor and council of the city for permit to conduct a rooming house, which was referred to the police committee. Under ordinances of the city it is the duty of that committee to meet in the city hall on Thursday immediately before the regular meeting of the council, for the purpose of passing on such applications as are referred to it. On Thursday, September 13, 1917, the day upon which it was to meet, according to the ordinances of the city, the committee did not meet, and, although petitioner's attorney was present in the city hall and in

the room where said committee was to meet, she was not given an opportunity to present her application in person, or for a hearing in her behalf by said committee. At the regular meeting of the city council on September 17, 1917, J. Lee Barnes, chairman of the police committee, stated in open meeting of the council that the committee did not meet as required by law; and each member of the committee signed an adverse report on petitioner's application during the session of the said council on that date, and she was denied a permit to conduct the rooming house. At the time of making the application she tendered to the city clerk \$25, the fee for a license to conduct a rooming house, but it was refused. On September 18, 1917, she again made application for a permit to conduct a rooming house at 135 Ivy street, and again tendered to the city clerk \$25, the license fee required, and it was refused. She makes a continuous tender of the fee; she is willing at all times to comply with the laws and ordinances of the city of Atlanta, and is now ready to pay the license fee required by the city for permission to conduct the rooming house. On August 13, 1917, she was served with a summons to appear in the recorder's court in the city of Atlanta on the next day, to answer the charge of keeping and maintaining a rooming house without a permit. At that time her application was pending before the city council; and on September 5, 1917, when the case came on to be heard, the charge against her was dismissed. From time to time the members of the police department have invaded her home and premises at 135 Ivy street, without a warrant and without any reasonable cause therefor, and that the chief of police is continually threatening to arrest her for conducting the rooming house. To deny her the right to conduct the rooming house would cause her great and irreparable damage and loss of the money she has invested; and unless the acts and conduct of the defendants be restrained, they will deprive her of her property without due process of law, and deny to her the equal protection of the laws. Waiving discovery, she prays that the city and the chief of police, as well as their subordinates, be enjoined and restrained from interfering with or disturbing her in the peaceful maintenance of the rooming house, and from going in or about said premises without a warrant issued according to law, and for general relief. When the case came on for a hearing the trial court refused the injunction.

[1] 1. We are of the opinion that the court did not err in refusing to grant the injunction in this case. Evidence was introduced tending to show that the rooming house conducted by the plaintiff was of a disorderly character, and that she maintained it for immoral purposes. Numerous affidavits were

introduced by her, tending to show that the house conducted by her was not a disorderly house, and that it was not conducted in such a way as to violate the law. The evidence made an issue of fact, and therefore an issue for determination by the court hearing the case, who determined it adversely to the plaintiff.

It is cogently urged in the brief of counsel for the plaintiff that operating a rooming house is a useful, and per se a perfectly lawful, occupation and business, and that the city of Atlanta has no discretion as to granting or refusing licenses to operate a useful and per se lawful business. Among other cases cited to support this position is that of *Peginis v. Atlanta*, 132 Ga. 302, 63 S. E. 857, 35 L. R. A. (N. S.) 716. The question of revoking a license which had been granted the proprietor of a restaurant was involved in the *Peginis* Case, and upon other facts it differs from the branch of the instant case now under consideration. Substantially the same question as that here involved was decided in *Cutsinger v. Atlanta*, 142 Ga. 555, 83 S. E. 263, L. R. A. 1915B, 1097, Ann. Cas. 1916C, 280, thus:

"The business of keeping a hotel, lodging house, or rooming house is one so far affecting the public health, morals, or welfare that it is competent for the Legislature, in the exercise of the police power, to authorize municipal authorities to require persons conducting such a business to obtain a license."

The full discussion in the *Cutsinger* Case of the question involved renders further discussion here unnecessary.

It is also argued in the brief that no ordinance requiring one to obtain a license to maintain a rooming house was introduced in evidence; and that for this reason the court erred in deciding adversely to the plaintiff. We do not think there is any merit in this contention. It is true that neither the ordinance nor a duly certified copy thereof was introduced in evidence; and usually, in order to show the existence of an ordinance, it is necessary that there should be proof of the same. This rule should not be applied with strictness in this court, because, both under the pleadings and the evidence of the plaintiff, while it is not distinctly stated that there was an ordinance requiring one to obtain a license for the purpose of conducting a rooming house, the existence of the ordinance is distinctly recognized in the plaintiff's petition and in certain parts of the evidence introduced by her, and the existence of the ordinance was not contested on

the trial. It is recognized in the petition itself, though not plainly alleged to exist, for the petitioner does show that she made application to the mayor and council of the city for a permit to conduct a rooming house, "and that the said permit was, in the ordinary course, referred to a committee of council, known as the police committee." Again, it is alleged in the petition that "under the ordinances of the city of Atlanta, it is the duty of the said police committee to meet in the city hall on the Thursday immediately before the regular meeting of council, for the purpose of passing on such applications as are referred to it." And in more than one place it is alleged that petitioner "tendered to the city clerk of the city of Atlanta the sum of \$25, the fee for a license to conduct such rooming house." It is nowhere in the petition alleged that no such license is required by ordinance, nor that the ordinance requiring the fee is invalid.

We are further of the opinion that the evidence does not show that the ordinance in regard to licenses which are to be secured by those seeking to engage in the business of conducting rooming houses is being administered in an arbitrary manner. The application for the license in question is referred to a committee in due course, as appears from the petition itself; and in the present case the chairman of the police committee, in his affidavit, denies that he had stated that his committee did not meet according to law. If, as a matter of fact, the committee and the chairman of the committee acted in an arbitrary manner in regard to the application of this petitioner, steps should have been taken to compel the committee to give the applicant an opportunity of making a showing, if any question should arise as to her being a suitable person to obtain such permit; but she could not, because of the failure of the committee, in the particular instance alleged, to have a meeting and grant her permit, operate a rooming house, for which an ordinance required her to obtain a license, without becoming subject to the penalties imposed by the ordinance.

[2,3] 2. Error is assigned upon certain rulings in admitting, over objection, evidence tending to illustrate the issue as to whether or not the permit to run the rooming house should have been granted upon the application of the petitioner; but we are of the opinion that this evidence was properly admitted.

Judgment affirmed.

All the Justices concur.

(148 Ga. 458)

FRANK v. McEACHIN. (No. 959.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

HUSBAND AND WIFE $\S 49\frac{1}{2}$ (2,6) 185—SALE OF WIFE'S SEPARATE ESTATE—JURISDICTION OF JUDGE OF CIRCUIT COURT — "DEED OF GIFT."

A contract by a wife to sell her separate estate to her husband is void unless it is allowed by order of the superior court of the county of her domicile. The judge of the superior court of the county of the wife's domicile has no jurisdiction to grant such an order in vacation, and a contract of sale made in pursuance of such vacation order is void.

A wife may give her separate estate to her husband without an order of the superior court; but such a gift will not be presumed. To establish it the evidence must be clear, unequivocal, and free from doubt that the parties intended the transaction to be a gift.

Proof merely that an instrument purporting on its face to be a warranty deed consummating a sale, for a stated consideration, by a wife to her husband, of land constituting her separate estate, and made under a vacation order of a judge of the superior court, was without consideration; would not convert it into a "deed of gift."

In this case there was no evidence of a clear and unequivocal character showing the intention of the parties, free from doubt, that the transaction between the wife and the husband was a gift from her to him of the land in controversy.

The action being to recover land, and against a widow, the maker of an instrument as referred to above, which was the only title under which the plaintiff claimed, the judge, under the legal principles hereinbefore announced, and on the evidence submitted, properly refused, on a preliminary hearing, to grant an interlocutory injunction, and to appoint a temporary receiver.

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

Action by E. A. Frank against A. E. McEachin for an injunction and a receivership. From a judgment refusing a temporary injunction, and the appointment of a receiver, plaintiff brings error. Affirmed.

Jno. C. Bennett, of Hazlehurst, and C. H. Parker and W. W. Bennett, both of Baxley, for plaintiff in error.

C. B. Conyers, of Brunswick, and Jno. Rogers, Jr., of Hazlehurst, for defendant in error.

FISH, C. J. This is an action brought by Edward A. Frank against Angel E. McEachin for the recovery of several parcels of land, and for an injunction and a receivership. On an interlocutory hearing the plaintiff submitted evidence in brief as follows: (1) A conveyance in the form of warranty deed

dated April 25, 1905, from Mrs. Angel E. McEachin to G. W. McEachin, her husband, for an expressed consideration of a stated sum of money, the receipt of which was acknowledged in the instrument, which contained a recital that the land "is sold in pursuance of an order of court and attached hereto and made a part of this deed, which is true." Attached to the instrument is a petition to the superior court of the domicile of Mrs. McEachin, signed by an attorney purporting to represent the petitioner, and praying for an order allowing petitioner to sell the land described in the deed to which the petition is attached for the consideration therein named. On April 24, 1905, "at chambers," the judge ordered that the petitioner be "allowed to sell the land described in her petition, for the consideration named, to her husband, G. W. McEachin," and that the petition and order be recorded with the deed. (2) A security deed dated January 12, 1912, from G. W. McEachin to the Union Savings Bank of Richmond county, Ga., executed to secure a loan from the bank to the grantor, with a power of sale to the grantee if the note for the loan should not be paid. (3) A written transfer of the security deed, February 13, 1912, by the bank to George J. Babson, with all the rights of the bank under the security deed. (4) A deed dated February 5, 1918, from Babson to Frank, the plaintiff, made in accordance with a sale of the land under the power in the security deed. (5) Certain allegations made in a petition of Mrs. Angel E. McEachin against Babson et al., brought on May 1, 1915, to the effect that she was compelled and coerced by her husband to execute the deed from her to him, dated April 25, 1905, and that such deed was without any consideration of any sort paid or promised to be paid by him to her. (6) An allegation in a petition brought by Mrs. Angel E. McEachin against Wesley White et al., on September 21, 1914, as follows:

"Petitioner shows that she holds said lands under the permission of her husband, G. W. McEachin, who is helpless from infirmity, and that she made the rent contract with the defendants; and that the said Whites, under the terms of said contract, are share croppers."

This allegation was verified by Mrs. McEachin. (7) The testimony of Mrs. McEachin, given on the trial of an action brought by her against the Union Savings Bank et al., prior to the institution of the present suit, to the effect that she never employed the attorney who prepared and presented the petition to the judge for the sale of her land to her husband; that she was not acquainted with such attorney, and had never seen him. "I just signed it [the deed from her to her husband] for nothing, so far as receiving anything is concerned. I signed it because

he told me to sign it. No other reason prompted me to sign it. I signed it because he told me to. I didn't want to sign it. * * * I was unwilling to sign it, and didn't want to sign it; but he told me to sign it, and I signed it."

The defendant testified to the effect that the land was hers; that she and her husband moved upon it about 1897 or 1898; that she lived on it with her husband until his death in January, 1915; that she had remained in possession of it as her own property since his death; and that the statement made in her case against the Whites was written by her attorney, and she did not understand the effect thereof.

The plaintiff in an action for land must prove title in himself. This the plaintiff in the present case undertook to do by the evidence hereinbefore set out. As will be seen, he claimed title under the defendant, Mrs. McEachin, and sought to prove that she conveyed the land in dispute to her husband; that he conveyed to the bank by the execution of a security deed to it; that the bank transferred the security deed and all rights it had thereunder, as well as the note secured thereby, to Babson; and that Babson, in accordance with the power given in the security deed, sold the land and conveyed it to the plaintiff, Frank. Civil Code, § 3009, provides:

"No contract of sale of a wife as to her separate estate with her husband or her trustee shall be valid, unless the same is allowed by order of the superior court of the county of her domicile."

This court has held that the authority to order such sale is conferred on the superior court, and not upon the judge of that court in vacation, and consequently that an order granted in vacation to the wife to sell her separate estate to her husband is void. *Roland v. Roland*, 131 Ga. 579, 62 S. E. 1042 (4). It follows that the conveyance from Mrs. McEachin to her husband was void as a deed of "bargain and sale," the order allowing the wife to execute it having been granted in vacation. The plaintiff contended that, as it appeared from the evidence that such deed was without any consideration, it was valid as "a deed of gift," and that no order of the court was necessary to authorize a wife to give her separate estate to her husband. "A wife may give property to her husband, but a gift will not be presumed. The evidence to support it must be clear and unequivocal, and the intention of the parties must be free from debt." Civil Code, § 3010. Certainly there was no clear and unequivocal evidence to support the contention that the deed from Mrs. McEachin to her husband indicated that the instrument showed that she intended to give the land convey-

ed to him. Nor can it be successfully urged that there was any evidence showing that to be the intention of the parties, much less that such intention was shown by the evidence to the extent of being free from doubt. The mere fact that there was no consideration for the execution of the instrument did not convert it from a deed of "bargain and sale," as it appeared on its face to be, to a "deed of gift" from the wife to the husband.

As the only title upon which the plaintiff relied originated in the deed from Mrs. McEachin to her husband, and as his title necessarily depended upon the validity of that conveyance, and it appearing from what we have said that that instrument was not valid, either as a "deed of bargain and sale" or as a "deed of gift," the plaintiff utterly failed to show title in himself to the premises in dispute.

The judgment refusing to grant a temporary injunction and to appoint a receiver indicates that his honor, the trial judge, entertained views similar to those we have hereinbefore expressed; and we, therefore, hold that he did not err in rendering such judgment.

Judgment affirmed. All the Justices concur.

(148 Ga. 847.)

UPMAGO LUMBER CO. v. MONROE & CO.
(No. 844.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. INJUNCTION \S 119—LANDLORD AND TENANT \S 22(1)—SALES \S 68—BREACH OF CONTRACT—ACTION FOR DAMAGES—CONSTRUCTION.

Monroe & Co. entered into a written contract with the Upmago Lumber Company for the purchase of certain machinery for the equipment of a sawmill to be located and operated at a place accessible to timbered lands of the Upmago Lumber Company, and for the advancement of money necessary to the installation of the plant, agreeing to saw lumber for the Upmago Lumber Company at certain scales of prices. After the mill had been located and operated for more than eight months, a third person, who had advanced supplies to Monroe & Co., foreclosed his lien and caused a levy to be made upon the sawmill property. The Upmago Lumber Company replevied the property, and offered to turn it over to Monroe & Co., and requested that they continue operation of the mill in terms of the contract. On the contention that Monroe & Co. declined the offer and voluntarily surrendered the property, and relinquished all of their rights therein, the Upmago Lumber Company took charge of the mill and operated it. Shortly thereafter the Upmago Lumber Company negotiated a sale to another person; and when the sale was about to be consummated, the members of the firm

of Monroe & Co., who had been employed by the Upmago Lumber Company to operate the mill, asserted that they were in possession by their own right, and that the property could not be sold without their consent. The Upmago Lumber Company filed suit to enjoin Monroe & Co. from asserting any claim to the property or interfering with the plaintiff's possession, and to recover a balance due on account of moneys advanced to Monroe & Co. The defendants filed an answer, admitting that they had refused to continue to operate the sawmill, alleging that this was because the plaintiff had failed to carry out its contract, and denying that they had yielded their rights to the possession of the property under the contract; and answering further, by allegations in the nature of a cross-petition, among other things they set up a demand for money supplied by them that went into improvement of the property, and for damages for alleged breach of the contract upon the part of the plaintiff. At an interlocutory hearing the judge granted a temporary injunction as prayed, on condition that the plaintiff execute a bond conditioned to pay any judgment that might be rendered in favor of the defendants on their cross-demand. By amendment to the answer, filed after the plaintiff had given a bond as provided in the order of the judge, concluded with a prayer that the defendants have judgment "against plaintiff and against the surety on their bond given in this matter," for a stated amount of money. The plaintiff filed a demurrer to the original answer of the defendants, and renewed the demurrer to the answer as amended. The court overruled the demurrer, and the plaintiff filed exceptions pendente lite. On the final trial the jury rendered a verdict in favor of the grant of an injunction as prayed, and awarding to the defendants a stated sum on their cross-petition. The plaintiff made a motion for new trial, which was overruled. Error was assigned upon the exceptions pendente lite, and upon the judgment refusing a new trial.

The contract, so far as material to be stated, was as follows: "For and in consideration hereinafter named the following agreement is entered into: That the party of the first part (Hugh T. and Fuller Monroe, trading as partners under the firm name of Monroe & Co.) agrees to purchase a sawmill outfit which * * * includes the sawmill and all fittings, two engines, lath mill, etc., but no boiler, at the price of \$1,750, where it now stands. This mill is to be moved and put up at the company's siding, Fla., or near there, which erection of mill Hugh T. Monroe will supervise. The Upmago Lumber Company will pay the expenses of erecting the mill plant, which will be added to the purchase price; said Monroe & Co. to pay \$1,000 cash and for the balance to execute mortgage on the property and other property, notes bearing interest at 8 per cent., being \$150 per month notes. Upmago Lumber Company agrees to furnish one 150 H. P. boiler and big surfacer machine, the boiler being at Cheraw at present, and the Upmago Lumber Company will pay the expense of erecting the big machine at the plant in Florida. And the said Monroe & Co. hereby agree to operate the sawmill and saw lumber, cutting the timber economically and loading it on cars of the railroad company that

the proposed tramroad connects with, at the following prices: [Follows a schedule of prices.] The timber that Monroe & Co. agree to cut under this contract is all the timber that the Upmago Lumber Company now owns, or may hereafter purchase within one and one quarter miles of the A. C. L. R. R., or the Fla. Central Road, within ten miles of the mill. * * * Also the timber Upmago Lumber Company now owns or may own within one and one quarter miles of proposed tramroad running west from the railroad eleven miles, or all east of the Beachton and Amonia road. Said Monroe & Co. are to stand any rejections of lumber they ship, including freight, which is not in accordance with orders furnished them; they also agree to operate the sizing machine (the machine being owned by the Upmago Lumber Company, the boiler also being owned by the Upmago Lumber Company). Monroe & Co. * * * hereby release from the Upmago Lumber Company the tramroad mentioned above, a locomotive and cars to do their logging with. * * * It is understood and agreed that said Monroe & Co. are to keep the planing machine, locomotive and cars and boiler, and tramroad in repair, and to return same after the expiration of this contract in good running order except ordinary wear and tear. In case either boiler, that is, locomotive or sawmill boiler, give out, become useless, when same is not the fault of Monroe & Co., Upmago Lumber Company will replace same. * * * In the event that said Monroe & Co. cannot or do not comply with the terms of this agreement, unless it is caused by an act of providence, the Upmago Lumber Company, on three days' written notice, may take charge of the operations and conduct the same; the intent of this clause being to prevent the operations being tied up indefinitely by sickness, death, or financial troubles. The Upmago Lumber Company is to build the main line of the tramroad out as far as necessary to handle the timber that the Upmago Lumber Company now owns. In the event that it is desirable to build spur tracks from the tramroad, Monroe & Co. are to build same, Upmago furnishing only the rail, spikes, frogs, switches, etc. It is understood and agreed that the timber cut by Monroe & Co. shall be cleaned up to all trees 12" in diameter at the stump, 18" from the ground, and all laps that will make a 6x8-12' or over." Held:

1. The defendants' answer in the nature of a cross-petition as finally amended, is to be construed as setting up a demand for damages on account of the breach of the contract, and not a suit for the recovery of the property. The contract contemplates a sale of the sawmill outfit, except specified parts of the machinery to be used therein, and a lease of the tramroad and its equipment.

2. DAMAGES \S 40(2) — SUIT BY LESSEE OF TRAMROAD—REMOVEDNESS.

Where the lessor in pursuance of the contract furnished a tramroad, engine, locomotive, and cars, and the lessees accepted and used them in their business, a claim for damages by the lessees, based upon the alleged defective condition of the road and its equipment, for alleged profits which the lessees would have earned in operating the mill if the tramroad and equip-

ment had been in good condition, was too remote and speculative to be the basis for recovery. Civ. Code 1910, § 4394; Willingham v. Hooven, 74 Ga. 234 (3), 58 Am. Rep. 435.

3. DAMAGES ¶117—BREACH OF CONTRACT—MEASURE.

Treating the cross-demand as for a breach of the contract, the measure of damages for the alleged breach in taking so much of the sawmill outfit as was owned by the defendants should be upon the basis of the fair market value of that property at the date it was taken, and not for any amount of money that may have been advanced by Monroe & Co. for the equipment, maintenance, or improvement of the property. Demands of the character last mentioned were set up in the answer, and the judge erroneously instructed the jury in regard to considering this in determining the amount of damages recoverable by the defendant. The measure of damages applicable as above stated would also apply to the value of buildings and other appurtenances erected by the defendants as a part of the sawmill outfit.

4. ASSIGNMENTS OF ERROR.

The foregoing rulings dispose of the controlling questions so far as properly made; and it is unnecessary to pass upon any other assignment of error presented by the record.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Suit for injunction by the Upmago Lumber Company against Monroe & Co., with cross-petition by defendant. Temporary injunction granted on condition, demurrer to answer overruled, verdict for plaintiff, awarding defendants a certain sum on a cross-petition, motion for new trial overruled, and plaintiff excepts and brings error. Reversed.

John P. Knight, of Nashville, and Clifford E. Hay, of Thomasville, for plaintiff in error.

Merrill & Grantham, of Thomasville, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., disqualified.

(148 Ga. 822)

BARNES v. WATSON, Tax Collector, et al. (No. 774.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. TAXATION ¶611(6) — VALUATION — ARBITRATION—EVIDENCE.

Upon consideration of the evidence and the pleadings it does not appear that the petitioner in this case was denied the right of arbitration upon the question of the valuation of his property, which had been assessed by the county board of tax assessors at a higher valuation

than that placed upon it in the return made by petitioner to the tax receiver.

2. CONSTITUTIONAL LAW ¶229(3), 284(1)—TAXATION ¶452 — DUE PROCESS — EQUAL PROTECTION OF THE LAWS.

The sixth section of the act of August 14, 1913 (Acts 1913, p. 127), relative to the duties of county boards of tax assessors created by that act, and providing for notice to any taxpayer whose returns have been increased, and for arbitration in case of dissatisfaction of a taxpayer with the action of the board, and for a decision by a majority of the arbitrators fixing the final assessment of the property, except so far as the same may be affected by the finding of the state tax commissioner, is not repugnant to the due process clause of the Constitution of the United States, as contained in the Fourteenth Amendment; nor is it obnoxious to the due process clause of the Constitution of the state of Georgia; nor does it deprive the taxpayer of the equal protection of the laws.

(a) Questions raised as to the constitutionality of those portions of the act, which relate to and define the powers and duties of the state tax commissioner, are not determined, as they are not involved under the facts of this case.

(b) Upon review of the decision of Vestel v. Edwards, 143 Ga. 368, 85 S. E. 187, the request that it be overruled is denied.

3. TAXATION ¶40(6)—UNIFORMITY—CONSTITUTIONALITY OF STATUTE.

The tax equalization law is not unconstitutional on the ground that it is in conflict with article 7, § 2, par. 1, of the Constitution of Georgia (Civ. Code 1910, § 6553), which declared that all taxation shall be uniform upon the same class of subjects, etc.

4. TAXATION ¶312—APPOINTMENT OF ASSESSORS—"COUNTY OFFICERS"—ELECTION.

That part of the act which provides for the appointment of county boards of tax assessors is not unconstitutional on the ground that it is in conflict with article 11, § 2, par. 1, of the Constitution of Georgia (Civ. Code 1910, § 6599), which declares that county officers shall be elected by the qualified voters of their respective counties. The members of the board are not "county officers," within the meaning of that expression, as used in the section of the Constitution last referred to.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County Officer.]

5. TAXATION ¶312—APPOINTMENT OF COUNTY BOARD OF TAX ASSESSORS—VALIDITY.

The appointment of the board of tax assessors of McDuffie county by the ordinary was legal and proper under the law.

Error from Superior Court, McDuffie County; H. O. Hammond, Judge.

Suit for injunction by J. M. Barnes against W. A. Watson, Tax Collector, and H. T. Clary, Sheriff. Interlocutory injunction refused, and plaintiff excepts and brings error. Affirmed.

J. Glenn Stovall and J. B. Burnside, both of Thomson, for plaintiff in error.

Clifford Walker, Atty. Gen., Jno. C. Hart, of Atlanta, John T. West, of Thomson, and H. J. Fullbright, of Waynesboro, for defendants in error.

BECK, P. J. John M. Barnes brought his petition against W. A. Watson, tax collector, and H. T. Clary, sheriff, seeking to enjoin the collection of a tax *fi. fa.* issued against him for state and county taxes for the year 1915. In the petition it is alleged as follows: On May 4, 1915, petitioner returned his property for taxation for that year at a stated valuation. This return was regularly made pursuant to law, and was delivered to the tax receiver of the county, who delivered it approved to the board of tax assessors of the county; and the board increased the valuation given in his return, and assessed his property for taxation at the increased valuation. Within ten days from the date on which he was served with notice of the increase, being dissatisfied with the action of the board, he filed his protest and demanded an arbitration, as provided by the act approved August 14, 1913 (Acts 1913, p. 123), entitled "An act to regulate the return and assessment of property for taxation in this state," etc. Subsequently the board notified him of the selection by them of an arbitrator, and a time of meeting was appointed for the arbitration within ten days from the naming of the arbitrator chosen by the board. At the time named the petitioner and his arbitrator were present to proceed with the arbitration, but the arbitrator named by the board would not act, giving some frivolous excuse for continuing the matter, and failed and refused to act at any time within the ten days, though petitioner's arbitrator stood ready to proceed with the arbitration at any and all times. After the expiration of ten days from the date of his selection the arbitrator chosen by the board informed the arbitrator selected by the petitioner that the time allowed by law for arbitration had expired, and he declined to arbitrate the matter, for that reason; and so no arbitration was had, and petitioner was denied the right thereof through no fault of himself or of the arbitrator selected by him. It is charged that the assessment made by the board of tax assessors was null and void on account of denial to petitioner of the right of arbitration; that the assessment was illegal and void, for the reason there is a board of commissioners of roads and revenues in McDuffie county, who are the legal advisers of the ordinary, and the ordinary appointed the members of the board of tax assessors without the advice of the board of county commissioners; that the act of August 14, 1913, is void for reasons stated, because it conflicts with specified portions of the state and federal Constitu-

tions (see headnotes). The petitioner tendered the tax due according to the valuation of the property made in his return, but the tax collector refused to receive this, and issued *fi. fa.* based upon the increased valuation.

At the hearing, after evidence was submitted, the court refused an interlocutory injunction, and the petitioner excepted.

[1] 1. The court below did not err in adjudging adversely to petitioner upon the issue presented by his allegations that he had been denied the right of arbitration so as to contest the increased valuation made by the board of tax assessors. The board appointed an arbitrator, and the taxpayer appointed one. These two arbitrators could not agree on the valuation; and the court was authorized to find from the evidence that the arbitrator named by the petitioner capriciously refused to agree on an umpire, and it does not appear that any effort was made by petitioner to avail himself of the remedy provided by law, whereby the ordinary or the county commissioners, as the case may be, can appoint an umpire in case of disagreement of the arbitrators, thereby securing a hearing without delay. This question was ruled on in the case of *Vestel v. Edwards*, 143 Ga. 368, 85 S. E. 187.

[2] 2. In *Vestel v. Edwards*, supra, it was held:

"An act of the Legislature, which has for its object the equalization of taxation by means of a just and fair assessment of property returned for taxation, and which provides for notice to any taxpayer whose returns have been increased, and that if he is dissatisfied with the action of the county board of tax assessors in assessing the value of his property for taxation he may demand an arbitration of the question of the valuation of the property returned for taxation, and which provides that in case of disagreement as to the selection of an umpire the ordinary or the county commissioners, as the case may be, shall appoint one, and the arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board, is not repugnant to the due process clause of the Constitution of the United States as contained in the Fourteenth Amendment. (a) Nor is it obnoxious to the due process clause of the Constitution of the state of Georgia. (b) Nor does it deprive the taxpayer of the equal protection of the laws."

The decision in the *Vestel Case* is controlling upon the contention made by the petitioner that the tax equalization act is unconstitutional, in that it provides for arbitration in case the taxpayer is dissatisfied with the assessment of the value of his property by the board of tax assessors, and prohibits any right of appeal from the finding of the arbitrators, and provides that if no arbitration is had under the provisions of the act the valuation fixed by the board shall be binding and final. Substantially the same contentions were made in the case cited, and

the decision thereof settles this part of the controversy adversely to the plaintiff.

The contention that the tax equalization act is unconstitutional and void because of its provisions as to the duties and powers of the state tax commissioner, in that there is no provision for notice to a taxpayer in the event of an increase of the valuation of property by order of the commissioner, or by arbitration between the commissioner and the county board of tax assessors, will not be determined in this case for the reason stated in the Vestel Case, where substantially the same contention was made; it being ruled there that questions based upon constitutional grounds which relate to the duty of the state tax commissioner, "who, so far as the record shows, has not exercised any of the duties imposed upon him by those sections of the act, * * * and therefore, whatever" might be decided "relatively to that officer, or his duties under the act, would be moot."

And it was added that until that officer has exercised the authority conferred upon him by the act to the detriment of the plaintiff, the latter could not attack the act with respect to the authority conferred upon him.

Upon review of the case decision in Vestel v. Edwards, supra, the request that it be overruled is denied. See Turner v. Wade, 147 Ga. 666, 95 S. E. 220.

[3] 3. The plaintiff raises the further contention that the tax equalization act is unconstitutional because in conflict with article 7, § 2, par. 1, of the Constitution of Georgia, which provides that all taxation shall be uniform. There is no merit in this contention. See Columbus So. Ry. Co. v. Wright, 89 Ga. 574, 15 S. E. 293.

[4] 4. The board of tax assessors, which is to be established in every county is a part of the machinery created by the legislative power of the state to equalize the burdens of taxation, and for collecting the revenues due the state and the county; and while it is provided that the members of the board shall be residents of the county in which they are appointed, they are not county officers in the sense in which that word is used in the Code section providing that county officers shall be elected by the qualified voters of their respective counties.

[5] 5. It is further contended in this case that the assessment made by the county board is void, because the members of the board were appointed by the ordinary and not by the commissioners of roads and revenues. The portion of the tax equalization law relating to the appointment of the county board of tax assessors provides that they shall be appointed by the board of county commissioners; and that if there is no board of county commissioners in a given county, the tax assessors shall be appointed by the ordinary of that county. By an act of the General Assembly, entitled "An act to create a board of commissioners of roads and revenues for the

county of McDuffie, and for other purposes," approved August 24, 1872 (Acts 1872, p. 477), it is provided that the commissioners elected under the provisions thereof "shall be the legal advisers of the ordinary in all matters relating to the revenue and taxes for county purposes, public bridges, public roads, and county matters generally; and a majority shall determine all questions." This is the only part of the act of 1872 defining the duties of the commissioners of McDuffie county. It is provided in the Constitution of the state that the Legislature may define the duties of the board of commissioners for any county, and in the county of McDuffie it would seem that the commissioners have no other duty than to act in an advisory capacity. On the trial of the case the ordinary testified that he "was ordinary of McDuffie county, Ga., at the time of the appointment of the board of tax assessors of said county, and as such ordinary he was in absolute and sole charge of the management of county affairs; that he assessed the taxes, directed the working of public roads, the building and repairing of public bridges, and had charge of the property of the county generally; that he attended to all duties pertaining to the office of ordinary; that his predecessors in office had had similar charge of county affairs, and that the board of roads and revenues as created by the act of August 24, 1872, has never managed any of the county affairs or had direction in county matters, except when the ordinary desired to consult them in merely an advisory capacity; that the various ordinaries of said county have always managed county affairs without any direction from said board of roads and revenues, the affairs having been always absolutely controlled as deemed best by the ordinary alone, who was in no wise bound by the views of said board of roads and revenues.

We are of the opinion that it is giving a proper construction to the provisions of the act of 1872, relating to the commissioners of McDuffie county, to hold that the ordinary had the power to appoint the county board of tax assessors; and whether or not it was proper for him to obtain the advice of the county commissioners, the fact that he acted without that advice would not render his appointment vain and nugatory. It seems clear that where the county has no other commissioners than those who can act only in an advisory capacity to the ordinary, these are not such commissioners as fall within the meaning of that part of the act of August 14, 1913, relating to the appointment of the county board of tax assessors. When the Legislature enacted the tax equalization law, and provided therein that the county board of tax assessors should be appointed by the county board of commissioners in counties where there were commissioners, it must have had in view counties which had commissioners with some actual authority to

transact the business of the county and to manage its affairs in the ordinary way in which it is done by boards of county commissioners, and did not have in view those counties with commissioners vested merely with the right to advise. The expression, "and a majority shall determine all questions," which follows the definition of the powers conferred upon the commissioners of McDuffie county, evidently means that a majority of those commissioners shall determine all questions arising as to the advice which they shall give the ordinary, and leaves that officer as the actual agent of the county in managing its affairs within the sphere of duties pertaining to an ordinary where there are no commissioners.

Judgment affirmed.

All the Justices concur.

(148 Ga. 724)

GROOVER et al. v. WILKES. (No. 877.)

(Supreme Court of Georgia. Feb. 14, 1919.)

(Syllabus by the Court.)

1. NEW TRIAL \S 18, 26—PLEADING \S 254—
DEMURRER—ABSENCE OF PARTIES.

Where a petition was brought to recover a described tract of land and to cancel a deed thereto which contained a condition subsequent, and by amendment it was alleged that there were outstanding a quitclaim deed to one of the defendants to the action and a deed from a sheriff conveying the land in controversy to the grantor in the quitclaim deed, and it was prayed that the quitclaim deed and the sheriff's deed be canceled, and where upon the trial evidence was adduced to support this amendment, the fact that the grantors in the quitclaim deed and the sheriff's deed were not made parties is not a ground for a new trial after verdict in favor of the plaintiff, no objection to the allowance of the amendment having been raised by demurrer or otherwise.

(a) The objection that the amendment set forth no valid ground for the cancellation of the two deeds should have been urged by demurrer. Defects in pleadings cannot be taken advantage of in a motion for a new trial.

2. CANCELLATION OF INSTRUMENTS \S 51—
CONDITIONAL DEED—CONSTRUCTION—FORFEITURE.

Under the evidence there was no error in giving the jury instructions as to the effect of the mental condition of the plaintiff's intestate, the grantor in the conditional deed, upon his failure to act in regard to declaring a forfeiture by reason of a failure of the grantee to comply with the condition subsequent in the deed, conveying the land to him.

3. HARMLESS ERROR—INSTRUCTION.

The charge upon the subject of notice to one of the defendants as to the failure upon the part of the grantee in the conditional deed to

comply with the condition did not contain error in any way hurtful to the movant.

4. EVIDENCE \S 271(1)—SELF-SERVING DECLARATION.

The court did not err in excluding from evidence a self-serving declaration by grantee, tending to show that he was complying with the condition in the deed.

5. NEW TRIAL \S 35—EXCLUSION OF MATERIAL EVIDENCE—PROVINCE OF JURY.

The exclusion of relevant and material evidence is ground for the grant of a new trial; it being the province of the jury, and not of this court, to say what weight the evidence should have.

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Suit by Mrs. A. C. Wilkes, as administratrix of the estate of J. W. Groover, against J. J. Groover and another. Verdict and judgment for plaintiff, motion for new trial overruled, and defendants bring error. Reversed.

See, also, 138 Ga. 407, 75 S. E. 353.

Mrs. A. C. Wilkes, as administratrix of the estate of J. W. Groover, brought her petition against J. J. Groover and J. C. Groover, to recover certain land and to cancel deeds, and for other equitable relief. The plaintiff's intestate had conveyed the land in controversy, by warranty deed, to his grandson, J. J. Groover, one of the defendants, upon the expressed consideration of natural love and affection "and the consideration of support and maintenance of the said [grantor] and his wife," the deed containing this clause:

"It is further provided herein that should the said [grantee] voluntarily refuse and fail to care for and maintain the said [grantor] and his wife, that fact will cancel, annul, and void this deed."

The suit was based on the ground, as alleged in the petition, that the grantee had violated the condition subsequent in the deed. After the filing of the original petition R. J. Groover was made a party defendant, and by his answer he set up a claim of title to the land, based upon a deed from J. D. Strafford, sheriff of Liberty county, Ga., to P. H. Raiford, dated July 6, 1909, and a quitclaim deed from P. H. Raiford to R. J. Groover. By amendment the plaintiff prayed that the two deeds just mentioned be declared void and be canceled. Upon the trial, after evidence was introduced by both sides, the jury returned a verdict that the plaintiff recover the land, and that the deeds from J. W. Groover to J. J. Groover, from the sheriff, Raiford, and from Raiford to R. J. Groover, be canceled. J. J. and R. J. Groover made a motion for a new trial, which was overruled.

A. S. Way and H. H. Elders, both of Reidsville, for plaintiffs in error.

Oliver & Oliver, of Savannah, for defendant in error.

BECK, P. J. (after stating the facts as above). [1] 1. The defendants in their motion for a new trial set up the contention that the court was without jurisdiction to try the question as to whether or not the sheriff's deed to Raiford and Raiford's quitclaim deed to R. J. Groover should be canceled. In support of their contention they cited several decisions by this court, in which it is ruled that both the grantor and the grantee are necessary parties to proceedings to cancel deeds. We do not think, however, the defendants are in position to successfully urge this contention in the motion for a new trial. An amendment to the petition was allowed, reciting the execution and the existence of the sheriff's deed and the quitclaim deed, and praying that these instruments be canceled. Inasmuch as no objection was raised to the amendment or to the prayer contained in it, and evidence pertinent to this amendment was adduced and considered by the jury, the defendants cannot, after verdict, insist that the verdict should be set aside and a new trial granted on the ground of a nonjoinder of the sheriff and the grantee in the sheriff's deed, who was the grantor in the quitclaim deed. The objection to the amendment that it sets forth no valid ground for the cancellation of the two deeds should have been urged by demurrer. Defects in pleadings cannot be taken advantage of in a motion for a new trial.

[2] 2. Exception is taken to the following charge of the court:

"You are to take into consideration all the facts and circumstances which surrounded J. W. Groover, the deceased. If you find that he didn't take any steps to create a forfeiture, if there was a willful refusal to comply with the conditions in this deed, see whether or not that failure to take advantage of it was due to his inability, mentally or physically; if the circumstances surrounding him were such as to keep him from asserting his rights under the deed. You are to look to the evidence to see whether or not he had a desire to do that. If he had no desire to do it, why then the plaintiff couldn't recover. If you find from the facts and circumstances in the evidence that he did have a desire to do it, but by reason of his physical or mental condition, or both, he was unable to do it, why then, gentlemen of the jury, she, his administratrix, would not be precluded from bringing suit in this case; and if you find under those circumstances that the support was an inadequate one, and that he didn't acquiesce in it or waive his right under it, and was prevented from creating the forfeiture or acting upon the clause which would create the forfeiture, why, then, her right would be the same as his right, and she would have the right to have the deed to James J. Groover annulled."

This charge was, in substance, correct. The deed from the intestate of the plaintiff to J. J. Groover contained the clause set forth in the statement of facts, providing that upon a certain condition the deed should be canceled and declared void. This provision as to avoidance, it was ruled when the case was previously before this court (*Wilkes v. Groover*, 138 Ga. 407, 75 S. E. 353), created a condition subsequent. Evidence was adduced to show that the condition had been violated, which made it a question for the jury to decide whether or not the grantor had a right to enter and repossess himself of the land, or declare a forfeiture on account of the violation of the condition subsequent, if such was found to be the case, or whether he had waived the forfeiture. And the fact that there is no evidence to show that the grantor was mentally incapable of entertaining a desire to declare a forfeiture or to understand his rights in the premises did not render a charge upon the subject of his mental condition improper; for if, during the latter years of his life, he was suffering from intense physical pain, pain so great as to prevent his fixing his mind upon the question of his rights under the deed, then it might be said that his mental condition was such that his failure to act would not amount to a waiver of the forfeiture.

[3] 3. Exception is taken to the following charge of the court:

"In reference to that question of notice, I charge you that notice need not necessarily be an absolute information upon the part of one to the other, but it might be drawn from all the facts and circumstances surrounding the parties, their ability to know, and their positions that would require them, if they were undertaking to make a purchase, to inquire and look into the facts and circumstances surrounding the case. There is no constructive notice involved in this case. There may be actual notice, but that notice must be derived from the facts and circumstances surrounding the parties, such as would put a prudent man on notice and make him inquire into the condition of affairs."

This charge was given in reference to the notice R. J. Groover must have had of any failure of J. J. Groover to comply with the condition in the deed made to him by J. W. Groover, before the presumption that R. J. Groover was an innocent, bona fide purchaser would be overcome. If there are any inaccuracies in this charge, they are not of such character as to injure the movants.

[4] 4. During the progress of the trial, while M. S. Lewis, a witness for the defendants, was testifying, counsel for the defendants propounded the following question to him: "Do you know whether Jesse [J. J. Groover] ever carried anything over there for the old man?" to which witness answered as follows:

"Well, I would see him leave his place with a dish or plate, something covered up with a

cloth, and he said, 'Just make yourself at home; I am going to carry the old man something to eat.'

This was objected to by counsel for the plaintiff, on the ground that what was stated by J. J. Groover as testified to by the witness was self-serving, and therefore inadmissible. The court sustained this objection, and ruled out that part of the testimony as to what J. J. Groover said. The exception to this ruling is without merit. In substance it was a saying by J. J. Groover that he was going over to furnish the grantor in the deed with food; in other words, that he was complying with the condition subsequent in the deed, which was clearly a self-serving declaration, and upon that ground objectionable.

[5] 5. One branch of the defense was based upon the contention that J. J. Groover was holding the land in controversy under R. J. Groover, who had purchased from Raiford after the last named had bought at a sheriff's sale and had taken a sheriff's deed to the land, and that Raiford was an innocent purchaser for value. It is clearly inferable from the evidence that the contention of the plaintiff, relatively to this defense just referred to, was that R. J. Groover was not a bona fide purchaser without notice of the violation of the condition subsequent in the deed from J. W. Groover to J. J. Groover, and that the transaction between him and J. J. Groover was colorable. During the progress of the trial, while J. J. Groover was testifying as a witness, and after he had testified that since the land in dispute had been purchased by R. J. Groover, from Raiford he (J. J. Groover) had rented the land to a tenant, the following questions were propounded to said witness by counsel for defendants, and the following answers were made:

"Q. Who claims this land? A. R. J. Groover. Q. Why is it that you rented any part of the land? A. He [indicating R. J. Groover, who was near the witness stand] told me to."

Upon objection of counsel for the plaintiff this testimony was rejected; the court holding that it was hearsay evidence. We think this ruling was error. The evidence was material; it tended to negative the theory of the plaintiff, as indicated in the evidence, that J. J. Groover did not recognize R. J. Groover as the real owner of the land, but was holding it under a conveyance from J. W. Groover, and that when he rented it to a tenant he was acting for himself in the exercise of an ownership with which he was vested under the original deed from J. W. Groover. And the case being close under the evidence, this error, though the evidence may seem trifling in itself, is sufficient to cause a reversal; for it is not the province of this court to say what weight should be given

to the evidence, where it is clearly admissible and material.

Judgment reversed. All the Justices concur.

(23 Ga. App. 484)

MARTIN v. ENGLISH, Sheriff. (No. 2725.)

(Court of Appeals of Georgia, Division No. 2, Feb. 27, 1919.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION — RIGHT OF ACTION—PROPERTY IN CUSTODIA LEGIS.

Where an automobile, while conveying intoxicating liquors on a public road or private way of this state, is seized by a sheriff under the provisions of section 20 of the prohibition law approved March 23, 1917 [Laws 1917 [Ex. Sess.] p. 16], and is being lawfully held by him in his official character as an arresting officer pending the condemnation proceedings authorized by the statute, or subsequently to the judgment of the court and pending the sale of the property, an action of trover against the sheriff cannot be maintained by the owner of the automobile. The property is in custodia legis, and trover does not lie in such a case. *Smith v. Kershaw*, 1 Ga. 259; *Wallace v. Holly*, 13 Ga. 389, 58 Am. Dec. 518; *Chipstead v. Porter*, 63 Ga. 220; *Haslett v. Rogers*, 107 Ga. 245, 33 S. E. 44; *Geer v. Thompson*, 4 Ga. App. 756, 62 S. E. 500; *Barton v. Thompson*, 13 Ga. App. 786, 80 S. E. 30; *Hoyt v. Smith*, 20 Ga. App. 596, 93 S. E. 224; *Bernstein v. Higginbotham, Sheriff*, 148 Ga. 353, 96 S. E. 1; 35 Cyc. 1737. The cases of *Riley v. Martin*, 34 Ga. 136, and *Wilson v. Paulsen*, 57 Ga. 596, and others wherein an apparently contrary ruling is made, are easily distinguishable by their facts from the instant case and the cases cited above.

(a) While in this case there was no demurrer to the petition, nor a motion to strike it, substantially the same result was reached by the verdict for the defendant.

2. TROVER AND CONVERSION — GIST OF ACTION—RIGHT OF POSSESSION.

Even if an action of trover would lie under the circumstances stated above, the agreed statement of facts in this case shows that the defendant sheriff had the right of possession of the automobile sued for, and that the plaintiff owner was not entitled to recover. "The gist of the action of trover is the injury to the right of possession." *Roper Wholesale Grocery Co. v. Faver*, 8 Ga. App. 178, 68 S. E. 883. In some cases, to recover in trover, it is essential that the plaintiff show both title and the right of possession. In this class of cases, although the plaintiff may show that he has legal title, if it appears from the evidence that the defendant is rightfully entitled to retain possession of the property sued for, a verdict for the defendant is not only authorized, but demanded. *Geer v. Thompson*, 4 Ga. App. 756, 62 S. E. 500; *Birmingham Fertilizer Co. v. Dozier*, 13 Ga. App. 759, 79 S. E. 927; *Clark v. Fleming*, 78 Ga. 782, 4 S. E. 12; *Mitchell v. Georgia &*

Alabama Ry. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; 38 Cyc. 2061, 2081 (B).

Stephens, J., dissenting.

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action of trover by L. J. Martin against B. A. English, Sheriff. Verdict and judgment for defendant, and plaintiff brings error. Affirmed.

Evans & Evans, of Sandersville, for plaintiff in error.

J. J. Harris and M. L. Gross, both of Sandersville, for defendant in error.

PER CURIAM. The majority of the court are of the opinion that the headnotes require no elaboration. In view, however, of the lengthy dissenting opinion of Judge STEPHENS, it was thought advisable to set forth briefly the views of the majority of the court.

[1, 2] The agreed statement of facts specifically shows that the condemnation proceedings were begun within 10 days from the date of the seizure of the automobile, and that statement of facts and the answer of the sheriff (which the plaintiff admitted was true) clearly show that in all other respects the proceedings were in substantial compliance with the provisions of the statute; and no question as to the irregularity or illegality of the proceedings, including the order of the judge for the sale of the automobile, or as to the jurisdiction of the trial court, was raised in that court or in this court; nor was any attack made upon the statute by the plaintiff in error in either court. The brief of his counsel in this court states that "the only question in this case was whether or not trover would lie against the sheriff when brought by the real owner of the car." With all due respect to our learned Brother, we do not think the questions referred to above, as to the legality of the condemnation proceeding, or as to jurisdiction, are in the case. It is only when it clearly appears from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter that this court will of its own motion reverse the judgment. *Smith v. Ferrario*, 105 Ga. 51, 31 S. E. 38. No such lack of jurisdiction appears from the record in this case.

In our opinion the alleged owner of the automobile could not maintain an action in trover to recover it. As said by Mr. Presiding Justice Beck in the *Bernstein Case*, *supra*:

"The act of the Legislature to which we have last referred provides a plain statutory remedy to promptly try the question of title where vehicles are seized under circumstances attending the seizure of the one in question. *Chipstead v. Porter*, 63 Ga. 220."

And that remedy is not an action in trover. A complete answer to the inferential attack upon the act itself, made in the dissenting opinion, is found in the recent able and exhaustive opinion of Justice George, speaking for the Supreme Court, in *Mack v. Westbrook, Solicitor*, 148 Ga. —, 98 S. E. 339, decided February 12, 1919.

If, however, we are wrong in holding that under the facts of the case an action of trover will not lie, then, under the answer of the sheriff (which was admitted to be true) and the agreed statement of facts, the verdict for the defendant was clearly the only legal one possible.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

STEPHENS, J. (dissenting). Plaintiff in error, L. J. Martin, instituted a suit in trover in the city court of Sandersville against B. A. English, sheriff of Washington county, for the recovery of a certain automobile, alleged to be in the possession of the defendant, to which plaintiff claimed title. The defendant answered, and by way of defense set up that he held possession of the automobile in question by virtue of a judgment or decree of the judge of the city court of Sandersville condemning the automobile and ordering it sold, alleging in his answer that the car had been seized by one of his deputies while it was being used to transport intoxicating liquors, that the said seizure had been made under section 20 of the prohibition act of 1917 (Laws 1917 [Ex. Sess.] p. 16), providing for the seizure by a sheriff and the condemnation and sale of any vehicle or conveyance engaged in the transportation of intoxicating liquors, and also alleging that a condemnation proceeding had been instituted in the city court of Sandersville against "said car and against one Marvis McBride as owner." Under an agreed statement of facts the answer of the sheriff was agreed to as true, and it further appeared from the agreed statement of facts that the solicitor of the said city court instituted the condemnation proceeding within the 10 days required by the statute, and that the petition in such proceeding was served upon "Marvis McBride alleging that he was the true owner thereof," that the plaintiff, L. J. Martin, was the true owner of the automobile at the time of the seizure, and that the plaintiff had made demand on the defendant for the delivery of the property, and the same had been refused. The judgment or decree of the judge appearing in the defendant's answer and admitted in evidence was as follows:

"It having been made to appear to the court that a copy of the within petition was duly served upon Marvis McBride on the 24th day of August, 1917, and that no answer has been

filed by the said Marvis McBride, the same is hereby declared in default, and the sheriff is hereby directed to proceed to advertise for two issues in the Sandersville Progress, the legal organ of Washington county, said car described in the petition hereof, and to sell the same, and apply the proceeds thereof as the law directs."

Upon the issues thus made a verdict and judgment were rendered for the defendant. A motion for new trial on the general grounds only was overruled, and on exception thereto the case was brought to this court for review.

The majority of the court are of the opinion that an action of trover does not lie; that the verdict and judgment are supported by the evidence and are not contrary to law. The judgment is therefore affirmed. In this judgment of affirmance and the reasons given therefor I cannot concur.

I make no attack upon the act itself. I am of the opinion that the plaintiff proved his title and right to possession, and that the defendant sheriff failed to set up, either in his answer or by the evidence, that the automobile in question had been condemned according to the terms of the statute. I am of the further opinion that under the showing made by the defendant sheriff the property is not in custodia legis, and trover is the proper remedy, and that the verdict and judgment for defendant are contrary to law.

The plaintiff made a prima facie case. Did the defendant, admitting the plaintiff's title at the time of the seizure, show by his answer and the evidence that plaintiff became divested of his title and that the same was acquired by the state of Georgia? The proceeding against the property, being in invitum and predicated upon a drastic statute derogatory of the common law and common right, must be strictly pursued. It must affirmatively appear that the court under whose order the property was condemned and the true owner claimed to have been divested of his title had jurisdiction in the particular case. All jurisdictional facts must appear of record.

That no person shall be deprived of his property without due process of law is a well-settled constitutional doctrine. Notice to the person whose property is sought to be taken is an essential element of due process of law. This is fundamental and needs no argument. Our Legislature, in enacting the statute under which this seizure is justified, recognized this constitutional provision, and provided that a copy of the petition in the condemnation proceeding should be served upon "the owner or lessee, if known, and, if the owner or lessee is unknown," then service must be perfected by publication. If the owner is known, service upon him would be sufficient. If, however, he is not known, the state proceeds at its peril in seeking to con-

demn his property by service upon some other person. Only service by publication will then protect the state, unless, perhaps, service upon a lessee would suffice under the terms of the statute. The notice required under the statute is jurisdictional. The proceeding is in rem and the notice required is prerequisite to the power and jurisdiction of the court to condemn property and order it sold under the authority of this statute.

In *Bradstreet v. Neptune Insurance Co.*, 3 Sumn. 607, Fed. Cas. No. 1793, Justice Story said:

"It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate and clear."

In *Brown on Jurisdiction*, p. 189, it is said:

"When a legal proceeding is commenced against a person or corporation, whether resident within the jurisdiction of the court in which it is begun or not, and whether the proceeding is in rem or in personam, the defendant must be served with process in some one of the forms provided by law, or a voluntary appearance must be made by or on his behalf. The notice, if there is no appearance, is jurisdictional. Although much has been said by courts touching jurisdiction derived from the filing of a petition, seizure of property by attachment, garnishment, or other means of sequestration, we hold that the rule to-day is that there must be service of process made on the defendant in some form to give the court jurisdiction over the property seized; otherwise the judgment would be an arbitrary edict, condemning without hearing."

At page 191 the author further says:

"Without notice one essential element of jurisdiction is absent—the party defendant. * * * Where the statute prescribes the form of service, or mode of obtaining it, that mode must be pursued strictly. The law requiring process to be served also gives the implied right to the defendant to appear and defend; and, if this right is refused him, the judgment is void. The judgment is based on the service as much as subject-matter. The petition simply says: I have a cause of action against the defendant. The law says: Notify the defendant of the proceedings and the court will hear you. Hence the notice must be given under the forms of law. Where it provides a form, or gives direction as to the manner of service by publication, the statute must be complied with strictly; the direction is mandatory."

At page 239:

"The proceeding in rem is a proceeding to acquire, dissolve, forfeit, confiscate, or sell and apply a thing for some legal purpose, or its proceeds. In the latter proceedings, when regular, it is said to bind the world. This, however, is subject to conditions, for the owner must be notified in some form of the proceedings, but personal service is not necessary. The state in which the thing is situated may prescribe a

form of service and seizure other than personal service of the notice of the suit on defendant, usually by publication. It is such proceedings that, when regular, bind the world."

At page 250:

"There are certain conditions and means under and by which the res is brought under the control of the court: (1) The court must have jurisdiction over the subject-matter and actual dominion over the thing; (2) a petition or information must be filed in a court of competent jurisdiction asking the seizure of the thing, setting forth a right of action against the thing or the owner of the thing attached, and praying for judgment or condemnation or sale for the debt; (3) *notice must be given to the owner of the thing of the seizure and the nature of the proceedings against it, or notice to the world, where the action is purely against the thing*; (4) opportunity for intervention and defense by the owner of the thing must be given; (5) a judicial finding of the facts alleged in the information or petition and a judgment of condemnation or sequestration are necessary; (6) *the conclusiveness of the decree rests upon the sufficiency of the notice and regularity of the proceedings.*" (Italics mine.)

At page 132:

"To render a valid judgment the court rendering it must acquire jurisdiction over the defendant in the action, and all the authorities agree that, if it does not, then the judgment is invalid and void, a mere arbitrary edict and entitled to no respect. The defendant must be subject to the jurisdiction of the court, and in order that the judgment be valid, the process must be served within such jurisdiction. It is also shown that the judgment rendered by the court must be such a one as it is authorized to render in the proceedings before it or it will be coram non judge."

The Supreme Court of the United States, in the case of *Thatcher v. Powell*, 6 Wheat. (19 U. S.) 119, 5 L. Ed. 221, held that—

"In summary proceedings, where a court exercises an extraordinary power, under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction ought to appear on the face of the record; otherwise the proceedings are not merely voidable, but absolutely void, as being coram non judge."

In *Galpin v. Page*, 18 Wall. (85 U. S.) 350, 21 L. Ed. 959, that court held that—

"Where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

See, also, *D'Antignac v. Augusta*, 31 Ga. 700, approved in *Frank v. Atlanta*, 72 Ga. 432, and in *Du Bignon v. Brunswick*, 106 Ga. 322, 32 S. E. 102.

Section 20 of the prohibition act of 1917 provides that, in a proceeding to condemn a vehicle or conveyance on the ground of its being engaged in the transportation of intoxicating liquors, a copy of the condemnation proceeding—

"shall be served upon the owner or lessee if known, and if the owner or lessee is unknown, notice of such proceeding shall be published once a week for two weeks in the newspaper in which sheriff's advertisements are published."

Under the foregoing authorities cited the perfection of notice in some manner as required by this statute is jurisdictional, and all jurisdictional facts must appear upon the face of the record. Notice is a condition precedent, under the statute, to the right and power of the court to render judgment condemning a vehicle or conveyance seized upon the ground of its being engaged in the transportation of intoxicating liquors. When the record before us shows that before the rendition of the judgment of condemnation under which the sheriff justifies his possession of the automobile in question service was perfected upon a certain person by name, it will not be presumed, even if it was not necessary for the record to disclose such a jurisdictional fact, that other or different service than such service upon the party named was perfected. In other words, it will be taken as a fact that the plaintiff in this case, who was at the time the true owner of the property, was neither served personally nor was there any service by publication. In the case of *Galpin v. Page*, supra, it was held that—

"When * * * the record states the evidence or makes an averment with reference to a jurisdictional fact, * * * it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The judgment of the city court of Sandersville condemning the property, which was pleaded and admitted in evidence by consent, does not recite on its face such jurisdictional facts as are required by the foregoing authorities cited. This judgment merely recites that—

"It having been made to appear to the court that a copy of the within petition was duly served upon Marvis McBride" on a named date, and "that no answer has been filed by the said Marvis McBride, the same is hereby declared in default."

It does not recite who Marvis McBride is whether he is lessee or owner. So far as appears from this judgment, in the absence of the pleadings, Marvis McBride, the only party served with notice, was a perfect stranger to the case. He does not appear to be either the owner or lessee. It therefore does not appear from the judgment that the owner or the lessee was served, nor does it appear

that there was any service perfected by publication. The judgment on its face fails to show the jurisdictional fact of such service as is required by the statute, and therefore fails to show jurisdiction in the court which rendered it. Neither does it show that the condemnation proceedings were instituted by the solicitor of the court within 10 days after notice to him by the officer seizing the vehicle as required by the statute, nor that any one was ever in possession of the automobile, nor that the automobile was ever seized by any one, nor that it was ever engaged in the transportation of intoxicating liquors, nor that service was perfected within the jurisdiction of the court, nor that anything transpired within the jurisdiction of the court—all of which are jurisdictional facts. The judgment, therefore, failing to show jurisdiction over the subject-matter, is absolutely void and constitutes no defense for the defendant.

The judgment relied upon by the sheriff, in addition to failing to show jurisdictional facts, fails to show that it was based upon a proceeding under the condemnation statute. These omissions might have been aided by the pleadings, but the latter are not in evidence. The absence of the pleadings is fatal. The judgment being relied upon to show a judicial result, i. e., a condemnation under the terms of the statute, the pleadings are absolutely essential to establish the particular state of facts upon which the judgment is predicated, including service or notice. This was held to be the law in *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250. Mr. Justice Samuel Lumpkin, at page 763 of 90 Ga., at page 969 of 16 S. E., used the following language:

"It is well recognized as a general rule that, where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the *entire* proceedings in which the same was rendered. But where the only direct object to be subserved is to show the *existence and contents* of such judgment, this rule does not apply, and a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition and contents. * * * Such entry will be prima facie evidence of a valid judgment, and, on being admitted, all the legal incidents attach which the law annexes to judgments of that class. *It will not, however, be conclusive either of jurisdiction of the parties, service, or of any other matter material to the rendition of a valid judgment.*" (Italics mine.)

This opinion was cited with approval by the Supreme Court of this State in *Kerchner v. Frazier*, 106 Ga. 440, 32 S. E. 351. See, also, *Weaver v. Tuten*, 138 Ga. 103, 74 S. E. 835; *Little Rock Cooperage Co. v. Hodge*, 112 Ga. 526, 37 S. E. 743.

The defense, therefore, is fatally defective,

and fails to establish in the defendant sheriff any right to hold the automobile for the purpose claimed.

The judgment, failing to show any seizure or any other jurisdictional fact, is void on its face. Can such jurisdictional facts be supplied by evidence aliunde? If so, the burden would be upon one defending under the judgment to establish such facts. This the defendant fails to do. It is true that in the agreed statement of facts the evidence recites that a seizure was made, that it was made within the jurisdiction of the court, and that the condemnation proceedings were instituted against the automobile and against one "Marvis McBride as owner," and that the petition in such proceedings was "served upon Marvis McBride alleging that he was the owner thereof." Any allegation, if there were any, in the petition for condemnation which alleged ownership in any one, or that service was perfected on Marvis McBride, "alleging that he was the owner," certainly constituted no judicial determination of the ownership of the automobile claimed to have been seized and sought to be condemned. The recitals in the petition were merely what the state alleged or claimed in the case. Under no view do such recitals adjudicate or judicially determine anything, certainly nothing as against this plaintiff, who was not a party to that case, not having been served, and not having entered an appearance. Besides, there is nothing in the evidence whatsoever from which it can be remotely inferred that the fundamental jurisdictional fact of seizure was adjudicated or determined in the condemnation proceeding. The evidence therefore utterly fails to supply the jurisdictional facts lacking on the face of the judgment. A judicial determination upon the trial of the condemnation proceedings of all jurisdictional facts was necessary to a valid judgment of condemnation, and essential to the defendant's defense. It nowhere appearing that such determination was had, the verdict and judgment in the case before us are unsupported by the evidence and are therefore contrary to law, as set out in the general grounds of the motion for new trial.

Nowhere does it appear, either from the record or from the evidence, that the proceeding was against the "owner" or the "lessee," or the whole world by virtue of a newspaper publication. No notice whatever, as the statute requires, having been given, the defendant sheriff's right to hold and sell the property manifestly fails, and his answer and the evidence set up no defense against the true owner.

The automobile is not being condemned in the proceeding now before us. The sheriff here is defending upon the ground that it was condemned in the former proceeding. This defense he fails to substantiate, in the absence of proof, either in the judgment of con-

demnation or in the evidence produced, that the automobile was legally and judicially condemned.

Whatever presumption of ownership or legal possession may arise from mere possession can be disputed in this proceeding by the plaintiff when the fact of ownership or right of possession was not adjudicated in the condemnation proceedings. The plaintiff certainly stands as well before the court in this respect in the trover suit as does the defendant. As to the argument that one in possession of personal property is presumed to be the owner, it is a sufficient reply to say that the proof here conclusively shows that the person in possession of the automobile when seized was not the owner. Besides, the statute destroyed any such presumption by recognizing that the party in possession of the vehicle or conveyance proceeded against might be a lessee. Whether notice to a lessee binds the owner we are not called upon to decide, since there is nothing whatever in the record to connect Marvis McBride with the owner as a lessee. There nowhere appears any privity between them. So far as the evidence and the record disclose, he may have been in a wrongful and illegal possession of the automobile. Besides, he was proceeded against, not as a lessee, but, according to the evidence as the owner. He clearly was not the latter. Be that as it may, as evidenced from the judgment, so far as the recitals disclose, he was not proceeded against either as a lessee or as the owner.

That, under the terms of this statute, an automobile worth \$5,000 can be taken from its owner, confiscated, and sold, and the proceeds of the sale paid over to the state upon the automobile being found transporting liquor of the value of only 50 cents, is, to say the least, a harsh and drastic proceeding. It is a matter *strictissimi juris*. For this reason the statute should be enforced most strictly and in accordance with its very terms. Only then should its enforcement work a forfeiture and a destruction of property rights. The Constitution of this state declares that "protection to person and property is the paramount duty of government, and shall be impartial and complete." Civ. Code, § 6358. Therefore no fiction of ownership founded upon a mere presumption from possession should prevail when confronted with the absolute fact that the party in possession, and who alone was served and notified, was not the owner.

I am not unmindful of the decisions of this court and of the Supreme Court which hold that an action of trover will not lie against a sheriff to recover personal property held by him under judicial process. These

decisions are based upon the ground that such property is in *custodia legis*, and cannot be interfered with. The instant case, however, is distinguishable from them. It appears here that the court had no jurisdiction, and that the sheriff holds the property under a void judgment. The property therefore is not in *custodia legis*, but is being held by the sheriff tortiously and illegally. Under such circumstances the authorities abundantly sustain the proposition that trover will lie at the instance of the true owner to recover personal property in the possession of a sheriff. A sheriff as such is not exempt from an action of trover to recover property which he claims to hold in his official capacity. In *Riley v. Martin*, 35 Ga. 136, where a levying officer made a lawful levy, and afterwards tortiously converted the property, although acting in his official capacity, it was held that trover would lie against him. In 38 Cyc. 2041, where this case is cited with approval, it is stated that "an action for conversion may be maintained for the wrongful seizure and disposition of property under an attachment, execution, or distress." In support of the proposition that trover will lie against a sheriff to recover property in his custody, where there was either an unlawful seizure or a wrongful conversion, see *Laise v. Mitchell, Sheriff* (1893) 53 Mo. App. 563, and *Abercrombie, Sheriff, v. Bradford* (1849) 16 Ala. 560. A wrongful levy constitutes a conversion. *Stuart v. Phelps* (1874) 39 Iowa, 14; *Marks v. Wright* (1892) 81 Wis. 572, 51 N. W. 882; *Vaden v. Ellis* (1857) 18 Ark. 355; *Lyon v. Yates* (1868) 52 Barb. (N. Y.) 237.

Plaintiff relies upon title in himself; the sheriff defends upon title in the state. The issue that is being tried is one of title, and trover, therefore, must be the remedy. The owner may rest secure on his title and demand that his property be taken by due process of law and in accordance with the terms of the statute.

The uncontradicted testimony showing title in the plaintiff at the time of the alleged seizure of the automobile, and the answer of the defendant sheriff and the evidence failing to show that plaintiff's title had become divested, and that such title had by due process of law been transferred to the state of Georgia, the sheriff falls to set up any title in the state which would justify him in withholding from the plaintiff the automobile in question after plaintiff had demanded of him its surrender. In my opinion the verdict and judgment were contrary to law, and the judgment of the trial judge overruling the motion for new trial should be reversed.

(88 W. Va. 464)

WILLIAMS v. MAIN ISLAND CREEK COAL CO. et al. (No. 3642.)(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)*(Syllabus by the Court.)***1. EVIDENCE ⇨158(18)—BEST EVIDENCE—ESTABLISHMENT AND MAINTENANCE OF PUBLIC ROADS.**

Record evidence of action taken by a county court or other governmental agency empowered to control the establishment and maintenance of public roads, streets, and alleys, and showing the establishment of such highway or its official recognition by the appointment of road supervisors who have repaired and improved it, is the best evidence of the fact, and, as a general rule, ought to be produced, or its absence accounted for.

2. HIGHWAYS ⇨5—"PUBLIC ROAD"—USER—STATUTE.

Mere user of a way or road by the public for travel will not suffice to make it a "public road," within the meaning of section 56a10, c. 43 (sec. 1777), Code 1913; but such user, accompanied by some official recognition by the county court, as by work done on it by a supervisor acting by appointment of that tribunal, does come within the intendment of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Road.]

3. HIGHWAYS ⇨197(3)—SELECTION OF DANGEROUS WAY—ASSUMPTION OF RISK.

A traveler, having two reasonably convenient ways for his journey, one of which is dangerous and the other not, assumes the risk of injury, if he uses the dangerous way, and cannot recover for any injury he may thereby sustain.

4. HIGHWAYS ⇨213(2)—DANGERS—QUESTION FOR JURY.

The comparative availability, convenience, freedom from dangerous defects, and safety for travel, as between two or more highways are generally questions for the jury to determine.

5. HIGHWAYS ⇨198—INJURY FROM DEFECT IN STREET—LIABILITY.

Sections 56a49 and 56a50, c. 43 (secs. 1815, 1816), Code 1913, impose upon a county court, incorporated city, town, or village absolute liability for injuries occasioned to travelers by defects in a public road or street.

6. HIGHWAYS ⇨197(6) — INJURY FROM DEFECT IN STREET—LIABILITY.

The only limitations upon such liability, other than that noted above, where there are available two reasonably convenient ways, are where the negligence of the plaintiff is the direct or proximate cause of the injury, or where the defect or obstruction is only a remote cause thereof.

7. HIGHWAYS ⇨187(1)—DEFECT—INJURY TO TRAVEL—LIABILITY OF COUNTY COURT.

While the liability of county courts is in its nature absolute, a cause of action must exist before a liability arises.

8. HIGHWAYS ⇨197(3) — INJURY FROM DEFECT—CONTRIBUTORY NEGLIGENCE.

If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion.

9. HIGHWAYS ⇨213(1, 4)—DEFECT—PERSONAL INJURY — LIABILITY — DEFENSE—QUESTION FOR JURY.

Ordinarily such questions of liability and defense in an action based upon an injury due to an alleged defect in a public highway should be submitted to the jury as the triers of fact. Only where the facts are undisputed, or clearly established by the evidence, do they become questions of law for the court.

10. HIGHWAYS ⇨192—"OUT OF REPAIR"—STATUTE.

A public road is defective and "out of repair," within the meaning of sections 56a49 and 56a50, c. 43 (secs. 1815, 1816), Code 1913, when it becomes unsafe for reasonable use in the ordinary modes of travel, and includes obstructions to the highway, as well as defects therein, without regard to the manner in which or the persons by whom such obstructions were placed therein.

11. HIGHWAYS ⇨153, 192—OBSTRUCTION—NUISANCE—ACTION FOR DAMAGES.

But not every obstruction to the free and unrestricted use of a public road or street, even if unauthorized by the proper authorities, constitutes a nuisance, or is actionable in damages. The right of the public to the free and unobstructed use of a highway or street is subject to reasonable and necessary limitations and restrictions.

12. HIGHWAYS ⇨192 — OBSTRUCTION — EXCUSE—LIABILITY.

Temporary obstructions for some purposes frequently are unavoidable. But this necessity cannot operate to excuse careless or indifferent disregard of the rights of travelers, or justify the leaving of the street in an unsafe and dangerous condition.

13. HIGHWAYS ⇨198, 200—COUNTY ROADS—FAILURE TO REMOVE OBSTRUCTION—SECONDARY LIABILITY—PRIMARY LIABILITY.

Where by the mere omission of the county court to act promptly in causing the removal of an obstruction placed by another in a county road under its control, from which arises a cause of action for which both are jointly and severally responsible, the county court being the passive or permissive agent, and the obstructor the active agent, the former, though liable, is only secondarily so, while the latter is primarily liable, and in any event must finally respond to the injury suffered because of the obstruction.

Error to Circuit Court, Logan County.

Action by A. A. Williams against the Main Island Creek Coal Company, the County Court of Logan County, and others. Verdict and judgment for defendants, and plaintiff

brings error. Reversed and remanded for new trial.

Greene & Hogsett, of Logan, for plaintiff in error.

J. B. Wilkinson, England, Hager & Davis, Butts & Minter, and Chaffin & Bland, all of Logan, for defendants in error.

LYNCH, J. Denied the right to submit to a jury upon the proof introduced the question of defendant's liability for a personal injury caused by the skidding and upsetting of an automobile driven by him over and along the public road between Logan and Omar, and complaining of a *nisi* capiat judgment upon the exclusion of the proof and a directed verdict, the plaintiff prosecutes this writ to reverse the action taken in these respects.

The defendants here and below are the county court of Logan county and the Main Island Creek Coal Company, a corporation, and its agents and employes. The sufficiency of the declaration was not challenged by demurrer. The negligence charged against the county court is its failure to exercise the diligence required by law to keep and maintain the road in good condition for public travel, and permitting the road to be obstructed by its codefendant, thereby endangering the lives and property of persons lawfully upon it. The negligence charged against the Main Island Creek Coal Company, its servants and agents, is the obstruction of the road by the erection and maintenance thereon of a scaffold built out of heavy timbers along and about and attached to a building in process of construction by the defendant company at the time of the injury, and the projection of the scaffold into the road to the extent of about three feet, leaving for public use only from six to eight feet of level space between the structure and the steep bank of Main Island creek at the point of injury, the bank over which the automobile skidded and upset early one morning when the plaintiff attempted to pass the scaffold in his car.

The proof introduced to show the public character of the road was deemed insufficient to establish that fact. It consists, among other testimony, of that of two surveyors or supervisors, who by appointment of the county court had charge and control of the precinct or district in which the road is located, and under whose direction it was kept in reasonably fair condition for an ordinary country roadway leading from the county seat to and through a rural mining community. Viewers acting or assuming to act under an appointment of the county court, according to the testimony of at least one witness, inspected the road with the view of repairing the injury done to it by a washout occasioned by a freshet in Main Island creek several years before the accident suffered by plaintiff. The road, as said by many witnesses

acquainted with and traveling over and along it, had existed and the public had recognized it for years as a thoroughfare devoted to general travel without question as to the purpose to which it apparently was devoted.

[1] Plaintiff introduced no record evidence emanating from the minutes of the county court proceedings for the purpose of showing official recognition of the roadway or appointment of the road supervisors who testified to the facts already stated. If it be true that such authorization appears, the record is the best evidence of the fact and ought to be produced or its absence accounted for, as a general rule. Ordinarily such evidence would remove all doubt and uncertainty in respect of a matter of so vital importance in regard to the establishment and maintenance of city, county, state, and national highways.

[2] To avoid the difficulty presented in this case may have had some influence upon judicial tribunals in holding sufficient for the establishment of a highway recognition of its existence by the proper governmental agency, as by preparing or repairing it for the use of the public, and its general use as a highway. But, whatever the inducement, our decisions, often repeated, say such recognition and use are of themselves sufficient to show the way used and improved to have all the essential characteristics of a thoroughfare devoted to public use, and to require the county court to respond in damages for any injury caused by defects therein due to its negligence.

Besides, under the statute in force at the time of the injury sustained by plaintiff, section 56a10, c. 43 (sec. 1777), Code 1913:

"Every road, * * * used and occupied as a public road, * * * shall in all courts and places be taken and deemed to be a public road, * * * whenever the establishment thereof as such may come in question."

Though broad in its terms, this provision was construed in *Talbott v. King*, 32 W. Va. 6, 9 S. E. 48, as not actually meaning that mere user of a way for travel will suffice to make it a public road under this section, but that such user, accompanied by some official recognition by the county court, as by work done on it by a surveyor or supervisor acting by appointment of that tribunal, does come within the intentment of the statute. *Ball v. Cox*, 29 W. Va. 407, 1 S. E. 673; *Campbell v. Elkins*, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159; *Burke v. County Court*, 70 W. Va. 174, 73 S. E. 304.

[3, 4] The road over which plaintiff drove his automobile on the morning of the accident clearly was such a road as the statute intended to be taken and deemed in all respects to be a public highway. It was the only way available for use by the ordinary means of travel through a narrow and circumscribed rural valley between Logan, the

county seat of Logan county, and Omar—a valley which at the place where the injury occurred was occupied exclusively by railroad tracks, by buildings and coal-mining operations of the Main Island Creek Coal Company, and by the roadway; and although at certain seasons travelers departed from the usual way, as some of the witnesses testified, yet other testimony seems to warrant the assumption that such departure was no longer possible, owing to these improvements, and at the point where the accident occurred there had never been any departure of consequence from the used roadway. After the erection of the barn and the scaffold temporarily attached to it, the width of the traveled way was narrowed so that the only space available for the passage of vehicles at that point was the distance between the outer edge of the scaffold and the creek bank, estimated by not more than three or four witnesses as being about twelve feet, and by many others as being from six to eight feet, barely sufficient for a car to pass, as taxi drivers testified who used the road daily. Nor was any testimony introduced to show that there was any other available road for travel between Logan and Omar.

Respecting this situation or condition, the cause of action averred in the declaration is not within or controlled by the principles enunciated in *Shriver v. County Court*, 66 W. Va. 685, 66 S. E. 1062, 26 L. R. A. (N. S.) 377, point 4, syllabus, as to any of the defendants. But more clearly as to the Main Island Creek Coal Company the case is governed by the principles enunciated in *O'Hanlin v. Carter Oil Co.*, 54 W. Va. 510, 515, 46 S. E. 565, 66 L. R. A. 893. In the *Shriver* Case the plaintiff had the choice of travel between two equally convenient public highways by which to reach his destination, and with knowledge of the defect that caused him injury he chose that way rather than the other which was either not defective or less hazardous. It is said:

"A traveler, having two reasonably convenient ways for his journey, one of which is dangerous and the other not, assumes the risk of injury, if he uses the dangerous way, and cannot recover for any injury he may thereby sustain."

The availability, comparative convenience, and freedom from dangerous defects and safety for travel, as between two or more highways, the accessibility of passage over private property by the use of which injury could be avoided, and the necessity for assuming the risk by the selection of the dangerous road, are questions for the jury according to that case. However, as developed by the proof offered, plaintiff, as we have said, had no such choice between traveled roadways and no such access to private property. Upon the retrial, which for reasons herein stated must be awarded, the proof may show what does not

now appear upon this phase of the instant case, and nothing said respecting the matters above mentioned is intended to foreclose inquiry as to them.

[5-7] Our statute, as uniformly construed by this court in numerous decisions, imposes upon a county court, incorporated city, town, or village absolute liability for injuries occasioned to travelers by defects in a public road. Sections 56a49 and 56a50, c. 43 (secs. 1815, 1816), Code 1913; *Burke v. County Court*, 70 W. Va. 174, 73 S. E. 304; *Warth v. County Court*, 71 W. Va. 184, 76 S. E. 420; *Shipley v. County Court*, 72 W. Va. 656, 78 S. E. 792; *Boylard v. Parkersburg*, 78 W. Va. 749, 90 S. E. 347; *Whittington v. County Court*, 79 W. Va. 1, 90 S. E. 821. The only limitations, other than those laid down in the *Shriver* Case cited, upon the liability of the county courts for injuries occasioned by defects in a public road, are where the negligence of the plaintiff is the direct or proximate cause of the injury (*Phillips v. Ritchie County Court*, 31 W. Va. 477, 7 S. E. 427), or where the defect or obstruction is only the remote cause thereof (*Childrey v. Huntington*, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313). While the liability of county courts is in its nature absolute, that does not refer to the cause of action. That must exist before a liability arises. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

[8] For, except where a statute otherwise provides, as in the Workmen's Compensation Act, the negligence of the person injured and his unwarranted disregard of a danger or defect of which he has notice or knowledge may always be interposed in defense of the action for an injury resulting therefrom. This is but another application of the familiar doctrine that, where an injury is directly traceable to the fault or negligent act of the plaintiff, and but for such fault or negligence the accident probably would not have occurred, he is not entitled to damages. Likewise, if a traveler negligently fails to exercise ordinary care and caution for his own safety against defects which he knows or can readily see are dangerous and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion. *Phillips v. Ritchie County Court*, cited; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211; *Slaughter v. Huntington*, 64 W. Va. 237, 61 S. E. 155, 16 L. R. A. (N. S.) 459; *Faugh v. Parsons*, 74 W. Va. 425, 82 S. E. 204; *Corbin v. Huntington*, 74 W. Va. 479, 82 S. E. 323, and 81 W. Va. 154, 94 S. E. 38.

[9-11] Lawfully to entitle a plaintiff so injured to recover from a county court or other person or persons jointly liable for the consequences resulting from defects or obstructions in a public highway, he must show, by the record evidence, if reasonably available, or in the manner heretofore indicated, the way

to be devoted to public use, and the concurrence of the defendants in unlawfully producing the defect or causing the obstruction or permitting them to remain, as the case may be, and that he was injured as a result thereof. To defeat recovery defendants may show the defensive matters recognized by the decisions cited. Ordinarily these questions should be submitted to the consideration and judgment of the jury as the triers of fact, and should not be taken from them. Only where the facts are undisputed or clearly established by the evidence do they become questions of law for the court. *Snoddy v. Huntington*, 37 W. Va. 111, 16 S. E. 442; *Slaughter v. Huntington*, 64 W. Va. 237, 61 S. E. 155, 16 L. R. A. (N. S.) 459; *Warth v. County Court*, 71 W. Va. 184, 76 S. E. 420; *Corbin v. Huntington*, 81 W. Va. 154, 94 S. E. 38.

A public road is defective and out of repair within the meaning of sections 56a49 and 56a50, c. 43, Code 1913, when it is in such condition as not to be reasonably safe for use in the usual manner and by the ordinary modes of travel, including obstructions to the highway as well as defects therein without regard to the manner in which or the person by whom such obstructions were placed there. *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171; *Boylard v. Parkersburg*, 78 W. Va. 749, 90 S. E. 347; *Whittington v. County Court*, 79 W. Va. 1, 90 S. E. 821; *Johnson v. Huntington*, 82 W. Va. 458, 95 S. E. 1044.

[12, 13] But it is not every obstruction to the free and unrestricted use of a public road or street, even if unauthorized by the proper authorities, that constitutes a nuisance or is actionable in damages. The right of the public to the free and unobstructed use of a highway or street is subject to reasonable and necessary limitations and restrictions. Temporary obstructions for some purposes sometimes, doubtless frequently, are unavoidable. *Stanton v. Parkersburg*, 66 W. Va. 393, 66 S. E. 514; *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344; *idem*, 82 W. Va. 458, 95 S. E. 1044; 3 *Dillon, Municipal Corp.* (5th Ed.) § 1168. This necessity, however, cannot operate to excuse willful, careless or indifferent disregard of the rights of travelers lawfully entitled to the enjoyment of the highway, nor will it ever justify the leaving of the street or way in an unsafe and dangerous condition. 3 *Dillon, Municipal Corp.* § 1168. This rule of law applied to the issues here involved means that the Main Island Creek Coal Company is responsible for an injury resulting from or incident to the scaffold, unless it brings itself within the terms of the rule. Whether it can do so or not, the case as now presented does not disclose.

Where by the mere omission of a county

court to act promptly in causing the removal of an obstruction placed by another in a county road under its control, from which arises a cause of action for which both are jointly and severally responsible, the county court being the passive or permissive agent and the obstructor the active agent, the former though liable, is only secondarily so, while the latter is primarily liable, and in any event must finally respond to the injury suffered because of the obstruction. For if the highway was unduly obstructed by the scaffold, as the weight and preponderance of the evidence clearly indicates, and the county court is held liable to plaintiff, it would have, within well-recognized legal principles, remedy over against its codefendant, Main Island Creek Coal Company, enforceable in an independent action. *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879; 4 *Dillon, Municipal Corp.* (5th Ed.) §§ 1725-1728, citing numerous cases.

For the reasons assigned, our order will reverse the judgment and remand the case for new trial, to be governed by the principles herein announced.

McCLURE et al. v. NORFOLK & W. RY. CO.
(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. CARRIERS § 149(1/2), 156(1)—CARRIAGE OF GOODS—REASONABLE LIMITATION OF LIABILITY—APPLICATION OF LIMITATIONS.

The following provision in a bill of lading, viz.: "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains"—is a reasonable limitation upon the carrier's liability and enforceable. But neither clause of said provision has application, except in cases where it appears the loss of goods shipped occurred at stations, wharves, or landings at which the carrier did not maintain a regularly appointed agent.

(Additional Syllabus by Editorial Staff.)

2. CARRIERS § 156(1)—CARRIAGE OF GOODS—LOSS—BILL OF LADING.

Such bill of lading did not exempt carrier from liability for loss of freight by fire while the loaded cars were on a private siding on carrier's belt line about three-quarters of a mile from a station at which an agent was maintained.

Error to Circuit Court, Wayne County.

Action by L. E. McClure and F. E. Way, receivers of the Kenova Poplar Manufacturing Company, against the Norfolk & Western Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Holt, Duncan & Holt, of Huntington, for plaintiff in error.

Livezey & Irons, of Huntington, for defendants in error.

WILLIAMS, J. This writ of error was awarded the Norfolk & Western Railway Company to a judgment recovered by L. E. McClure and F. E. Way, receivers of the Kenova Poplar Manufacturing Company, a corporation, in an action of assumpsit against it to recover the value of two carloads of dressed lumber, which plaintiffs say was delivered to the defendant at Kenova, W. Va. on the 22d of July, 1911, to be transported to the city of Detroit, Mich. There is a private siding leading from defendant's belt line in Kenova into plaintiffs' manufacturing plant and lumberyards. On the afternoon of said 22d of July, plaintiffs loaded the two cars in the mill and shoved them out on the siding about 70 feet away from the building. Bills of lading were then filled out and sent by a messenger to defendant's depot, which was between a half and three-quarters of a mile distant from the mill, to obtain the signature of defendant's agent. They were signed by the agent about 4:45 o'clock p. m. of the same day and mailed to plaintiffs, who received them in due course. About 11 o'clock of the same evening, fire originated in the mill, from some unknown cause, and destroyed both the mill and the loaded cars standing on plaintiffs' private siding. The lumber was the subject-matter of an interstate shipment, and the bills of lading, signed by the railway company's agent, contained certain provisions, stipulations, and conditions identical with those contained in a form of bill of lading which was made a part of the published tariff rate schedule then filed with the Interstate Commerce Commission and applicable to interstate shipments originating in West Virginia.

[1] Defendant claims exemption from liability under the last clause of the following provision printed on the back of the shipping contract, and made a part thereof, viz.:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

This provision does not undertake to limit the railway company's liability resulting

from its own negligence or the negligence of its agents and servants, and is a reasonable restriction of the carrier's liability. *Berry v. W. Va. & P. R. Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781. But plaintiffs contend that it has no application to the present case; and it is admitted by counsel for the respective parties that the issue depends upon the proper interpretation of the last clause of the provision above quoted, beginning with the words, "and when received." Defendant contends that, inasmuch as the two cars were on plaintiffs' private siding and had not been attached to a train, its liability as carrier had not attached, that the loaded cars were on the shippers' private siding at their risk, at the time they burned. On the other hand, plaintiffs contend that, Kenova being a station at which defendant maintained a regular freight agent, the provision does not apply; that the phrase, "at which there is no regularly appointed agent," qualifies the last clause, as well as the first clause of the provision; and, when expanded to express fully what, according to grammatical construction, it evidently means, it would read as follows:

"And when property is received from or delivered on private or other sidings, wharves, or landings, at which there is no regularly appointed agent, it shall be at owner's risk until the cars are attached to or after they are detached from trains."

This construction is the logical one, for why should the carrier wish to place a greater limitation on its liability in case of property loaded into cars than in case of property at the same siding before it is loaded? The first clause of the provision clearly does not limit the carrier's liability for property not loaded into cars, whether placed at, or to be received from, stations, wharves, or landings, without regard to whether they be public or private, except only in case no regularly appointed agent is maintained at such places. There is as much, if not more, danger that property not loaded into cars would be destroyed or carried away, than there is after it has been loaded, and therefore no reason for making the distinction contended for by counsel for defendant in the application of the provision. The terms, "private or other sidings," in the last clause, necessarily mean private or public sidings, because all railroad sidings fall under one or the other class.

[2] It is clearly established by the evidence that Kenova is a station at which defendant maintains a regularly appointed agent; and the fact that plaintiffs' private siding was from a half to three-quarters of a mile distant from the station house does not contradict the fact that the point at which the cars were destroyed was a station at which defendant maintained an agent, within the meaning of the provision. It maintained a

belt line extending around the town of Kenova, and plaintiffs' manufacturing plant was right near to the belt line, and connected with it by a private siding.

In *Jolly v. A., T. & S. F. Ry. Co.*, decided by the District Court of Appeals, First District, of California, 21 Cal. App. 368, 131 Pac. 1057, the identical provision in the bill of lading here involved was interpreted in the manner now contended for by these plaintiffs. There a carload of goods had been placed upon a public siding in one of the streets of the city of San Francisco, consigned to George H. Tay Company. The car arrived in the morning, and the consignee was notified that it would be set on the siding next to its warehouse in the due course of its business, and was actually so placed some time after 5 o'clock in the afternoon, after business hours and without further notice to the consignee. About two hours after the car was placed on the siding, it caught fire and damaged the goods, for which the consignee recovered a judgment. On appeal the carrier claimed exemption by reason of said provision in the bill of lading, but the court held that it applied only in case of deliveries at points where no regularly appointed agent was maintained.

These observations call for an affirmance of the judgment, and it will be so ordered.

UNION WATER METER CO. v. TOWN OF NEW MARTINSVILLE.

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⇨248(1)—PURCHASE BY UNAUTHORIZED AGENT—RATIFICATION—INTRA VIRES.

A municipality is bound by a contract of purchase of property on its behalf by an unauthorized agent, if with knowledge thereof it performs acts amounting to ratification; the contract being intra vires.

2. MUNICIPAL CORPORATIONS ⇨248(3)—UNAUTHORIZED PURCHASE BY AGENT—RATIFICATION.

In such case, ratification may be implied either from acquiescence after full knowledge, or from subsequent acts and conduct by the municipal authorities inconsistent with any other theory.

3. MUNICIPAL CORPORATIONS ⇨248(3)—PURCHASE OF GOODS BY UNAUTHORIZED AGENT—RATIFICATION.

Where water meters are sold and delivered to a city owning its water plant and system, upon the order of one not authorized to act on its behalf, and it thereafter receives them and pays for their installation, by an order drawn

upon its treasury, it thereby impliedly ratifies the contract of purchase, and is bound by its terms.

Error to Circuit Court, Wetzel County.

Action by the Union Water Meter Company against the Town of New Martinsville. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

M. H. Willis, of Martinsville, for plaintiff in error.

H. H. Rose, of Fairmont, for defendant in error.

WILLIAMS, J. Plaintiff brings error to a judgment for defendant, rendered upon its demurrer to the evidence in an action of assumpsit to recover \$687.06 and interest thereon, the price of certain water meters which plaintiff, a corporation, alleges it sold and delivered to defendant, a municipal corporation, at its special instance and request, to be paid for in 30 days from the 2d day of November, 1911. Defendant's demurrer to the declaration was overruled. Thereupon it gave notice of recoupment, pleaded the general issue and the statute of limitations, and filed two other special pleas, in one of which it averred that, at and before the time of making the purchase, plaintiff falsely and fraudulently represented to it that said water meters would not corrode; that they were of sufficient strength to endure the pressure of water in defendant's lines or pipes without leakage; that they would correctly and accurately measure and register the quantity of water flowing through the pipes to which they should be attached, knowing at the time of said representations that they were untrue; and that defendant relied upon said representations as being true and was thereby induced to make the purchase. The other special plea sets up a warranty by plaintiff of the same facts alleged to have been falsely represented as true. It further alleges defendant notified plaintiff of the alleged defects in the meters and tendered them back to it before this action was brought. Issues were joined on all of said pleas, and the case was tried upon evidence introduced by plaintiff only; defendant offering none. No resolution is shown to have been adopted at any meeting of the municipal council authorizing any one as its agent to purchase the meters, or obligating it to pay for them. Plaintiff introduced the following letter under date, "New Martinsville, September 13, 1911," signed by G. A. Harman and addressed to plaintiff:

"Some time ago, your agent was here in interest of your company. We were not ready to buy meters at that time but I told him that I would notify the company when the city took steps towards getting meters. We have about decided to put meters in. Would like for your

agent to come here and meet the city council. Let us know when he can come and the council will meet him. We would prefer to meet him some evening as we have more time in the evening. Have him bring sample meter with him."

Mr. Harman appears to have then been president of the city's water board. Plaintiff proved also that it shipped the meters upon the written order of George Grall, clerk of the city water board, after they had been carefully tested at the factory and found to be in good condition, and that they were received, installed, and used in the water system; that the only complaint was by the same clerk who wrote, under date of January 10, 1912, the following letter to the plaintiff:

"One of the 2-inch meters would not register and on examination found disk bent and one of the 4-inch meters has also 'stoped' running kindly advise us what to do would like to know if you can give us any information as to where we can get a regular meter book. Thanking you in advance."

Plaintiff promptly replied, explaining what it supposed was the cause of the trouble, and requested that the two meters be returned for inspection and repairs, free of charge if it should be found to be on account of defective material. They were never returned. At the same time a meter reading book was forwarded to Mr. Grall. Notwithstanding numerous letters were addressed and mailed to the city water board of New Martinsville demanding payment of the account, no further complaint was made.

[1, 2] Edward Huffman, a plumber, swears he installed the meters between the 10th and 17th of November, 1911; that he was employed by Mr. Faucet, superintendent of the waterworks, and was paid for the work by the city, "by regular order by the town council and paid out of the treasury." No objection was made to any of the foregoing evidence. Upon demurrer to the evidence, we think a fair inference to be drawn therefrom is that the municipality of New Martinsville owned and controlled the waterworks, and that George Grall, clerk of the city water board, was authorized by the municipal council to purchase the meters, or, if not so authorized, the contract of purchase was made by him on behalf of the city, and, by paying Huffman for their installation, the city ratified the unauthorized contract. The contract was *intra vires*, and in such case a municipality may ratify an unauthorized contract just as an individual or a private corporation may do; and ratification may be inferred from acquiescence after knowledge of the facts or from conduct inconsistent with any other supposition. 2 Dillon on Munic. Corp. (5th Ed.) § 797; 3 McQuillin on Munic. Corp. § 1255; 15 C. J. 544; 28 Cyc. 677; Jones v. School District, 110 Mich. 363, 68

N. W. 222. Diamond Power Specialty Co. v. City of West Point, 11 Ga. App. 533, 75 S. E. 903, was a case very similar to the one now before us, and the court there held that—

"Even if the chairman of the electric committee of a city council had no authority to purchase blowers for the city electric plant, yet where the blowers were accepted and installed, and operated for nine months, the city would be estopped from setting up want of authority to execute the contract."

See, also, Goshorn's Ex'rs v. County Court, 42 W. Va. 735, 26 S. E. 452, wherein Judge Holt, in discussing the liability of the county court, in an action against it for the price of hogs, purchased by two members of the county court at a time when the court was not in session, says at page 741 of 42 W. Va., at page 454 of 26 S. E.:

"Having received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

If the contract and its ratification were not proven, still the city would be liable, on an implied contract, to pay what the meters were reasonably worth; the agreement being one which the city could lawfully make in a formal manner, and it having received the benefits therefrom. In such case, the city would be estopped to deny its liability, on a quantum valebant, for the reasonable worth of the property. Goshorn's Ex'rs v. County Court, *supra*; and Cade v. City of Belington, 82 W. Va. 613, 96 S. E. 1053; and authorities above cited. Cases like the present are exceptions to the general rule that municipalities are bound only by the action of their constituted authorities when assembled.

[3] But there is sufficient evidence, we think, to show a ratification, and the contract must be regarded as ratified according to its terms, which includes the time of payment. The bill was payable in 30 days from the day of delivery, which made it fall due December 2, 1911. Limitation did not begin to run until then, hence this action, brought on the 18th of November, 1916, was within time to prevent the bar of the statute; the limitation being five years.

Plaintiff retained title to the meters until they were paid for, and because thereof counsel for defendant insists that it cannot maintain this action. This is a non sequitur. Plaintiff retained the title for its security, and, having elected to bring this action for the price of the meters, it thereby treated the title as vested in defendant, which it had a right to do, and waived its right to sue in detinue for the goods. Plaintiff has made its election and is bound thereby. Orenstein-Arthur Koppel Co. v. Martin, 77 W. Va. 793, 88 S. E. 1064.

The judgment will be reversed, and, the case having been submitted upon a demurrer to the evidence, a judgment entered here for

plaintiff for the amount assessed by the jury, to wit, \$926.67, with interest thereon from the 28th day of September, 1917, the date of the verdict.

**HUPP et al. v. PARKERSBURG MILL CO.
et al.**

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER — 232(8)—POSSESSION UNDER UNRECORDED DEED—NOTICE.

Possession of a tract of land by the grantee thereof in an unrecorded deed, attended by only slight improvements such as might reasonably and fairly be deemed to have been the work of a tenant, or provision by an owner for a tenant, and unaccompanied by any conspicuous markings of the boundary lines, or improvement up to such lines, while his grantor resides upon and uses an adjacent tract which, together with the one conveyed by the unrecorded deed, constitutes a single tract, to which he has recorded title and out of which he made the conveyance, is not sufficient to put a subsequent purchaser of such entire tract upon inquiry as to the title of the occupant under the unrecorded deed.

2. VENDOR AND PURCHASER — 232(8)—POSSESSION UNDER UNRECORDED DEED—NOTICE.

In such case, the possession under the unrecorded deed is apparently consistent with that of the grantor having record title to all of the land on which there is such concurrent possession at different places: wherefore a purchaser from him is under no duty to prosecute his inquiry as to the title beyond the record and the possession by the holder of the recorded title.

Appeal from Circuit Court, Calhoun County.

Suit by W. S. Hupp and others against the Parkersburg Mill Company and others, with cross-bill by defendants. Decree denying relief sought by the bill, and granting the prayer of the cross-bill, and plaintiffs appeal. Affirmed.

Bruce Ferrell, of Grantsville, for appellants.

Pendleton, Mathews & Bell, of Spencer, and R. F. Kidd, of Glenville, for appellees.

POFFENBARGER, J. The appellants, having been in possession of a tract of land, conveyed to them by E. J. Vannoy and wife, out of a larger tract to which the grantors had record title, by an unrecorded deed, at the date of the execution and recordation of a deed of trust on the entire tract, in favor of the Parkersburg Mill Company, a corporation, brought this suit for cancellation of the deed of trust, in so far as it affects or relates to the portion of the land conveyed to them,

as a cloud upon their title, under the impression that their possession constituted notice of their right, to the trustee and the trust deed creditor. Upon the bill and the joint and several answer of the trustee and creditor, denying notice and praying enforcement of the lien, the exhibits filed therewith, depositions taken, and a stipulation filed, the court entered a decree denying the relief sought by the bill, for want of equity, and granting the prayer of the cross-bill answer, from which the plaintiffs have appealed.

By deeds executed and duly recorded in 1910, Vannoy became the owner of a tract of land containing 406 acres and 93 poles. By a deed executed July 9, 1912, and not recorded until November 11, 1913, Vannoy and his wife conveyed to the appellants a portion thereof, containing 91½ acres, describing it by metes and bounds. For the most part, the land so conveyed was unimproved. In a cleared space containing 1½ or 2 acres, there was a house into which the grantees moved in December, 1912, after having enlarged the cleared space by about an acre and built a corncrib. Between that date and the execution of the deed of trust they cleared some additional land in another place on the tract and cultivated it in corn, built some fence, sowed some grass seed, and set out a small orchard. The house and outbuildings were in view of a public road, but the other improvements were not. The deed of trust was executed October 16, 1913, and admitted to record October 22, 1913, without actual notice of the conveyance to the appellants, or their claim of title as purchasers, on the part of the grantee or creditor. It conveyed all of the 406-acre tract, except five small parcels thereof, amounting in the aggregate to about 117 acres, previously sold to other parties and conveyed by deeds duly recorded, to secure to the Parkersburg Mill Company a promissory note for the sum of \$2,000, executed by the grantor, but it did not except the 91½ acres previously conveyed to the appellants by the unrecorded deed.

In a chancery suit brought by the First National Bank of Spencer, the portion of the 406-acre tract retained by Vannoy was sold, and out of the proceeds of the sale \$690.67 was paid on the debt secured as aforesaid. A decree entered therein saved to that company its right to proceed against the 91½-acre tract conveyed to the appellants, for sale thereof to satisfy the unpaid portion of its said debt. After having denied all the material allegations of the bill, the answer averred the existence of the unpaid indebtedness secured by the deed of trust, and prayed for a sale of the land in controversy to satisfy the same, by way of affirmative relief, which prayer was granted in the decree appealed from.

[1] As between the appellants and Vannoy.

their grantor, the unrecorded deed was valid and effective, and their possession under it adverse. It must be admitted, also, that they were not tenants in common with Vannoy. But these conclusions are not determinative of the issue raised by the pleadings or the rights of the parties. Possession under an executory contract, not adverse at all to the vendor, and even under a merely verbal contract, would be notice to a subsequent purchaser, under some circumstances. *Marshall v. McDermitt*, 79 W. Va. 245, 90 S. E. 830, L. R. A. 1917C, 883; *Anderson v. Nagle*, 12 W. Va. 98; *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; *Campbell v. Fetterman*, 20 W. Va. 398. Upon an issue as to title between the grantor in an unrecorded deed in possession of land and a subsequent purchaser thereof claiming to have bought it and obtained a conveyance thereof, without notice of the prior conveyance, the relation between the grantor and grantee in the unrecorded deed, and their rights, are only incidentally involved. The real inquiry is whether the subsequent purchaser had notice of the prior right of the grantee in the unrecorded deed, so as to deprive him of the benefit of the statute declaring every deed conveying any estate void as to subsequent purchasers for valuable consideration and without notice, until and except from the time that it is duly admitted to record. Section 5, c. 74, of the Code (sec. 3835). The peculiar relation between tenants in common is a factor that sometimes enters into the inquiry. *Martin v. Thomas*, 56 W. Va. 220, 49 S. E. 118; *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183. But, when probative or potential, this, too, is only incidentally involved. The situation of the parties to the transaction out of which this controversy has arisen and the facts and circumstances are altogether different from those disclosed by the records in the two cases just referred to and all others in which this court has been called upon to determine questions of notice between prior and subsequent purchasers, arising under the recording statute. In *Campbell v. Fetterman's Heirs*, 20 W. Va. 398, two town lots constituted the subject-matter of the unrecorded deed, and the grantor was not in possession of any part of either of them at the date of the execution of the subsequent deed. Here the grantee was in possession of the portion of the original tract conveyed to him by the unrecorded deed, while the grantor remained in possession of the residue thereof; wherefore there was concurrent and partial, but not joint nor common, possession of the original tract considered as an entirety. In *Delaplain v. Wilkinson*, 17 W. Va. 242, and *Anderson v. Nagle*, cited, the element of notice by possession was not involved; the claimants against the unrecorded papers having been creditors, as to whom such notice is unavailing, not sub-

sequent purchasers. The decision in *Marshall v. McDermitt*, 79 W. Va. 245, 90 S. E. 830, L. R. A. 1917C, 883, rests upon another proposition, Marshall's estoppel by acceptance of the benefit of the decree under which his land was sold.

The legal effect of possession under such circumstances has been a subject of inquiry in other jurisdictions, however, and has generally been held to be insufficient to constitute such notice as will put a subsequent purchaser upon inquiry. It is so held because it is not inconsistent with the possession of the grantor. He is in possession of a portion of the land, under a deed calling for the entire tract and recorded. One contemplating the purchase of land so held is required to examine the record as to the title and also the land itself as to possession. Going to the record, he finds a deed conveying the entire tract to the grantee; and going to the land, he finds the grantee in possession at some point on the tract. Although others may be found in possession, also, their possession is not deemed to be inconsistent with that of the holder of the record title, ordinarily; wherefore the inquiry need not go beyond the record and the ascertainment of possession on the part of the grantee in the record title, unless there is something in the character of the possession that renders it inconsistent with that of the holder of the recorded deed. That such others found in possession may be only tenants of his, though not known to be such, makes their possession legally consistent with the recorded title and his possession thereunder. *Billington v. Welsh*, 5 Bin. (Pa.) 129, 6 Am. Dec. 406; *Hewes v. Wiswell*, 8 Me. (8 Greenl.) 94; *McMechan v. Griffing*, 3 Pick. (Mass.) 149, 15 Am. Dec. 198; *Pope v. Allen*, 90 N. Y. 298; *Brown v. Volkening*, 64 N. Y. 76; *Holmes v. Stout*, 10 N. J. Eq. 419; *Coleman v. Barklew*, 27 N. J. Law, 357; *Wade on Notice*, §§ 291, 293; *Webb, Rec. Tit.* § 232.

[2] This theory of consistency in possession is not judicially asserted with a degree of rigidity that precludes possibility of notice by means of possession and improvement of a part of the land so held. The doctrine of the cases above referred to seems to be that circumstances sufficient to put a prudent man upon inquiry may amount to notice.

"Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. The character of the possession which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a spe-

cial or temporary purpose; neither must it be consistent with the title of the apparent owner by the record." *Brown v. Volkening*, 64 N. Y. 76, 82.

"The fact of notice must be proved by indubitable evidence; either by direct evidence of the fact, or by proving other facts, from which it may be clearly inferred. It is not in such case sufficient that the inference is probable, it must be necessary and unquestionable." *McMechan v. Griffing*, 3 Pick. (Mass.) 149, 155, 15 Am. Dec. 198.

"If such a line had been run, as alleged in the bill, and the complainant had made improvements up to the line, such an actual occupancy of the land would have been sufficient to put the purchaser upon inquiry." *Hanrick v. Thompson*, 9 Ala. 409, 413.

In that case, two persons had bought an imperfect section of land, at the same time, taking separate conveyances, with the understanding that, although the patents called for an unequal division of the section, it was to be equally divided between them. *Hanrick*, to whom the larger portion had been conveyed, having died, his executor advertised and sold the area called for in his patent, to an innocent purchaser. In *Billington v. Welsh*, cited, *Turner*, owning a tract of 234 acres on which he had made valuable improvements, verbally sold about 100 acres thereof to his brother-in-law, *Welsh*, who entered upon it and made slight improvements. *Billington* purchased the entire tract at a sale made under an execution against *Turner*, and it was held that *Welsh's* possession was not sufficient to constitute notice. One of the judges, in delivering the opinion of the court, said:

"At best the possession of the defendant was of a mixed nature. His pretensions are not defined by marked boundaries or an actual survey. If one inclining to purchase had previously viewed the premises, he would have seen nothing but what usually occurs, where forges, grist and saw mills are carried on—outhouses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner, as an exclusive, unmixed possession, in common cases might * * * seem to give."

Concurrent possession of grantor and grantee on the original tract is not always conclusive evidence against notice, however. Any peculiar circumstance which strongly suggests disassociation or separation of title between them suffices to put the purchaser upon inquiry. *Krider v. Lafferty*, 1 Whart. (Pa.) 303; *Hatch v. Bigelow*, 39 Ill. 546.

The boundary lines of the tract of land conveyed to the appellants may have been surveyed, but there is no proof that they were marked by any conspicuous monuments or defined by possession and improvement up

to them. Whether such marking or improvement would be sufficient to put a purchaser upon inquiry need not be determined. It suffices to say the occupancy of the appellants and the improvements made by them were not apparently inconsistent with the possession of their grantor, but, on the contrary, were entirely consistent therewith. The house into which they moved had been erected before they purchased, and the additional clearing they had done and the out-buildings they had put up did not differ in character from improvements frequently made by tenants. The possession of the 91½ acres was exclusive and adverse, as regards the grantor of the appellants; but it was neither actually nor apparently coextensive with the bounds of the tract to which the vendor had record title and under which he was likewise in possession. Though perfect as between themselves and their vendor, their title, as to the subsequent purchaser, was equivocal, mixed, and consistent with that of the vendor, if not secret or concealed. The principles and precedents to which reference has been made fully sustain the finding and the legal conclusion of the trial court.

For the reasons stated, the decree complained of will be affirmed.

DONEHOO et al. v. KING et al. (No. 3672.)

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. ESTOPPEL \S 37—ESTOPPEL BY DEED—CONVEYANCE IN FRAUD OF CREDITORS.

The doctrine of estoppel by a covenant of warranty is not operative between the grantor and grantee, in a deed conveying land with intent to defraud creditors, against a purchaser from the grantor for a valuable consideration, or any person claiming under such purchaser; the deed having been set aside for fraud, and the land sold to satisfy a debt of a creditor, and the grantor having reacquired the title and conveyed the land to a third person for value.

2. FRAUDULENT CONVEYANCES \S 315(1)—DEED—CONSTRUCTION.

A decree setting aside a deed, and subjecting the land conveyed by it to sale, at the instance of a creditor of the grantor, to satisfy both prior and subsequent debts, upon a bill charging the making of the conveyance with intent to defraud the creditor as to such debts, withholding of the deed from record, inducement of credit by a false representation of ownership of the land after the conveyance, failing circumstances of the grantor at the date of the deed, and his insolvency at the date of the filing of the bill, is properly interpreted as one setting the deed aside for fraud in the making thereof.

8. FRAUDULENT CONVEYANCES ¶162(2) — PARTICIPATION IN FRAUD—VOLUNTEER'S ACCEPTANCE OF BENEFITS.

A mere volunteer in a fraudulent conveyance, whether an infant or an adult, participates in the fraud of the grantor by his acceptance of the benefit of the conveyance.

4. FRAUDULENT CONVEYANCES ¶162(2)—INFANT GRANTEE—PURCHASER FOR VALUE—ESTOPPEL.

To permit an infant grantee in a fraudulent conveyance to have the benefit of an estoppel, arising from the covenant of warranty in the deed, against a purchaser for value from the grantor, after the latter has reacquired the title through judicial proceedings and conveyed the land to a third person for value, would contravene the legal principle denying to any person the benefit of his own wrong, as well as the spirit of the statute against fraudulent conveyances.

Appeal from Circuit Court, Boone County.

Bill by Cora B. Donehoo and others against J. D. King and others and J. W. Cassingham and others. Decree for plaintiffs, and defendants J. W. Cassingham and others appeal. Decree reversed and bill dismissed.

J. Blackburn Watts and McClintic, Mathews & Campbell, all of Charleston, for appellants.

Murphy & Wade, of Madison, for appellees.

POFFENBARGER, J. This appeal is from a decree setting aside and canceling the title papers of the appellants as to the undivided two-fifths of 2,503 acres of land claimed by them, as constituting clouds upon the title of the appellees, and awarding partition of the land, upon the theory that the latter acquired the title by means of a covenant of warranty in a deed which was set aside and annulled and the covenantor's partial reacquisition of the title warranted by him.

By a deed dated September 9, 1877, and recorded August 30, 1883, Daniel Donahoo and wife conveyed the land to Clara J. Briggs and Mary King, two of his children, in trust for his six minor children, with a covenant of general warranty as to all of it but three acres. In November, 1883, T. M. White, a creditor of Donahoo, filed his bill to set aside the deed for want of consideration, and intent on the part of the grantor in the making thereof to hinder, delay, and defraud his creditors and particularly the said White. Upon that bill the deed was set aside and the land sold to satisfy the plaintiff's debt, and he became the purchaser. By a deed dated October 9, 1897, White reconveyed to Donahoo two-fifths of the land for a recited consideration of \$2,012. By a deed dated August 21, 1890, Donahoo and wife conveyed said two-fifths to John Moores, who on the next day acquired the other

three-fifths from White by deed. From Moores such title as he acquired by these conveyances, purporting to be entire and complete, has passed by numerous deeds to the appellants.

The sole ground of alleged title in the appellees is inurement to them of the title to the two-fifths reconveyed to Donahoo by reason of his covenant of general warranty in the deed by which he had formerly conveyed the entire tract to them and which had been canceled and set aside. Their contention is that the deed was set aside only as to the superior right of White as a creditor, and was left in full force and effect between the parties to it, and that the warranty passed the reacquired title to the two-fifths by estoppel. Of course a creditor of a fraudulent or voluntary grantor has no right to have the conveyance wholly set aside, except for subjection of the property to payment of his debt, but he has an undoubted right to have the property sold, and complete title thereto passed by the sale, if such procedure is necessary to the satisfaction of his debt. And in this instance the property was sold, and complete title passed to White. Hence this bill cannot be sustained upon the theory of title remaining in the grantees after the sale. Such a status is both logically and legally impossible. It is fair to counsel to say they do not claim it.

[1] Ordinarily, if a person grants land with a covenant of general warranty, any title thereto he subsequently acquires from a third person virtually passes by force of his warranty to his grantee, for he is estopped to claim it against his own covenant. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312; *Yock v. Mann*, 57 W. Va. 187, 49 S. E. 1019; *Summerfield v. White*, 54 W. Va. 311, 46 S. E. 154. And the estoppel binds his heirs, grantees, and all persons claiming under him. *Clark v. Sayers*, cited; *Custer v. Hall*, 71 W. Va. 119, 76 S. E. 183; *Raines v. Walker*, 77 Va. 92; *Carver v. Jackson*, 4 Pet. 86, 7 L. Ed. 761; *Myers v. Croft*, 13 Wall. 291, 20 L. Ed. 562; *Irvine v. Irvine*, 9 Wall. 618, 19 L. Ed. 800.

The theory of the appellees is that the covenant of warranty between Donahoo and his grantees embodied in the deed was not destroyed by the decree or the sale made under it, and that it still has force and efficacy, binding him and all persons claiming under his subsequent deed to Moores. It seems to be admitted, however, that if the deed of 1877 was actually fraudulent the grantees therein are estopped to claim the benefit of the warranty against Moores, a purchaser for value from Donahoo, after he reacquired title. That they are, if such is the case, is most emphatically asserted by well-considered decisions. *Gilliland v. Fenn*, 90 Ala. 230, 8 South. 15, 9 L. R. A. 413; *Stokes v. Jones*,

18 Ala. 734; Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781.

[2] This record discloses none of the proceedings in the suit brought by White, except the bill, the decrees of sale and confirmation, and the deed made by the special commissioner. The bill alleged indebtedness both prior and subsequent to the date of the deed it assailed, and charged both want of consideration and fraud in a single paragraph, and, in addition thereto, false representations of ownership of the land after the conveyance, by way of inducement to loans made to the grantor by the plaintiff, as well as a withholding of the deed from record. It also alleged failing circumstances on the part of Donahoo since the year 1876, and total insolvency at the date of the filing thereof. What defense he set up in his answer does not appear. The decree did not adjudge the existence of fraud in terms. Its language is that the deed "be set aside and held for naught so far as the same in any way affects the plaintiff's debt." However, it subjected the land to sale for all of the indebtedness claimed, \$2,000, largely, if not entirely, contracted before the date of the deed, and \$1,123.95 contracted afterwards.

Considered as an entirety, the bill cannot be fairly construed otherwise than as one attacking the deed on the ground of actual fraud. Lack of consideration was charged as a circumstance tending to prove fraudulent intent. In addition thereto it charged a conveyance by a man in failing financial circumstances, to avoid payment of existing indebtedness, and fraudulent contraction of subsequent indebtedness. Nor is the decree fairly susceptible of any interpretation other than that of one setting aside the deed for actual fraud, since it set it aside as to indebtedness subsequently incurred; for it could not have been set aside for lack of consideration alone as to a debt subsequently incurred. Code, c. 74, § 2 (sec. 3830); Ed-

wards Manufacturing Co. v. Carr, 65 W. Va. 673, 64 S. E. 1030; Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74; McCue v. McCue, 41 W. Va. 151, 23 S. E. 689; Graham Grocery Co. v. Chase, 75 W. Va. 775, 84 S. E. 785.

[3,4] Inability of the infant beneficiaries of the deed of 1877 to participate actively in the fraud of the grantor may be admitted, but that does not absolve them from the effect of the fraudulent intent and purpose. There is no saving in section 1 of chapter 74 of the Code (sec. 3829) in favor of volunteers, whether infants or adults. If there is fraud on the part of the grantor only, it vitiates the deed as to everybody except a purchaser for value and without notice. Graham Grocery Co. v. Chase, cited. The recipient of a fraudulent gift, however free from intent actually fraudulent, becomes a fraudulent grantee the moment he claims the benefit of the grant. His acceptance amounts in law to an adoption of the fraudulent act of the grantor. Graham Grocery Co. v. Chase; Laidley v. Reynolds, 58 W. Va. 418, 52 S. E. 405; Mayhew v. Clark, 33 W. Va. 387, 10 S. E. 785; Connaway v. McCann, 30 W. Va. 200, 3 S. E. 590; Duncan v. Custard, 24 W. Va. 730; Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603. To claim the benefit of the estoppel ordinarily arising from a covenant of warranty, the grantees in the fraudulent deed would have to adopt the fraudulent act of the grantor, for the covenant is a part of that act, and that would make them, in a legal sense, participants in it. If permitted to take the benefit of it, they would be allowed to profit by their own fraud at the expense of a purchaser for value.

From these principles and conclusions it results that the decree complained of is erroneous, and that there is no merit in the bill; wherefore the decree will be reversed and the bill dismissed, with costs to the appellants in this court and in the court below.

GRIFFIN v. RICHARDSON. (No. 3567.)

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. DEDICATION ¶19(5)—SALE BY REFERENCE TO MAP—RIGHT OF PURCHASERS.

Where the owner lays off a tract of land into lots, streets, and alleys for an addition to a town, and has a map made thereof, with reference to which he makes sale of such lots, the purchasers thereof are entitled to the use of all such streets and alleys necessary to the complete enjoyment of the lots purchased by them.

2. DEDICATION ¶60—STREETS AND ALLEYS—ACCEPTANCE—RIGHT TO MAKE IMPROVEMENTS.

Where the owner of a tract of real estate lays off the same into lots abutting upon streets and alleys, as shown by a plat thereof, and dedicates such streets and alleys to the public upon their natural grade and in their natural state, and such dedication is accepted by some public corporation having the right to accept the same, such public corporation has authority to make such improvements in the streets and alleys so dedicated as will make them reasonably fit for the purpose of their dedication, so that the reasonably convenient use thereof by any abutting owner is not materially affected.

3. DEDICATION ¶61—TOWN ADDITION—MAP—RIGHT OF PURCHASERS—CHANGE OF GRADE.

Where a tract of land is laid off into lots, streets and alleys as a subdivision to a city or town, and the owner so laying off the same makes a map thereof, and makes sale of the lots with reference thereto, the purchasers of such lots have the right to the free and unobstructed use of such streets and alleys, and where it is necessary, in order that such use shall be enjoyed, that changes be made in the natural grade of such streets or alleys, any purchaser so having the right to use the same may make such changes as are necessary for the reasonable enjoyment of the easement possessed by him, so that he does not materially affect any other abutting owner's reasonably convenient use of such streets or alleys.

Appeal from Circuit Court, Harrison County.

Bill for injunction by James A. Griffin against Edwin V. Richardson, administrator, etc. Decree for plaintiff, perpetuating the injunction, and defendant appeals. Reversed, and bill dismissed.

Harvey W. Harmer and Chas. G. Coffman, both of Clarksburg, for appellant.

Homer Strosnider and Fred L. Shinn, both of Clarksburg, for appellee.

RITZ, J. In the year 1890 one William Hood laid off into town lots an addition to the town of Shinnston. A plat was made of this addition, which included thereon cer-

tain streets and alleys, as well as the lots, as part thereof. These lots were sold by Hood to various parties, among the purchasers being the plaintiff Griffin and defendant's intestate, Luther H. Coffman. Coffman became the owner of three of said lots, to wit, those numbered 6, 7, and 8 on the plat, and Griffin likewise became the owner of three thereof, Nos. 25, 26, and 27. Between the rear of the three lots owned by Griffin and the rear of the three owned by Coffman there was laid down on the plat an alley 18 feet wide connecting at one end of the property of Griffin and Coffman with another road or alley referred to in the proceedings as Ravine alley, and at the other end of their respective properties was another alley running at right angles to the alley separating the properties of the parties to this suit. Each of the parties constructed houses on the respective parcels of land owned by him, the house of Coffman fronting on a street running in front of his lots at the end farthest from the lots of Griffin, and the house of Griffin fronting on a street running in front of his lots at the end farthest from the lots of Coffman. It appears that the surface of the alley at one end of the lots of the parties, known as the Ravine alley, at the point at which it intersected with the alley separating the properties of the parties, was about 10 or 12 feet below the surface of the alley with which it so connected, so that it was impossible, under the conditions that existed at the time the property was laid out, to use these two alleys in conjunction. Each of the parties reached the rear of his property by coming over the alley between them, and in order to turn around was compelled to go upon his own lots, or the lots of his neighbor; the alley not being wide enough in which to turn a wagon. That part of the alley lying between the property of the parties farthest from the Ravine alley, and for about one-third of the length thereof, was paved with brick by Coffman some time since, and for the remainder of the distance the alley was in the same condition, until shortly before the institution of this suit, that it was when the property was originally laid out; that is, it was never graded, but was simply laid out upon the ground and left in its natural state. At the end of the alley separating the properties of the parties next to the Ravine alley it is considerably lower than it is in the middle. The addition at the point where the properties of the parties are located is on sloping ground, Griffin's property lying on the upper side of the alley, and Coffman's property on the lower side thereof, and the ground sloping gradually from the front of Griffin's lots down to the alley in the rear, and from the rear of Coffman's lots down to the front thereof. In addition to this slanting condition of the alley, it is not uniform in its longitudinal

elevation, being considerably higher at a point located about the center of the properties of the parties to this suit than at either end. In this ungraded condition, except as to the portion thereof which had been paved with brick as above stated, the parties had used this alley for a considerable length of time, part of the time it being occupied with chicken houses, and sometimes entirely closed part of the way with other outbuildings and fences.

Shortly before the institution of this suit Coffman desired to open this alley through to the Ravine alley, and with a view to doing this the obstructions were removed therefrom, and he proceeded to grade down the alley between him and Griffin, and to remove the material into Ravine alley; his purpose being to raise the grade of the Ravine alley some 6 or 7 feet, and lower the grade in the alley separating his property from that of Griffin, so as to make a grade over which travel might be conducted from one of these alleys to the other. This involved cutting off the high part of the alley between his property and that of Griffin, about the center thereof, and also making some cutting in the alley from a point near the end of the present brick paving to the point where it intersects with the Ravine alley. The engineer he procured to lay out the proposed improvement files a profile with his deposition, which indicates the extent of the cutting required in order to carry out the plan. From this profile it is shown that Coffman's purpose was to cut down the alley at one point 5 feet, this being the deepest part of the cut, and the cut on both sides of this point gradually grew less until it tapered off to the present grade. For some of the distance the alley is only cut down a few inches, for part of the way a foot or two, and for another part of the way as much as 5 feet. In accordance with this plan Coffman procured men to enter upon the grading, and as soon as this was done Griffin filed this bill and procured an injunction against further work being done.

Griffin in his bill alleges that the purpose of Coffman is to cut down the alley between them to the level of the grade of the Ravine alley, which would make a cut some 10 or 12 feet deep, and his proof is to the effect that, if this was done, it would destroy the access to his property from the rear thereof. The uncontradicted evidence, however, is that Coffman never had any such purpose, his only purpose being to grade the alley as above indicated; but Griffin contends that even then, while the access to his property would not be entirely destroyed, it would be affected in a substantial way—that is to say, that for part of the distance he could not get into his property as readily as he can at the present time. This is undoubtedly true as to that part where the cut will be five feet deep. It will require some grading at

those points to get into the Griffin lots, and then the access thereto would not be as easy as it was theretofore, but the cutting to this extent is only over a portion of Griffin's property. For much the larger portion thereof the excavation is very much less, and for considerable parts of it there is no cut in the alley contiguous to his property, or it is inconsiderable, and Coffman's contention is that he has a right to put this alley in condition fit to be used in connection with the other streets and alleys with which it connects, so long as he does not too materially injure the premises of Griffin. Upon a hearing the court below made the injunction perpetual, and, Coffman having died pending the suit, his personal representative prosecutes this appeal.

[1] There is no doubt that when a party lays off a piece of land into lots and sells those lots to others with reference to certain streets and alleys indicated upon the plat, such purchasers are entitled to have the use of those streets and alleys. They are entitled to put them in condition so that they can be reasonably used in connection with the properties purchased by them, and also to have them kept free from any obstructions which would prevent such use. *Cook v. Totten*, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792; *Edwards v. Moundsville Land Co.*, 56 W. Va. 43, 48 S. E. 754. There is no obligation upon the party who lays out the lots to grade the streets in the absence of some express agreement to that effect. 9 R. C. L. 794; 10 Am. & Eng. Ency. of Law, 428; *City of Bellevue v. Daly*, 14 Idaho, 545, 94 Pac. 1036, 15 L. R. A. (N. S.) 992, 123 Am. St. Rep. 179, 14 Ann. Cas. 1136; *Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 40 L. R. A. 81, 66 Am. St. Rep. 122; *Dudgeon v. Bronson*, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315, and note at page 328.

[2, 3] While there is no obligation upon the party dedicating the streets and alleys in this way to put them in reasonable condition for use, he does vest the right in the parties to whom he sells the lots to so put them in such condition, and to do whatever may be necessary to that end. As between the original owners of the property and the purchasers of the lots, or the owners of the easement, the latter have the absolute right to do whatever may be necessary for the reasonably full enjoyment of the easement granted. *Hammond v. Woodman*, 41 Me. 177; *Cook v. Totten*, supra; *Edwards v. Moundsville Land Co.*, supra; 9 R. C. L. 794; 10 Am. & Eng. Ency. of Law, 428; *City of Bellevue v. Daly*, supra; *Nichols v. Peck*, supra; *Dudgeon v. Bronson*, supra; *McMillan v. Cronin*, 75 N. Y. 474; *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266. These authorities clearly establish the right of the purchasers of lots under such circumstances, as between them and the original owner, to do whatever may be necessary to put the

streets and alleys in condition for use. Clearly when they were laid off this is what the parties contemplated, and while the original owner cannot be compelled to improve the same at his expense, he cannot prevent such improvement being made by the lot owners. And where a subdivision of this character has been dedicated, and such dedication has been accepted by a municipal corporation, the right of said municipal corporation to change such streets and alleys from their natural state into a condition making them reasonably serviceable to the people having a right to use the same is beyond question. And this is true notwithstanding that by so doing the ingress and egress of some abutting lot owner may be in some measure disadvantageously affected. *Hickman v. City of Clarksburg*, 81 W. Va. 394, 94 S. E. 501, and authorities there cited.

But it is contended that while this right may be vested in a municipal corporation upon its acceptance of such a dedication, it does not belong to the owners of lots in such a subdivision. It is a little difficult for us to understand why, if a municipal corporation can make such a change in the natural condition of such streets and alleys, that one or more of the parties who own the easement, and are entitled to use the same, could not do the like. The action of the municipal corporation is only by reason of the fact that it has accepted the dedication, and its right to improve such streets or alleys without paying compensation to an abutting owner who may be injured thereby depends on no other ground than that it is the owner of the easement. Why, then, in a case where no public authority has accepted the dedication of such easement, cannot the private owners thereof do exactly the same thing? If it is *damnum absque injuria*, in case the work is done by a public authority owning the easement, why is it any less so when such improvements are made by private persons owning exactly the same easement? It may be said that the right of a municipal corporation to make such improvements is not unlimited. It can only do such grading and make such improvements in streets and alleys thus dedicated as may be reasonably necessary to put the same in condition for the reasonable enjoyment of those entitled to their use, and this must be done so as to disadvantageously affect abutting property owners as little as possible. We think exactly the same rule applies in cases where the easement thus created has never been accepted by a public authority, but is vested in the owners of the lots. So far as our examination has gone there have been few adjudications upon this particular question, but we find in the case of *Rotch v. Livingston*, 91 Me. 461, 40 Atl. 428; that it is held that any one of the several owners of such a road or alley as is involved here may at his own expense fit the way for convenient use, so

that such improvement does not materially impede any other owner in his convenient use of the same, and this same doctrine is announced by the Supreme Judicial Court of Massachusetts in the case of *Killion v. Kelley*, 120 Mass. 47. We conclude, therefore, that Coffman had the right to improve this alley lying between his property and that of the plaintiff so long as he did not materially impede the plaintiff in the use of the easement in connection with his property.

This brings us to the question of whether or not the improvements contemplated constitute such an impediment. We have pretty fully shown their character in the statement we have before made. Griffin, it is true, will not be able to obtain access to his property as readily as theretofore, but his use of the alleys and streets of the subdivision will be very much easier than theretofore. The rule does not mean that an abutting property owner cannot be made to suffer any inconvenience at all, but only that no substantial injury may be inflicted upon him. It must be borne in mind that when these people bought these lots they knew that it was contemplated that these streets and alleys would be used for the purpose for which such streets and alleys are ordinarily used, and they also must have known, because the physical facts so informed them, that this could not be done without making some change in the then existing condition thereof, and so long as the change proposed to be made goes no further than the absolute necessity of putting them in condition fit for the use to which they are dedicated, and does not substantially prevent the use thereof by any of the abutting owners, no one has a right to complain, even though his property may not be as free of access as it would be were no changes made therein. To hold in this case that Griffin is entitled to have this alley remain in its natural condition would be practically dedicating it to his individual use, and to deny the use of it to others who are equally entitled thereto, for it is conceded that it cannot be used in connection with the Ravine alley unless some improvement is made in it, and some change made in the grade of the Ravine alley. We do not think that the change proposed to be made by Coffman, as shown by the evidence in this case, is any more than Griffin must have contemplated would be made when he purchased his property, for he surely must have known that this alley lying between him and Coffman would be used in connection with the alley with which it intersects, and such could not be the case except it be improved in the manner which it was proposed by Coffman to improve it.

We are therefore of opinion that the court erred in perpetuating the injunction, and our order will be to reverse the decree of the circuit court and dismiss the bill.

BLAGG v. BALTIMORE & O. R. CO.
(No. 3680.)

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919. Rehearing Denied
March 27, 1919.)

(Syllabus by the Court.)

1. RAILROADS — 358(1) — OPERATION — LICENSEE—CARE REQUIRED.

One not in the employ of a railway company, using its tracks as a walkway over a portion thereof which pedestrians are accustomed to use for such purpose, but not at a public crossing, is at most a mere licensee, and such railway company owes to him no higher or other duty than it owes to a trespasser.

2. EVIDENCE — 119(1) — READMISSIBILITY — RES GESTÆ.

Whenever a statement is made by one under such circumstances that it may be regarded as spontaneous and as the direct result of a transaction to which he was a party, it becomes a part of the transaction itself, and if proof of the fact is material to the inquiry being made, such statement will be received in evidence as tending to establish such fact.

3. RAILROADS — 369(3) — LICENSEE—PERSONAL INJURY—LIABILITY.

A person using a railroad track as a foot-path for his own convenience elsewhere than at a public crossing, and injured by a train while so doing, cannot recover damages from the railroad company, unless it be shown that after he was discovered upon the track by the employes or servants of the railroad company they did not use reasonable care to avoid injuring him.

4. TRIAL — 250(1) — INSTRUCTION—EVIDENCE.

It is error to give an instruction based upon an hypothesis which is not supported by any evidence.

Error to Circuit Court, Mason County.

Action by B. H. Blagg, administrator of Raymond Bennett, deceased, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Rankin Wiley, of Point Pleasant, for plaintiff in error.

B. H. Blagg, of Point Pleasant, and Somerville & Somerville, of Grafton, for defendant in error.

RITZ, J. This writ of error is prosecuted to a judgment in favor of plaintiff for damages occasioned by the death of his decedent, Raymond Bennett, caused by the alleged wrongful act of the defendant. Bennett was killed on the 26th day of August, 1913, by being run over on the tracks of the defendant near its station of Point Pleasant. The evidence shows that a north-bound train of the defendant, containing a locomotive,

tender, and three cars, just a short distance north of defendant's station of Point Pleasant, ran over the defendant about 7 o'clock on the morning of August 26, 1913, and so badly injured him that he died in a few minutes after the accident. As to how long Bennett was on the track before he was struck by this train, as to when he came on the track, what efforts were made to stop it before he was struck, whether or not the engineer saw him in sufficient time to have stopped the train before it struck him, there is no evidence. The testimony for the plaintiff, by one witness shows that she lived near the railroad track, at the point where the accident happened; that she was in her kitchen eating breakfast at the time she heard the locomotive give quick short blasts of the whistle indicating the possibility of an accident; that she quickly got up from the table, and went rapidly to her front door, which was just across another room, the door between the kitchen and this room, and the front door, being open at the time, and that when she got to her front porch the train had run over Bennett, and he was still under it; that by the time the train stopped it had passed entirely over his body and left it remaining a few feet to the rear of the train. She does not undertake to state when Bennett got on the track; in fact she did not see him until after he was run over, nor does she undertake to say how far the engine was from him at the time he was discovered. The only reasonable inference that can be drawn from her evidence is that it must have been very close from the fact that she, moving as rapidly as she conveniently could, only crossed the front room of her house from the time she heard the first alarm given until the train had run over him. She does state in her evidence that the train had not slowed down from the time it first began to whistle until she first saw it, or until after it had run over Bennett. Manifestly she could not know whether the train had slowed down before she saw it or not. She does state, however, that the train stopped when the last car had passed just a few feet beyond Bennett's body, and when the engine was just up to a trestle a short distance north of where Bennett was struck. Another witness testifies that he was working at a house near the place of the accident, and that he saw Bennett struck by the train on the trestle above referred to. This testimony is denied by the physical facts shown that Bennett's body was south of the trestle at the time it was run over, and at the time it was recovered, and that the train had stopped before going upon the trestle. Manifestly this witness was confused in his statements, and they are not to be relied upon, being in direct conflict with the physical facts indis-

putably shown. He does not, however, undertake to say how long Bennett had been on the track at the time the engineer discovered him, or before he was struck, or what, if any, efforts were made to prevent his being struck after he was discovered. He does state that the train was running 40 to 50 miles an hour at the time he observed it, and his statement in this regard is all of the evidence as to the speed of the train. Another witness who came upon the ground very shortly after the accident observed what he presumed to be the place where Bennett was hit. He found at this point Bennett's dinner bucket with his dinner spilled upon the ground, and also marks of blood and mangled pieces of his clothing and remains. This point, this witness says, was a little bit closer to the trestle referred to than it was to the Point Pleasant station. He says that he stepped off the distance from this point to a point in a southerly direction, at which the plaintiff's decedent would have been observable had he been upon the track, and he finds that plaintiff's decedent could have been seen 265 steps from the point at which he was hit, but he does not undertake to say that the engineer saw him at any such distance, or that he was even upon the track at the time the engine was that distance away. In fact, as before stated, there is no proof in this case as to when Bennett came upon the track, how long he had been upon the track before he was hit by the engine, how far the engine was from him at the time he was discovered, or as to whether or not the engineer could have, in the exercise of ordinary care, prevented the injury after discovering Bennett upon the track. In this state of the case the defendant requested a peremptory instruction to find in its favor, which was refused, and certain instructions given on behalf of the plaintiff to which objection was made. The jury found a verdict in favor of the plaintiff for the sum of \$1,000, and, after overruling defendant's motion to set it aside, the court rendered judgment thereon.

[1] There is some attempt made to show that the defendant's track at the point at which Bennett was killed had been frequently used by pedestrians going to and from their work, and by others having occasion to use the same as a walkway or passway. The evidence upon this, however, is not very satisfactory, and it does not appear that the track was used for this purpose to a very much greater extent than railroad tracks are ordinarily used for such purposes. However, this can make no difference so far as the duty which the defendant owed to the plaintiff's decedent is concerned. He would be a mere licensee at most, and the defendant company owed him no other or different duty than it owed to a trespasser. *Bralley v. Railway Co.*, 66 W. Va. 462, 66 S.

E. 653; *Woolwine's Adm'r v. Railway Co.*, 36 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859; *Poling v. Railroad Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; *Melton v. Railroad Co.*, 64 W. Va. 168, 61 S. E. 39; *Tompkins v. Sunday Creek Co.*, 68 W. Va. 483, 69 S. E. 980; *Norfolk & Western Railway Co. v. Bondurant*, 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N. S.) 443, 122 Am. St. Rep. 867; *Norfolk & Western Railway Co. v. Denny*, 106 Va. 383, 56 S. E. 321; *Nesbit v. Webb*, 115 Va. 362, 79 S. E. 330; *Chesapeake & Ohio Railway Co. v. Saunders*, 116 Va. 826, 83 S. E. 374.

[2] On the trial of this case the court permitted a witness to testify that he came to the station at Point Pleasant immediately after the accident, and that the engineer in charge of the train made a statement to the effect that he saw Bennett in the middle of the track and blew for him, but the man did not seem to hear the alarm, apparently for the reason that there was a train going over the K. & M. at the time. It is complained that this statement was improperly admitted. The theory, of course, upon which it is sought to justify the statement of the engineer is that it is part of the *res gestæ*. It appears that it was made in a very few minutes after the accident happened, and under such circumstances as that it might well be assumed that it was a spontaneous and voluntary outburst. We think under the rule laid down in *Starcher v. Oil Co.*, 81 W. Va. 587-601, 95 S. E. 28, this statement was properly admitted as part of the *res gestæ*. The circumstances under which it was made and its substance particularly characterize it as a spontaneous utterance, the natural result of the accident.

[3] But does the evidence in this case justify the jury's verdict? It must be borne in mind that a railroad company owes to a trespasser or mere licensee discovered upon its tracks only the duty not to injure him if it can be avoided. Primarily the railroad is built for the purpose of operating trains thereon, and such trains are entitled to the use of the tracks free from obstruction by trespassers, and one who goes upon such tracks at a point other than a public crossing, where he has a right to be, is charged with this knowledge. Of course, it cannot be said that if a trespasser or a mere licensee is discovered upon the track, the employes of the company owe no duty to him. It seems to be well established that in this event there is an obligation to give an alarm in order to inform him of the approach of the train, and, if he does not heed such alarm, then the employes must resort to such other means as may be available to prevent injuring him, if possible, such as giving a second alarm, or reducing the speed of the train, or even stopping it if this can be done. *Bralley v. Railway Co.*, 66 W. Va. 462, 66 S. E. 653; *Teel v.*

Railroad Co., 49 W. Va. 35, 38 S. E. 518; Spicer v. Railway Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385; Huff v. Railway Co., 48 W. Va. 45, 35 S. E. 866. There is not the slightest evidence in this case to show when plaintiff's decedent came upon the railroad track, or that he was discovered thereon within such time as that the train could have been stopped and the injury prevented. In fact, the only reasonable deduction from the evidence presented is that plaintiff's decedent was discovered upon the track only a few seconds before he was hit. There is no evidence to show, even assuming that Bennett had been on the track for some time before the train hit him, that the train, at the speed at which it was running, could have been stopped after he was discovered, assuming that he was discovered as soon as the engineer might have seen him. There is no evidence to fix negligence upon the railroad company, or any of its employes, and unless this is done there is no right of recovery.

[4] Complaint is made of instructions given on behalf of the plaintiff. The first of these instructions tells the jury that if the engineer saw Bennett on the track it was his duty to give an alarm, and in case the alarm was unheeded it was the duty of the engineer to adopt additional measures of precaution, such as a repetition of the signal, and, if necessary, to check the speed of the train. This is a correct statement of a general principle of law, but what evidence is there in this case to justify some of the hypotheses assumed by the instruction? This instruction assumes that Bennett did not heed the alarm when given, and this assumption may

be justified from the fact that he did not get off the track. It further assumes that the engineer had opportunity to check the speed of the train, or to give the second alarm, and did not do so. There is no evidence of this. The second instruction likewise states a correct proposition of law, but the hypotheses contained therein find no support in the evidence. The third instruction tells the jury that if Bennett was seen by the engineer in charge of the train on the right of way of the defendant company in such close proximity to the track as to be in danger, it was then the duty of the engineer to take such precaution for his safety as the circumstances reasonably dictated. There is no basis in the evidence for the hypothesis that Bennett was upon the right of way so close to the track as to be in danger. If the evidence shows anything, it shows that he was on the track. Then too, this instruction is indefinite in advising the jury that it was the duty of the engineer to take such precautions, by signaling or otherwise, as the circumstances reasonably dictated. It should have been more definite in this regard, and directed the jury just what things the engineer should have done, and not left the jury to speculate or wander at large as to the duty of the engineer under a particular state of facts. While these instructions correctly propound propositions of law, the hypotheses upon which they are founded find no support in the evidence offered, and they were therefore improperly given.

It follows from what we have said that the judgment of the circuit court will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial.

(177 N. C. 198)

GOODRICH v. MATTHEWS. (No. 217.)

(Supreme Court of North Carolina. March 19, 1919.)

1. HIGHWAYS ⇐175(1) — NEGLIGENCE—LAW OF THE ROAD.

Failure to turn to the right, as required by Laws 1913, c. 107, when meeting another on a highway, renders one guilty of negligence.

2. TRIAL ⇐165—MOTION FOR NONSUIT—PRESUMPTIONS AS TO EVIDENCE.

Upon a motion for judgment of nonsuit, the evidence in favor of the plaintiff must be taken as true.

3. HIGHWAYS ⇐184(3) — COLLISIONS—NEGLECT—QUESTION FOR JURY.

In an action for injuries to a mule struck while being led on a highway, whether defendant's negligence in staying in the used rut in the highway, and not turning to the right when meeting the mule, was the proximate cause of the accident, *held* for the jury.

4. APPEAL AND ERROR ⇐904(2), 905—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

It is the province of the jury, and not the appellate court, to pass on credibility of witnesses and to determine weight of evidence.

5. EVIDENCE ⇐220(2) — DECLARATIONS OF DECEASED PERSONS—IMPLIED ADMISSION.

A declaration of a deceased person in defendant's presence in nature of a charge that defendant was responsible for injury to a mule which his automobile struck, and therefore negligent, was admissible in evidence on the same ground that a charge of crime made to a party and not replied to is treated as an implied admission.

Appeal from Superior Court, Sampson County; Calvert, Judge.

Action by W. L. Goodrich against Elliott Matthews. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for the killing of a mule belonging to the intestate of the plaintiff, which, the plaintiff alleges, was killed by the negligence of the defendant in driving an automobile.

At the time of the injury complained of, the plaintiff was walking along a public road leading two mules and going in a westerly direction, and the defendant was driving an automobile along the road going in an easterly direction and met the intestate of the plaintiff.

There was a motion for judgment of nonsuit at the conclusion of the evidence which was overruled, and the defendant excepted.

A witness for the plaintiff named Cain went to the place where the mule was injured a few minutes after the injury, and he was permitted to testify that the owner of the mule said to the defendant, "You have run over my mule, and you will have to pay for her," and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

E. L. Gavin, of Sanford, and Fowler & Crumpler and W. H. Fisher, all of Clinton, for appellant.

ALLEN, J. [1] The statute in force at the time of the injury complained of (chapter 107, Laws 1913) required the defendant to turn to the right when he met the plaintiff's intestate on the road, and if he failed to do so he was guilty of a breach of a statutory duty, which is negligence, and, if this was the cause of the injury to the mule, it is actionable and renders the defendant liable to answer in damages. *Ledbetter v. English*, 166 N. C. 125, 81 S. E. 1066; *McNeill v. R. R.*, 167 N. C. 396, 83 S. E. 704; *Dunn v. R. R.*, 174 N. C. 259, 93 S. E. 784. Does the evidence tend to prove these facts?

The road was 21 feet wide. E. M. Bullard, a witness for the plaintiff, testified:

"The mules, judging from their tracks, were as far to the right as they could get. I noticed defendant's car tracks were in the wheel ruts. I know his car tracks, as they had non-skid tires, and could tell from that that the defendant kept in the ruts and did not turn to his right. To the right going west it was 7 feet and 2 inches from the rut to the edge of the ditch. I am satisfied Matthews did not turn to his right."

[2, 3] Upon a motion for judgment of nonsuit, we must assume that this evidence is true, and, if so, it shows that the mules were as close to the ditch on their side as they could go, and that the defendant having a space of 7 or 8 feet to his right, instead of going as far from the mules as he reasonably could, did not turn to the right at all, but continued in the rut ordinarily used by travelers, and that he was therefore negligent in that he failed to obey the statute, and it was for the jury to say, under the circumstances, whether this failure on his part to do as the law required was the proximate cause of the injury. The jury might reasonably conclude that if the defendant had turned 2 or 3 feet, which he could have done easily, that the mules would not have been injured, and that the real proximate cause of the injury was because he did not do so.

[4] The evidence of the defendant tends to prove that he was as far to the right as he could reasonably go, and that the injury was not caused by his negligence, but because as he drove opposite the mules one of them backed into the car and was injured, but we cannot base our ruling on this contradictory evidence, as it is the province of the jury alone to pass on the credibility of the witnesses and to determine the weight of evidence, and we must presume that the contentions of the defendant were fairly sub-

mitted to the jury, as there is no exception to the charge, and it has not been sent up as a part of the record.

We are therefore of opinion that the motion for judgment of nonsuit was properly overruled.

[5] The exception to the evidence does not come within the ruling in *Bumgardner v. Railroad*, 132 N. C. 440, 43 S. E. 948, in which the declaration of a deceased party, who was injured, made after the event and detailing the cause of the injury, was excluded because it was a narrative of a past event, as the evidence admitted in this case was a declaration made to the defendant himself, and was in the nature of a charge that the defendant was responsible for the injury and therefore negligent, to which the defendant made no reply.

It was admissible upon the same ground that a charge of crime or misconduct made to a party and not replied to is dealt with as an implied admission.

No error.

(177 N. C. 559)

STATE v. DUNNING. (No. 89.)

(Supreme Court of North Carolina. March 12, 1919.)

1. ASSAULT AND BATTERY ⚡95 — ASSAULT WITH DEADLY WEAPON—EVIDENCE.

In a prosecution against a peace officer for shooting and wounding prosecuting witness whom he was attempting to arrest for a misdemeanor under a warrant, evidence held not to support a direction that defendant was guilty as a conclusion of law.

2. ARREST ⚡68 — CRIMINAL PROCEEDINGS — OFFICERS—RIGHT TO EMPLOY FORCE.

A peace officer having the right to arrest an offender may use such force as is necessary, and to a great extent is the judge of the degree of force that may properly be asserted, and if resisted he may use force to the extent of taking life, regardless of whether the offense be a felony or misdemeanor.

3. ASSAULT AND BATTERY ⚡92 — USE OF FORCE BY OFFICER — EVIDENCE — SUFFICIENCY.

Where a peace officer shot and wounded prosecuting witness while attempting to arrest him under a warrant for disorderly conduct, on being assaulted by the latter with a knife, evidence, in prosecution for assault with a deadly weapon, held to justify the degree of force used.

4. ARREST ⚡68 — CRIMINAL PROCEEDINGS — USE OF FORCE—OFFICER'S DUTY TO RETIRE.

A peace officer attempting to arrest an offender under a warrant, and being assaulted by him, need not retreat or retire in order to justify the use of force in making the arrest.

Appeal from Superior Court, Bertie County; Kerr, Judge.

I. W. Dunning was convicted of assault with a deadly weapon, and he appeals. Error.

This is an indictment for an unlawful assault with a deadly weapon on one C. T. White, while defendant, as constable and chief of police of the town of Aulander, was endeavoring to arrest the said prosecutor C. T. White for disorderly conduct in breach of the criminal law.

On the trial the defendant testified in his own behalf, and at the close of all the evidence the court charged the jury as follows:

"Gentlemen of the jury, if you believe the evidence of the defendant, I. W. Dunning, himself, I charge you that he is guilty, and, if you so believe it, you will say guilty for your verdict."

Verdict of guilty. Judgment, and defendant excepted and appealed.

Winston & Matthews, of Windsor, and Alex Lassiter, of Aulander, for appellant.

The Attorney General, Frank Nash, Asst. Atty. Gen., and Winborne & Winborne, of Murfreesboro, for the State.

HOKE, J. There was evidence on the part of the state tending to convict the defendant, but the same does not accompany the record, as no exception is made concerning it.

For the defense I. W. Dunning, a witness in his own behalf, testified as follows:

"I am the defendant. I have lived near and in Aulander, Bertie county, all my life. I am now 24 years old. Some three years ago I moved to Aulander, to be near a physician for treatment. I went to Norfolk and underwent an operation and came back to Aulander. I have not been strong since then. The commissioners of the town of Aulander elected me constable and chief of police of the town. There was no other constable of the town nor any other policeman. I was the only one. I have known C. T. White all my life. He was then living in Aulander, and had been living there a number of years. His reputation was that when under the influence of liquor he was a desperate and violent man. I know that of my own knowledge, because I had frequently seen him in that condition. He had been indicted for repeated assaults and for cutting people, and had been convicted. At the May election of this year in Aulander I was re-elected constable by the people of the town. On the day in question, about 4 o'clock in the afternoon, complaint was made to me that C. T. White was drunk on the street, violently noisy, and profane in the presence of the public and of ladies passing on the street. I went up the street and found him at the Main street crossing of the town, within a few yards of the post office, in the heart of the business section of the town and of the bank, and in the very center of the business part of the town. I went up to him. He had an open knife in his hand and was noisy and cursing. I ordered him to cease cursing and advised him to go home. I did not want

to have to put him in the lockup, and thought I could get him quiet. He did quiet down for a few moments, and came up to me and said he wanted me to give him his liquor. He claimed that he had been to Kelford and brought back two quarts of liquor, and said I had taken it. I told him I had not done so. He demanded that I let him search me, and to satisfy him I did so. He felt in all my pockets until he came to the one in which I had my pistol, as I was then on duty. I told him he could not go in that pocket. Then he began to curse and abuse me, and called me a most foul and loathesome name (too foul for this record). I backed back from him. He had me by the hand and was attempting to cut me. I was trying to arrest him. This kept up for several minutes. Finally the mayor came up and quieted him down. Later he went in the barber shop and commenced raising a row and cursing Mr. Early, who was in the barber shop. Early finally got him down on the floor. I went to arrest him, and Early and his relatives said if I would let him alone they could get him to go home. He was quiet for but a moment, and came out in the street and commenced cursing Early and myself and threatened to kill us both. He had his open knife in his hand. I dodged about the town to keep out of his way. He completely terrorized the town. All the above occurred about three to four hours before I shot him. People came to me and complained, and finally about 10 o'clock Mr. A. T. Castellow, the mayor of the town, brought me a warrant charging disorderly conduct or a misdemeanor, for the arrest of C. T. White, and told me to go at once and arrest him and bring him before him. During the early part of the evening, and again after I got the warrant, I called on several persons to go with me to assist in making the arrest. They all declined because they said they knew his desperate and dangerous character when under the influence of liquor, and they did not propose to get cut. I finally got a man to go with me. Then White was passing down the street with one Cox, and going in the direction of the Cox place of business—his restaurant and poolroom. I heard him cursing and threatening to kill me and Early. He was violent; cursing and noisy. He went in the Cox place of business and took a seat by the stove. It was a store some 70 feet deep. In the back was a poolroom. Some young boys were there playing pool. The stove was in the middle of the house, between the counters, and about 20 feet from the door. I went in with my warrant in my hand. I then had my pistol in my pocket, and had not taken it out during the day or night. I had my hand on my pistol, which was in my hip pocket. I walked within ten or twelve feet of White, and said, 'I have a warrant for you; consider yourself under arrest.' He got up with his open knife in his hand, and I said, 'Put up your knife and consider yourself under arrest.' He said, 'damn you and your warrant, too; take your hand off your gun.' I again told him I had the warrant and to consider himself under arrest. He again replied, 'damn you and your warrant both; take your hand off your gun.' He then advanced towards me about one step with his knife open in his hand, and drawn back in the attitude of striking. He did not get in striking distance of

me; an open door opening on the street was behind me, and there was nothing to keep me from going out of it. If I had stepped out of this door he could not have hurt me, but I did not go out of door because I did not want to run. The warrant I had for his arrest charged disorderly conduct, or a misdemeanor."

[1] And on this evidence we are of opinion that there was error in holding the defendant guilty as a conclusion of law.

[2] It is a principle very generally accepted that an officer, having the right to arrest an offender, may use such force as is necessary to effect his purpose, and to a great extent he is made the judge of the degree of force that may be properly exerted. Called on to deal with violators of the law, and not infrequently to act in the presence of conditions importing serious menace, his conduct in such circumstance is not to be harshly judged, and, if he is withstood, his authority and purpose being made known, he may use the force necessary to overcome resistance, and to the extent of taking life, if that is required for the proper and efficient performance of his duty. It is when excessive force has been used maliciously, or to such a degree as amounts to a wanton abuse of authority, that criminal liability will be imputed. The same rule prevails when an officer has a prisoner under lawful arrest, and the latter makes forcible effort to free himself; and, in this jurisdiction, the position holds whether the offense charged be a felony or a misdemeanor, the governing principle being based on the unwarranted resistance to lawful authority, and not dependent, therefore, on the grade of the offense.

These views are in accord with numerous decisions of our court in which the questions presented were directly considered, as in *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *State v. McMahan*, 103 N. C. 379, 9 S. E. 489; *State v. Pugh*, 101 N. C. 737, 7 S. E. 757, 9 Am. St. Rep. 44; *State v. McNinch*, 90 N. C. 695; *State v. Garrett*, 60 N. C. 144, 84 Am. Dec. 359; *State v. Stalcup*, 24 N. C. 50. In *State v. Sigman* the principle is stated and approved as follows:

"If an officer is resisted in making an arrest, he may use that degree of force which is necessary to the proper performance of his duty; and, after an accused person is arrested, the officer is justified in the use of such force as may be necessary, even to taking life, to prevent his escape, whether the offense charged is a felony or misdemeanor."

In *State v. McNinch*:

"A police officer, in arresting one for violating a city ordinance, was indicted for an assault. The prosecutor alleged that the force used was excessive, and the judge charged the jury if such was the case the defendant was guilty, but failed to call their attention to the good faith in which the officer claims to have acted. Held error. The amount of force necessary to make

the arrest is left to the judgment of the officer when acting within the scope of his general powers and actuated by no ill will or malice."

In *State v. Garrett* it was held, among other things:

"That where a defendant, in a state's warrant charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to unnecessary violence, it was held that he was justified."

In *Sigman's Case* the officer was convicted of an assault, but that was, because the offense being only a misdemeanor, the defendant was fleeing from the officer to avoid arrest, the distinction and principle applicable being stated as follows:

"But where a person charged only with a misdemeanor flies from the officer to avoid arrest, the latter is not authorized to take life or shed blood in order to make the arrest. Under such circumstances, if he kills he will at least be guilty of manslaughter, and he will be guilty of an assault if no actual injury is inflicted, if he uses such force as would have amounted to manslaughter had death ensued."

And a similar ruling was approved in *Sossamon v. Cruse*, 133 N. C. 470, 45 S. E. 757, and in *State v. Bryant*, 65 N. C. 327. In none of these was the question of resistance presented.

[3] Considering the facts in evidence as testified to by defendant, it appears that the prosecutor, C. T. White, shown to be a violent and dangerous man when drinking, had been drunk and disorderly in the town of Aulander for several hours, intimidating its citizens, committing various violations of the town ordinances, including several breaches of the peace; that when defendant, the constable and chief of police, approached the prosecutor to arrest him, having a warrant for the purpose duly issued, and of which the prosecutor was fully aware, the latter, in resistance, assaulted the officer with a drawn knife, making it necessary to shoot the offender in order to subdue him and execute the process, and, in view of the principles prevailing here, as stated, if this version of the occurrence is accepted by the jury, the action of the officer is fully justified. True, defendant testifies that he could have retired from the room and have avoided the difficulty, "but that he did not want to run." While this, at times, may be the rule as between individuals, under the circumstances presented he was not required to "withdraw or to run." Charged, in a special sense, with conserving the peace and quiet of the town, having, as stated, a warrant commanding him to arrest the prosecutor, it was both his legal right and official duty to proceed according to the exigency of his writ, and to

exercise the force required to its efficient execution.

[4] A proper concept of the officer's duty in the premises is very well stated in one of the defendant's prayers for instructions, as follows:

"The law does not require an officer with a warrant for an arrest for an offense to retreat or retire, but he must stand his ground and perform his duty; and it was not the duty of the defendant with the warrant for the arrest of the prosecutor, when the prosecutor advanced on him with the knife, if he did so, to back or retire, but it was his duty to stand and perform his duty and disarm the prosecutor, if it appeared to be necessary to do so, to effect the arrest."

On the record there was error to defendant's prejudice, and there must be a new trial of the cause.

Error.

BALCUM et ux. v. JOHNSON. (No. 225.)

(Supreme Court of North Carolina. March 19, 1919.)

1. RAILROADS \Leftrightarrow 481(2)—FIRES—EVIDENCE.

In action against railroad company for damages caused by fire alleged to have been started by defendant's engine, a witness was properly allowed to testify that engine operated by defendant a week before fire, in passing witness, threw out sparks and live coals from which fire caught, where defendant owned and operated only one engine.

2. NEGLIGENCE \Leftrightarrow 62(3)—PROXIMATE CAUSE—INTERVENING AGENCIES.

In order for act of intelligent intervening agent to break sequence of events and protect author of primary negligence from liability, such act must be an independent superseding cause and one that author of primary negligence had no reasonable ground to anticipate, and usually act must be in itself negligent or at least culpable.

3. RAILROADS \Leftrightarrow 465 — FIRES — PROXIMATE CAUSE—INTERVENING AGENCIES.

Where a railroad engine started a fire, conduct of persons attempting to prevent spread of fire, such as back-firing, on the question of intervening agencies, is not to be considered or charged with the critical scrutiny that may obtain in more deliberate circumstances.

4. RAILROADS \Leftrightarrow 465 — FIRES — PROXIMATE CAUSE—BACK-FIRING.

Where a railroad negligently started a fire, it was liable for damages caused by back-firing on part of a third person in a reasonable effort to extinguish fire.

5. REMAINDERS \Leftrightarrow 17(2)—REVERSIONS \Leftrightarrow 8(1)—FIRES—RIGHTS OF REMAINDERMEN.

Owners of property in remainder or reversion after a life estate may recover for a trespass which causes permanent damage to same, and to extent that it wrongfully affects or im-

pairs the value of their estate or interest, and this without making life tenant a party.

6. TRIAL \Rightarrow 365(1) — VERDICT — INTERPRETATION.

A verdict should be interpreted and allowed significance by a proper reference to the testimony and charge of the court.

Appeal from Superior Court, Sampson County; O. H. Allen, Judge.

Action by L. L. Balcum and wife against J. D. Johnson. Judgment for plaintiffs, and defendant appeals. No error.

Plaintiffs, alleging ownership of a designated tract of land, instituted the action to recover damages of defendant for wrongfully setting out fire and burning over the ground by means of a defective engine operated by defendant and his employees over his tramroad, etc.

There was denial of plaintiff's ownership by defendant and of any and all liability in the matter. There was evidence offered by plaintiffs of ownership of land, subject to a life estate therein of one J. A. Balcum, the life tenant not being a party, and also evidence in support of the wrong and damage alleged against defendant. On the part of defendant, there was evidence tending to show that he was in no default by reason of the fire complained of, including testimony to the effect that the fire that caused the damage was in fact and in truth put out by one Tom Wright, who had no relationship with defendant and his work and for whose conduct defendant was in no way responsible. Evidence in reply by plaintiff that the fire complained of and causing the injury was not started by Tom Wright, and that any fire put out by him was in the reasonable effort to check the spread of the fire started by defendant and which, under conditions presented, was a neighborhood menace.

On issues submitted, the jury rendered the following verdict:

"1. Are the plaintiffs the owners of the land described in the complaint? A. Yes, except as to the life estate of J. A. Balcum.

"2. Was the land burned over by the negligence of the defendant, as alleged in the complaint? A. Yes.

"3. If so, what damages were done to said land and premises? A. \$300."

Judgment on the verdict for plaintiffs, and defendant excepted and appealed, assigning errors.

Butler & Herring and H. E. Faison, all of Clinton, for appellant.

Geo. A. Smith, of Charlotte, and Fowler & Crumpler, of Clinton, for appellees.

HOKE, J. [1] Defendant noted an exception to the evidence of two witnesses for plaintiff, Martin Hairr and wife, to the effect that, one week before the fire in question,

the engine operated by defendant over his tramroad, in passing the witness, threw out sparks and live coals from which fire caught. In this connection, it was also proved that defendant owned and operated only the one engine over his road, and, under our decisions applicable, the evidence is competent on the issue. *Whitehurst v. Lumber Co.*, 146 N. O. 588, 60 S. E. 648; *Knott v. R. R. Co.*, 142 N. C. 238, 55 S. E. 150. In addition, it appeared from the evidence of Andrew Robinson, defendant's engineer and a witness in his behalf, that the engine in question was in the same condition on the day of the fire that it had been for six months previous to the fire and continued to be for six months thereafter. This, in any event, would render the evidence receivable on the issue. *Blevins v. Cotton Mills*, 150 N. C. 493, 64 S. E. 428. It was further insisted that his honor erroneously modified certain prayers for instruction by defendant in reference to the conduct of one Tom Wright who was engaged with others in the endeavor to extinguish or check the spread of the fire. The prayers more directly involved, being as follows:

"A. The defendant contends that the fire originated off his right of way and some distance from it, and that he was in no way responsible for this fire, but that from whatever cause originated this fire was held under control and was not permitted to go across the sand-clay road, and was not communicated to the plaintiff's land, and that the fire which burned the lands on the east side of the sand-clay road was set out by a third party, viz., one Tom Wright, and this is the fire that eventually burned the plaintiff's land. If this is true, and the jury should so find by the greater weight of the evidence, then the defendant is not liable. Or, if you shall find by the greater weight of the evidence that there was another fire set out by Tom Wright on the east side of the sand-clay road, as contended for by the defendant, and you are then in doubt as to whether the original fire or the fire set out by the third party, Tom Wright, burned the plaintiff's land, in that event, the defendant is not liable, and the plaintiff could not recover."

"B. If the jury shall find from the evidence that the fire originated between the defendant's railroad track and the county sand-clay road, which runs parallel with the railroad track and several hundred yards east therefrom, and that while those assembled endeavoring to control the fire, and while it was a considerable distance from the sand-clay road, which road was about 30 feet wide and free from combustible matter, one Tom Wright, a third party, instead of back-firing along the sand-clay road on the west side of the road and next to the fire, strewed fire on the opposite side of the road, being the eastern side of the road, with the wind blowing in an easterly direction, this would be an act of negligence for which the defendant would not be liable."

[2] His honor, both in his general charge and in direct response, told the jury that the

positions embodied in those instructions would prevail in their consideration of the case unless the act of Tom Wright referred to was a reasonable act and precaution to prevent the spread of the fire wrongfully started by defendant. It is the well-recognized doctrine that, in order for the act of an intelligent intervening agent to break the sequence of events and protect the author of a primary negligence from liability, such act must be an independent, superseding cause, one that the author of the primary negligence had no reasonable ground to anticipate, and usually the act must be in itself negligent or at least culpable. In *Barrows on Negligence*, the position is stated and commented on as follows:

"Where an independent, efficient, wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former, and not the latter, is deemed the proximate cause of the injury.

"An efficient, intervening cause is a new proximate cause, which breaks the connection with the original cause, and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action, and rendering its effect in the chain of causation remote. It is immaterial how many new elements or forces have been introduced; if the original cause remains active, the liability for its result is not shifted. Thus, where a horse is left unhitched in the street, and unattended, and is maliciously frightened by a stranger, and runs away. But for the intervening act he would not have run away, and the injury would not have occurred; yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded or obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening, responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible if damage results solely from the intervention."

The same principle is satisfactorily treated in *Shearman & Redfield on Negligence*, § 31 et seq., and has been very generally approved and applied in the decisions here and elsewhere. *Ward v. R. R.*, 161 N. C. 179, 78 S. E. 717; *Hardy v. Hines Lumber Co.*, 160 N. C. 113, 75 S. E. 855, 42 L. R. A. (N. S.) 759; *Harvell v. Lumber Co.*, 154 N. C. 254, 70 S. E. 389; *Harton v. Telephone Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390; *Harton v. Telephone Co.*, 141 N. C. 455, 54 S. E. 299; *Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395; *R. R. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Lane v. Atlantic Works*, 111 Mass. 136. In *Harton v. Telephone Co.*, 141 N. C. 455, 54 S. E. 299, supra, the general principle apposite is stated as follows:

"The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and

without which such event would not have occurred. Proximity in point of time or space, however, is no part of the definition.

"The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected."

In *Hardy v. Lumber Co.*, Walker, J., delivering the opinion, quotes from *R. R. v. Kellogg*, 94 U. S. at page 475, 24 L. Ed. 256, as follows:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury."

In *Lane v. Atlantic Works*, Colt, J., delivering the opinion, states the principle:

"In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended."

[3, 4] It is well understood that, when a fire of this kind is started and under conditions importing serious menace to the principal and adjacent property, it is the custom and assuredly the right of the neighbors to lend a hand and do what reasonable prudence and judgment require to prevent its spread, and that back-firing is one of the methods approved and frequently resorted to. It is also recognized that, in the presence of an emergency like this, the conduct of participants is not to be considered or judged with the critical scrutiny that may obtain in more deliberate circumstances. *McKay v. Ry.*, 160 N. C. 260, 75 S. E. 1081, Ann. Cas. 1914C, 412, and authorities cited. In the present case there was much testimony tending to show that the back-firing on the part of Wright was done in the reasonable effort to extinguish the fire wrongfully started by defendant, and, with such facts in evidence and under the principles stated, the intervening act of Wright would not break the causal connection with the original wrong of the defendant; the same being neither independent, improbable, nor culpable.

[5, 6] Again, it is objected that a proper consideration of the record and verdict will disclose that plaintiffs, the owners in remainder, subject to the life estate of J. A. Balcum, have recovered for the entire injury done to the property when the life tenant has

not been made a party and is in no way concluded by the judgment; but, in our opinion, this objection must also be disallowed. It is the accepted position here and elsewhere that the owners of property in remainder or reversion after a life estate may recover for a trespass which causes permanent damage to the same and to the extent that it wrongfully affects or impairs the value of their estate or interest, and this without the presence of the life tenant in the suit. *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850, 6 Ann. Cas. 143; *Gwaltney v. Timber Co.*, 115 N. C. 579, 20 N. E. 465; *Jordan v. Bearwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Shortle et al. v. Terre Haute, etc., Ry.*, 131 Ind. 338, 30 N. E. 1084. It is further recognized and approved in several of our more recent decisions that a verdict should be "interpreted and allowed significance by a proper reference to the testimony and charge of the court." *Weldon v. Ry.*, 98 S. E. 375, at the present term; *Jones v. R. R.*, 176 N. C. 260, 97 S. E. 48; *Grove v. Baker*, 174 N. C. 745, 94 S. E. 528; *Reynolds v. Express Co.*, 172 N. C. 487, 90 S. E. 510, Ann. Cas. 1918C, 1071.

Considering the record in view of these principles, it very clearly appears from the language of the issue, the charge of the court, and his honor's rulings in the exclusion of evidence, where it only tended to show injury to the life tenant, that the damages assessed in response to the third issue have been restricted to the injuries that were permanent in their nature and to the extent that they affected the interest and estate of the remaindermen who are both parties of record.

On careful consideration, we find no reversible error, and the judgment on the verdict is affirmed.

No error.

POCOMOKE GUANO CO. et al. v. COLWELL et al. (No. 223.)

(Supreme Court of North Carolina. March 19, 1919.)

1. HUSBAND AND WIFE ⇨142 — LABOR BY HUSBAND ON WIFE'S FARM—PRESUMPTION.

In absence of contract of renting between husband and wife, husband, as matter of law and fact, was merely agent of wife in carrying on her farm, and whether it was rented to tenants, or worked with hired labor, husband was entitled to no share in crops and profits for his services which his creditors could subject to their debts; presumption being that he was working gratuitously to contribute to support of family.

2. HUSBAND AND WIFE ⇨137(1)—SEPARATE PROPERTY OF WIFE—CONSTITUTION.

Under the Constitution, the wife holds her property free from any control of her husband.

3. HUSBAND AND WIFE ⇨142—OPERATION OF FARM THROUGH TENANTS — RIGHT OF LANDLORD—STATUTE.

A wife owning a farm worked by her husband through tenants, under Revisal 1905, § 1993; as to landlord's lien, was vested with right to the custody and control of the entire crop, subject only to the right of the tenants to their share.

4. HUSBAND AND WIFE ⇨138(10)—HUSBAND AS WIFE'S AGENT — LIABILITY FOR PURCHASE.

Guano bought by husband as agent for wife in making crops on her farm worked by him, other than fertilizers furnished by him for tenants, was liability against wife, not by reason of her receipt of crops, but by reason of husband's implied authority to incur indebtedness in making crop on part of the land worked for her directly, if furnished with her knowledge and without dissent.

5. JUDGMENT ⇨252(1)—PRAYER FOR RELIEF.

Plaintiff is entitled to recover any judgment which the facts alleged and proved would warrant, though not set out in the prayer for relief.

6. GARNISHMENT ⇨33—EARNED WAGES.

When a man has earned wages, they can be garnished as his property, if no personal exemption is claimed.

7. FRAUDULENT CONVEYANCES ⇨104(4) — HUSBAND AND WIFE.

No creditor has a right to the personal services of his debtor and a husband, as against his creditors, may donate to his wife his services in running her farm.

Appeal from Superior Court, Sampson County; Allen, Judge.

Action by the Pocomoke Guano Company and others against D. F. Colwell, administrator of S. F. Peterson, deceased, and others. From judgment for defendants, plaintiffs appeal. Affirmed.

S. F. Peterson died intestate in November, 1912, leaving a widow and several minor children. During the year 1912 and for some time previously he was engaged in running the farm on his wife's land in said county, part of it with hired labor and the rest by tenants. He also on his own account ran a store, a cotton gin, and acted as agent for the sale of fertilizers. At the time of his death and for some time prior thereto he was insolvent. There was no lease, or contract of rental between him and his wife. During 1912 he used guano, furnished by himself as agent of plaintiff Guano Company on the crops on his wife's land, which at his death were practically gathered. He sold 12 bales of the cotton at \$655.80, and received the proceeds. The rest of the crops were turned over to the widow, by the administrator of the husband.

The referee found that the value of the crops turned over to the widow by the ad-

ministrator after deducting the rental value of the farm was \$1,661.20, and gave judgment against the administrator and the widow for said amount. This action was brought by the plaintiff Guano Company against the administrator and his surety, and also against the widow, to recover the value of said crops to be applied to the general indebtedness of the husband for the guano sold by him as agent, and for other indebtedness of the husband.

On exception to the referee's report the court reversed the ruling of the referee, and held that the defendants were not indebted to the plaintiffs for the value of the crop turned over to the widow, and rendered judgment against the plaintiffs, who appealed.

Tillett & Guthrie, of Charlotte, Stevens & Beasley, of Warsaw, and McIntyre, Lawrence & Proctor, of Lumberton, for appellants.

Butler & Herring, of Clinton, for appellee.

CLARK, C. J. [1] It is found as a fact by the referee, and approved by the judge that there was no contract of renting between the husband and wife. The husband was, therefore, as a matter of law and of fact, merely the agent of his wife in carrying on her farm. Wells v. Batts, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506; Branch v. Ward, 114 N. C. 148, 19 S. E. 104. Whether the farm was rented to tenants or worked with hired labor, the husband was entitled to no share for his services, the presumption being, in the absence of a contract, that he was doing this gratuitously and in order to contribute to the support of a family. He had no interest in the crop which his creditors could subject to the payment of their debts. The husband did not give any lien upon the crop, and had no right to do so. Rawlings v. Neal, 122 N. C. 173, 29 S. E. 93; Bray v. Carter, 115 N. C. 16, 20 S. E. 164. The plaintiffs have no right to follow the fund which was the purpose of this action.

[2-4] Under the Constitution the wife holds her property free from any control of her husband (Manning v. Manning, 79 N. C. 300) and was vested with the right to the custody and control of the entire crop, subject only to the right of the tenants to their share therein. Revisal, § 1993. But while the plaintiffs cannot recover against her, for any indebtedness of the husband, whatever amount of guano was bought by him as agent for his wife in making the crops on said land (other than the fertilizers furnished by him for the tenants, as to which no assent of the wife is shown or presumed) would be a liability against the wife, not by reason of her receipt of the crops, but by reason of his implied authority to incur indebtedness for advances in making the crop on that part of the land worked for her directly if it was furnished with the wife's knowledge and without dissent. Thompson

v. Coats, 174 N. C. 193, 93 S. E. 724, does not apply, for in that case she and her husband were living apart, and there was nothing which implied an agency of the husband to act for her. But the court there said that the supplies furnished the tenants through her husband were not presumed to be by her authority; there being no direct benefit to her.

[5] It is true this action is brought to subject the entire crop (after deducting the rental), and the plaintiffs are not asking judgment against the widow on the ground of his agency, but she is a party to this action, and the plaintiff Guano Company is entitled to recover any judgment which the facts alleged and proven would warrant, though not set out in the prayer for relief. But, on the other hand, the husband was the agent of the plaintiff Guano Company in selling the fertilizers, and as there went into his hands the proceeds of 12 bales of cotton (which is found to be \$655.80), the Guano Company cannot recover of the widow, the owner of the land, unless the amount of the guano furnished for the crop worked for her direct, and not by her tenants, exceeded that amount.

When the case goes back, if it is suggested that there was an excess of such indebtedness above \$655.80, the amount may be ascertained, and the judgment may be rendered against the widow for that amount. Judgment should be rendered against the plaintiffs for the costs, up to that time, in any event and for the cost of this appeal.

[6, 7] It has been suggested that the creditor is entitled to recover for the value of the husband's services while acting as agent for his wife. When a man has earned wages, they can be garnished as his property, if no personal property exemption is claimed, but no creditor has a right to the personal services of the debtor, or, what is the same thing, to collect payment of the value thereof from one to whom he renders services, and thus make a contract which the debtor and the employer did not make. Such claim as this is simply an assertion of "peonage," and if it could be enforced the creditor could follow the debtor around wherever he might go, and compel his services through the medium of an employer.

It is too late in the world's history to assert such doctrine. Indeed the counsel for the plaintiff did not assert this proposition. He placed his right to recover upon the assumption that a husband, acting as agent in supervising his wife's farm, was in law a renter (though it is admitted here as a matter of fact that there was no contract of renting), and hence the wife was entitled only to rent, and the husband was entitled to the rest of the crop, which therefore the creditor could follow in the hands of the wife. This proposition is without a scintilla

of fact to sustain it, and has no analogy in the law.

In *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285, the court held that a married woman could employ her husband as her agent to carry on the manufacturing business, and that his "creditors acquire no interest in the profits because he gives his services without other compensation than an indefinite allowance applied by her permission to the payment of his expenses," citing numerous cases on page 672 of 108 N. C., on page 292 of 13 S. E. On page 673 of 108 N. C., on page 292 of 13 S. E., it is said that creditors "have no lien upon his [the debtor's] skill or attainments, nor can they compel him to exact compensation for managing his wife's property, or collect from her as on a quantum meruit what his services were reasonably worth. 2 Bishop, Married Women, §§ 299, 300, 453, 454. She may remunerate him by furnishing him a support. He may, if he choose, serve her without compensation. 2 Bishop, *supra*, § 439; *Corning v. Flower*, 24 Iowa, 584. Indeed, a creditor cannot collect from any person compensation for service rendered by his debtor with the understanding that it was gratuitous. 2 Bishop, *supra*."

The subject is fully discussed with full citation of authorities, and none to the contrary in *Mayers v. Kaiser*, 85 Wis. 382, 55 N. W. 688, 21 L. R. A. 623, 39 Am. St. Rep. 849, and with numerous authorities in the notes on pages 624 to 628 of 21 L. R. A. Indeed it is useless to discuss what amounts to a self-evident proposition, unless reversing the trend of the times, we should revert to the days when a man's labor and the control of his time belonged to his creditors.

Affirmed.

STATE v. OGLESTON et al. (No. 209.)

(Supreme Court of North Carolina. March 19, 1919.)

1. INTOXICATING LIQUORS §236(4)—UNLAWFUL MANUFACTURE—SUFFICIENCY OF EVIDENCE.

Where a still was in active operation and defendants, charged with unlawful manufacture of spirituous liquors, were the only persons present, jury was warranted in returning verdict of guilty; the inference being permissible that defendants were in charge of and operating the still.

2. INDICTMENT AND INFORMATION §174 — UNLAWFUL MANUFACTURE — AIDING AND ABETTING.

Under Laws 1917, c. 157, notwithstanding charge is for manufacture of spirituous liquors, a conviction for aiding and abetting can be had.

Appeal from Superior Court, Lenoir County; O. H. Allen, Judge.

Jonah Ogleston and Otis Perry were convicted of the unlawful manufacture of spirituous liquors and they appeal. No error.

The defendants, Perry, a white man, and Ogleston, a negro, were convicted under an indictment charging the unlawful manufacture of spirituous liquors, and appealed from the judgment rendered upon the verdict.

The exceptions taken by the defendants are: (1) To the refusal to enter judgment of nonsuit upon the ground that the evidence was not sufficient to sustain a verdict of guilty; (2) to the following charge given to the jury:

"Under this act [reading chapter 157, p. 310, Laws of 1917], notwithstanding the charge is for the manufacture of spirituous liquors, you can convict either of the defendants for aiding and abetting the manufacturing of spirituous liquors."

W. S. O'B. Robinson, of Goldsboro, and T. C. Wooten, of Kinston, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. [1] The evidence is, in our opinion, fully sufficient to support the verdict. It tends to prove that the sheriff of Lenoir county, with two deputies, found a still in the woods a mile behind the houses where the defendants lived; that the still was in active operation with a fire under the furnace and the spirits running from the spout of the still into a bucket; that Ogleston, who admitted that he had before that time engaged in the manufacture of spirituous liquors, was standing in front of the fire with his back to the still, and that Perry was sitting down; that each of the defendants had a gun, and that the two guns were wrapped up together, and were near the defendants; and that no one else was at or about the still.

As the still was in active operation, and as the defendants were the only persons present, the inference was at least permissible that the defendants were in charge of the still and operating it.

[2] The charge of his honor is sustained by *State v. Horner*, 174 N. C. 792, 94 S. E. 292, in which the court says:

"It makes no difference whether defendant was a principal in the first degree or in the second degree as an aider and abettor. The latter is but a lower grade of the principal offense, viz. the distilling or manufacturing of the liquor. An aider and abettor is denominated in the books as a principal in the second degree."

No error.

Ex parte COLEMAN et al.

Petition of WALLACE & BARRON et al.
(No. 10171.)

(Supreme Court of South Carolina. March 18, 1919.)

APPEAL AND ERROR §1180(3) — EFFECT OF DECISION ON PARTIES NOT APPEALING.

Where there were seven interests involved when the attorney's fees were fixed and only three appealed, decision that decree as to appellants is reversed, but that parties not appealing are bound, means that the parties not appealing are bound for four-sevenths of fee as formerly fixed, and not for the whole fee.

Appeal from Common Pleas Circuit Court of Union County; S. W. G. Shipp, Judge.

In the matter of the final settlement and discharge of William Coleman and another executors of Anne E. Rice, deceased. From decree of probate court adjudging that Wallace & Barron and George S. Mower, petitioning for attorney's fees, were entitled to only four-sevenths of their fee, they appeal to the circuit court, which allowed the entire fee, whereupon the executors and owners of four-sevenths interest in estate appeal. Judgment of circuit court reversed, and judgment of probate court affirmed.

John Gary Evans, of Spartanburg, for appellants.

Wallace & Barron, of Union, and Geo. S. Mower, of Newberry, for respondents.

WATTS, J. The sole question raised by the appeal turns upon the construction to be placed upon the decision of this court in the former appeal in this case reported in 106 S. C. 534, 91 S. E. 861. An examination of the records discloses that there were seven interests involved when the fees were fixed, and three interests appealed. Four did not appeal. The court sustained the contention of appellants when the case was remanded. The probate judge allowed the attorneys four-sevenths of their fee. An appeal was taken from this order, and his honor, Judge Shipp allowed the whole fee, as claimed, and required the appellants to be bound for what this court had allowed the appellants in the former appeal, on the ground that no appeal had been taken by them, and that they could derive no benefit from the decision.

The court, in the former opinion, held that the executors had no right to employ so many attorneys, the same not being necessary, but, inasmuch as no one appealed, except the appellants, the decree as to them was reversed, but that the parties not appealing were bound. This means they are bound for their proportionate part of the fee, as formerly fixed, and not the whole as fixed. That had

they appealed, the decree would have been reversed as to them, as well as the appellants. The probate court properly construed the intention and decision of this court. The exceptions are sustained, and judgment of circuit court reversed, and judgment of the probate court affirmed and made the judgment.

Reversed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

SISTER FELICITAS v. HARTRIDGE, Sol. Gen. (No. 790.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §56, 82, 206(1), 209, 318—CRIMINAL LAW §627(1), 629—SEARCHES AND SEIZURES §7—STATUTES §71, 110½(1)—SUBJECT AND TITLE—PROTECTION OF PERSON AND PROPERTY—DUE PROCESS OF LAW—UNIFORMITY OF LAWS—JUDICIAL POWER.

Except as to the part dealt with in the second division of the opinion, the act of the General Assembly of this state, approved August 21, 1916 (Acts 1916, p. 126), entitled an act to provide for the inspection by state authorities of private institutions, etc., was properly held not to be unconstitutional upon the grounds urged in the attack made upon various sections of the act.

2. STATUTES §64(10) 110½(1)—SUBJECT AND TITLE—INSPECTION BY GRAND JURY—EFFECT OF PARTIAL INVALIDITY.

So much of the fourth section of the act just referred to declares it to be the duty of the grand jury to specially present the owner, keeper, custodian, or manager of such institution, in certain cases there stated, contains matter different from what is expressed in the title of that act, and is therefore unconstitutional and void.

(a) But the void part of section 4 may be segregated and eliminated without destroying the entire act, as it is not so essentially connected with the primary principle and purpose of the law as to render its elimination destructive of the whole.

(b) The part of the act declared unconstitutional and void did not affect the issue involved in the instant case, nor the judgment rendered by the court.

(Additional Syllabus by Editorial Staff.)

3. CONSTITUTIONAL LAW §48—INVALIDITY OF STATUTE.

Before an act of a co-ordinate department of the government can be declared unconstitutional, the conflict between the act and the fundamental law must be clear and palpable, and an act will not be set aside in a doubtful case.

4. CONSTITUTIONAL LAW §40—VALIDITY OF STATUTE—SPIRIT OF CONSTITUTION.

That an act is contrary to the spirit of the Constitution is insufficient to invoke judicial interference, as courts cannot declare acts unconstitutional, except where they violate express words of Constitution.

Error from Superior Court, Chatham County; P. W. Meldrim, Judge.

Contempt proceeding, on the relation of W. C. Hartridge, Solicitor General, against Sister Felicitas. From a judgment holding defendant guilty of contempt and enforcing a fine, she excepts and brings error. Affirmed.

Anderson, Cann, Cann & Walsh, of Savannah, King & Spalding, of Atlanta, Augustin Daly, of Macon, and Louis LeGarde Battey, of Augusta, for plaintiff in error.

Walter C. Hartridge, Sol. Gen., of Savannah, pro se.

BECK, P. J. Pursuant to the provisions of an act of the General Assembly of this state, entitled an act to provide for the inspection by state authorities of private institutions, etc., approved August 21, 1916 (Acts 1916, p. 126), a committee of five members of the grand jury of the October term, 1917, of Chatham superior court, called at the Convent of the Sisters of Mercy, and at the Convent of the Franciscan Sisters, for the purpose of making the inquiry and investigation provided for in said act. Mother Clare, in charge of the Convent of the Sisters of Mercy, and Sister Felicitas, in charge of the Convent of the Franciscan Sisters, declined to permit the committee to make the investigation desired. This committee, through the grand jury, reported the refusal to the superior court. The solicitor general of the Eastern judicial circuit filed a petition to the superior court, reciting the facts just set forth, and setting up the contention that the refusal by Mother Clare and by Sister Felicitas constituted a contempt of court, and prayed that an order be passed requiring the respondents to show cause why they should not be adjudged guilty of contempt and be punished therefor; and an order to this effect was granted. Both respondents made answer to the rule, setting up, first, that the institution over which they presided was not within the purview of the act above referred to, for reasons set forth in the answer, and they attacked the act on numerous constitutional grounds. The judge of the superior court, after hearing evidence, discharged the rule as to Mother Clare, but held that Sister Felicitas was guilty of contempt, and imposed a fine. To this ruling Sister Felicitas excepted and brought the case by writ of error to this court for review.

[1, 3, 4] 1. The judge who heard the issues made by the rule and the answer, in passing upon the case and rendering the judgment complained of, delivered an opinion in writing, which (omitting only certain general observations made in the course of the opinion which do not materially affect the decision and discussion of the issues involved) is as follows:

"It appears that the respondent is the head of a private institution known as St. Francis Convent. That that institution is not only a convent but is also a 'private orphanage.' That no person is kept in confinement in the convent, and that the orphanage, which is for colored orphans, is governed by the usual and customary rules and regulations that obtain in orphan asylums. In a wide sense, the orphans are persons who are kept in confinement, and to this private orphanage the act approved August 21, 1916, applies.

"The constitutionality of the act is attacked on about forty grounds, great and small, general and special. I do not deem it necessary to consider in detail all of these grounds. They can be grouped together under three heads, of form, substance, and procedure. In the group 'form' falls the objection based on Code, § 6437, dealing with one subject-matter. Under this general ground there are six subdivisions. The first contention is that the act provides for inspection 'by state authorities,' and that five members of a grand jury are not state authorities. The grand jury represents the state. It acts 'in the name and behalf of the citizens of Georgia.' Its action is taken to maintain the peace, good order, and dignity of the state. The county is only a subdivision of the state. In the enumeration of county officers grand juries are not included. There may be county authorities and state authorities; but when the grand jury acts in matters of general welfare it is a state authority, and a committee from that body can be empowered by the state, acting through its Legislature, to make inspections 'of every private institution in which citizens of Georgia and other states are kept in confinement.' I cannot assume that the grand jury would act without legal evidence and the concurrence of at least twelve of its members.

"The second and third contentions are that the act provides for the examination and questioning of the inmates of these institutions, and that the caption provides only for inspection. Inspection and examination are synonymous terms, or are very nearly so; and if in order to make an inspection it is necessary to question an inmate, it is quite clear that the power given to inspect would include the power to question. The power being given, the usual and ordinary means for the exercise of the power are implied. Inspection, examination, questioning are all related, and are but the means employed to reach a given end, that is, the inspection of institutions in which citizens of Georgia and of other states are kept in confinement.

"The fourth and fifth contentions deal with the demand for release of an inmate and special presentment, while the sixth is a résumé of the first, second, third, fourth, and fifth contentions.

"The great purpose of the act is inspection of private institutions where citizens are kept in

confinement. Any instrumentality in aid of this purpose is not a subject-matter different from the title.

"In the group of 'substance' falls the objection, with its several subdivisions, based on Code, § 6358, dealing with protection to persons and property; the objection based on Code, § 6359, dealing with due process of law, with a like number of subdivisions; the objection based on Code, § 6372, dealing with searches and warrants, with its three subdivisions; and the objection based on Code, § 6700 (the Fourteenth Amendment of the Constitution of the United States), dealing with citizenship, with its eight subdivisions. Wherein this act breaks down the constitutional barrier which impartially and completely protects the person and property of the respondent, I am at a loss to see. That the respondent may be deprived of her liberty and property is true, but it is not true that such deprivation will be without due process of law. The Legislature has the right to require inspection of institutions where citizens are kept confined. When the right to inspect is denied, there is certainly no violation of the due process clause of the Constitution because the inspectors, a committee from the grand jury, report to that body the result of their inspection. The vice in the respondent's contention is in assuming that the report or action of a committee from the grand jury is a final process by which the respondent is, without due process of law, deprived of her liberty or property. No deprivation of any kind can arise until after the grand jury shall have specially presented the respondent, and then only after a fair and impartial trial a jury of her peers has found her guilty of the offense charged against her in the presentment.

"As to unreasonable searches, it is safe to say that no search is required to be made under the act. Certainly I cannot read into the act words that are not there. There is nothing in the act which can be construed as authority for a committee from the grand jury of this state to make an unreasonable search of this orphanage. The legislative authority is sufficient to authorize the inspection of private institutions where citizens are kept in confinement.

"I do not see the application of the Fourteenth Amendment to the instant case. For the reasons heretofore given, this state does not by the act in question abridge any privilege or immunity of the respondent, deprive her of any right without due process of law, or deny her the equal protection of the laws. The respondent erroneously assumes that the committee from the grand jury become vested under the act with all the powers of the grand jury and the trial court and jury, and that in this way the respondent is deprived of certain privileges and immunities, such as right of appeal, cross-examination, etc. The committee from the grand jury has no such powers, and cannot have.

"In the group of 'procedure' falls the objection based on Code, § 6361, dealing with accusation and list of witnesses; the objection based on Code, § 6497, dealing with the judicial powers vested in certain courts; and objection based on Code, § 6391, dealing with uniformity of laws. Under this last objection are two subdivisions. The vice of this group is that the respondent assumes a fact not contemplated in

the act, and that is, that the grand jury will not furnish the accused on demand, at the proper time, a copy of the accusation and list of witnesses. It is also vicious in that it confuses the ascertainment by the committee of the fact that a person is illegally deprived of liberty, with the final determination after presentment by the jury of the county, of the guilt or innocence of the respondent. The objection that the act does violence to the uniformity of laws clause, for the reasons assigned, is not convincing. The same vice here again appears, and that is, in assuming that the grand jury and a committee from that body are one and the same, and that the grand jury has surrendered all its rights and powers to a committee. There is no reason suggested why, after the report has been made, the proceedings before the grand jury will not be the decent and orderly investigation, hearing of evidence, and presentment required by law. So far as the grand jury or any committee or member of that body being required to keep secret all matters and things which may come to their knowledge, and so far as relates to the publication, at the expense of the county, of the names of dissatisfied inmates, these are matters which concern the jurors and the county, and in which it does not appear that the respondent is interested. * * * Before an act of a co-ordinate department of the government can be declared unconstitutional, the conflict between the act and the fundamental law must be clear and palpable. The solemn act of the General Assembly will not be set aside in a doubtful case; and before annulling an act passed upon as constitutional by both the legislative and executive departments of the state government, the judicial department should be clearly satisfied of its unconstitutionality. Even if the act in question were contrary to the spirit of the Constitution, that of itself would not be sufficient to invoke judicial interference. The courts cannot declare acts unconstitutional except where they are in violation of express words of the Constitution; otherwise there would be a substitution of the judgment of the court for the will of the Legislature, and this cannot be.

"The unconstitutionality of the act has not been made to appear so clear and palpable as to justify the annulling of it, and therefore it is adjudged that the respondent, Sister Felicitas, is in contempt, and judgment will be entered accordingly."

[2] 2. The foregoing opinion sufficiently discusses the objections urged to the constitutionality of the act in question, states the controlling issues made in the case, and announces sound principles of law applicable thereto, except as to that portion of the criticism directed against the part of the fourth section of the act which provides that—

"In case that such demand for the release of said person is not promptly complied with upon the demand of the committee, it shall be the duty of the grand jury to specially present the owner, keeper, custodian, or manager of such institution, in a special presentment for false imprisonment, and for holding persons to involuntary servitude, in violation of the Constitution of the state of Georgia, and of the United States."

The objection to this provision is not specifically discussed in the opinion which we have set forth, and is not dealt with in that opinion except in the general way where it is held that the act is not unconstitutional. If it was intended in this opinion to hold that that part of the act which we have just referred to is not unconstitutional, a conclusion is reached in which we cannot concur; but we will not reverse the judgment of the court below because of the ruling as to this part of the legislative act under review, for, in passing upon the issues made before him in the instant case and in reaching the decision which we are upholding, the court was dealing with those parts of the act which related to inspection strictly, as appears from the statement of facts. But we cannot concur in so much of opinion as holds, apparently, that the provision of the act which makes the refusal of demands for the release of persons a criminal offense is not objectionable on the ground that it contains matter different from what is expressed in the title of the act, in violation of the provision of the Constitution (Civil Code, § 6437) inhibiting the passage of a law containing matter "different from what is expressed in the title thereof." The title of the act is in the following language:

"An act to provide for the inspection by state authorities of every private institution in which citizens of Georgia and of other states are kept in confinement by sanitoriums, private hospitals, private asylums, private orphanages, Houses of the Good Shepherd, convents, monasteries, or any other institution under any other name, maintained by private individuals, corporations, churches, or charitable institutions, within the state of Georgia, and for other purposes."

We do not think this title can receive any fair construction which would make it sufficiently indicate that the part of the act which we have pointed out does not contain matter different from the title. The title itself indicates that it is the purpose of the act to provide for the "inspection" of certain institutions; and no other term is used to define the general scope of the act, except the words "and for other purposes," and this last expression can cover only those purposes which are germane to the main expressed purpose of inspection. If the express purpose of the act had been "to regulate" institutions of the kind named, possibly it might have been, in order to make the regulation effective, no violation of the clause of the Constitution now being considered to have provided that in certain contingencies the managers or those in charge of such institutions might be indicted, as an indictment might, in case of violation of the regulation prescribed, be a method of making effective the regulations; but where "inspection" is the sole specific purpose indicated,

we cannot see any indication, in the term employed, of a purpose to include in the act provisions for presentment by the grand jury and a prosecution, but we are further of the opinion that the part of the act which we have held to be unconstitutional does not so affect the entire legislative scheme as embodied in this act as to render the entire act void. We are of the opinion that the provisions as to prosecution and presentment can be segregated and eliminated from the act, and the main legislative scheme be given force. Accordingly we concur in what was said in the opinion of the trial judge which we have quoted, and adopt the decision contained in his opinion as the decision of this court upon the issues made by the contentions of the plaintiff in error based upon constitutional grounds, except as regards that part of the act contained in section 4, providing for prosecution and presentment by the grand jury. Therefore the judgment of the court below will stand unaffected by the ruling which we have made in the second division of the opinion, as that part of the act held to be unconstitutional was not involved in the proceedings which resulted in the judgment complained of.

Judgment affirmed.

All the Justices concur.

SOUTHERN RY. CO. v. HODGSON BROS. CO. (No. 860.)

(Supreme Court of Georgia. Feb. 24, 1919.)

(Syllabus by the Court.)

1. TRIAL ~~6~~368 — AGREED STATEMENT OF FACTS—EFFECT.

Hodgson Bros. Company sued out an attachment against Harris Bros. Grain Company, nonresidents of the state. The attachment was levied by process of garnishment served upon the Southern Railway Company. The garnishee answered not indebted, and that it had no property in its hands belonging to the defendant, etc.; and a traverse of the answer was duly filed. A judgment was rendered in the attachment suit in favor of the plaintiff, which was not excepted to. The garnishment case was tried upon an agreed statement of facts, as follows: "In June, 1915, the Ft. Worth & Rio Grande Railway Company received from the Harris Bros. Grain Company, at Rochelle, Tex., certain sacks of oats consigned to Harris Bros. Grain Company, Greenville, S. C., with instructions from the shippers to notify Hodgson Bros. Company at Athens, Ga., upon the arrival of the car at Greenville, S. C. A bill of lading was issued with draft attached, drawn by Harris Bros. Grain Company for \$559.30, with instructions that the paid freight bill was to be deducted from this amount and accepted as cash. This shipment of oats was received by the Southern Railway Company from its connecting

carrier, and by it transported to Greenville, S. C., where it arrived on or about July 10, 1915. In the meanwhile Hodgson Bros. Company had transferred the invoice covering the shipment to the Acme Feed Company of Greenville, S. C., and upon the order of Hodgson Bros. Company (Harris Bros. Grain Company having notified the Southern Railway Company, on June 15, 1915, that the car of oats was for Hodgson Bros. Company of Athens) it was delivered by the Southern Railway Company to the Acme Feed Company on July 10, 1915, upon that company paying to the Southern Railway Company \$559.30, \$240.40 of which was the freight charges to which the Southern Railway Company was entitled; thus leaving a balance in the hands of the Southern Railway Company of \$318.90. After the car of oats had been delivered as above set forth, the Southern Railway Company received, on or about July 16, 1915, another order from Harris Bros. Grain Company, dated July 14, 1915, instructing the railway company to deliver the car of oats to A. M. Hayes of Greenville, S. C.; but at that time the car had already been delivered to the Acme Feed Company, as above set forth. After summons of garnishment was served on July 14, 1915, on the Southern Railway Company, the defendant, Harris Bros. Grain Company, brought suit against the initial carrier, the Ft. Worth & Rio Grande Railway Company, in the county court of Dallas county, Tex., on account of the alleged wrongful delivery of this car of oats; and on February 17, 1916, a judgment was obtained against the Ft. Worth & Rio Grande Railway Company for \$399.10, the Southern Railway Company's plea of privilege having been sustained by the Texas court, and the suit as to it having been dismissed." The answer of the garnishee stated, among other things, that the oats were delivered to the Acme Feed Company "upon the order of Harris Bros. Grain Company, the consignor." There was no evidence as to indorsement or transfer of the bill of lading. A judgment was rendered against the garnishee, and it carried the case to the Court of Appeals by writ of error. The judgment of the trial court was affirmed, and a writ of certiorari to that judgment was granted by this court. *Held*:

Where a case was being tried by the judge without the intervention of a jury, and the parties in open court stated certain facts "which were agreed on by both parties to be true," there being nothing said in the agreement to qualify its terms, the facts thus agreed to for the purposes of the trial must be accepted as the truth and as binding upon both parties, notwithstanding they may be contradicted by certain admissions made in the answer of one of the parties, favorable to his adversary. *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; 1 Enc. Ev. 473; *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94; *Saltonstall v. Russell*, 152 U. S. 628, 14 Sup. Ct. 733, 38 L. Ed. 576; *Folger v. Insurance Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Sawyer v. Corse*, 17 Grat. (Va.) 230, 94 Am. Dec. 445.

2. GARNISHMENT — 39 — CONVERSION OF GOODS — GARNISHMENT BY CREDITOR OF OWNER — STATUTE.

A person who has committed a tort by conversion of the property of another is not sub-

ject to garnishment on account of such conversion, at the instance of a creditor of the owner of the goods, until final judgment has been recovered by such owner for the damages arising from the conversion. *Civ. Code* 1910, §§ 5272, 5265; *Gamble v. Central Railroad*, etc., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276; *Bates v. Forsyth*, 69 Ga. 365; *Selheimer v. Elder*, 98 Pa. 154; *Keyes v. Milwaukee*, etc., Ry. Co., 25 Wis. 691; *Rood on Garnishment*, 183.

3. CARRIERS — 83 — BILL OF LADING — DELIVERY — CONVERSION.

Where an owner of goods delivers them to a railroad company to be shipped to a designated point, and a bill of lading is issued to the owner, in which he is named as both shipper and consignee, and which contains a direction to "notify" a third person, it is the duty of the railroad company, unless otherwise instructed by the owner or by some holder of the bill of lading properly indorsed, after transporting the goods to the place of destination, to make delivery thereof to the holder of the bill of lading, or one duly authorized by such holder to receive the same. The company is not authorized to make delivery to the person designated to be notified, to whom the bill of lading has never been assigned, or to any other person acting upon his order. *Florida Central*, etc., R. Co. v. *Berry*, 116 Ga. 19, 42 S. E. 371. Therefore such a delivery would amount to a conversion. *Merchants'*, etc., *Transportation Co. v. Moore*, 124 Ga. 482, 52 S. E. 802; *Brothers v. Horne*, 140 Ga. 617, 79 S. E. 468.

4. CARRIERS — 177(3) — GARNISHMENT — 40 — CONVERSION — REMEDIES BY SHIPPER.

Where the shipment involved transportation between points in different states over the lines of several connecting railroads engaged as common carriers, and the conversion was committed by the last carrier by making a wrongful delivery of the goods, the holder of the bill of lading had an option to sue the initial carrier under the provisions of the act of Congress commonly called the Carmack Amendment (U. S. Comp. St. § 8604a; *Georgia*, etc., *Ry. Co. v. Blish Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948), or to sue the last carrier (*Southern Ry. Co. v. Morris*, 147 Ga. 729, 95 S. E. 284); and where the holder of the bill of lading obtained a judgment for the conversion against the initial carrier alone, the judgment not being one against the last carrier, it will not amount to such liquidation of the demand between those parties as to render it subject to garnishment at the suit of a creditor of the holder of the bill of lading.

5. DISPOSITION OF CAUSE.

Applying the foregoing rulings, the judgment of the Court of Appeals is reversed and the cause remanded.

Certiorari to Court of Appeals.

Suit by the Hodgson Bros. Company against the Harris Bros. Grain Company with attachment levied by process of garnishment served upon the Southern Railway Company. Judgment in attachment suit for plaintiff, and in garnishment suit against the garnishee,

which took writ of error to Court of Appeals, and from its judgment of affirmance (21 Ga. App. 753, 95 S. E. 263) a writ of certiorari was granted. Reversed, and cause remanded.

Blanton Fortson, of Athens, for plaintiff in error.

Wolver M. Smith and Erwin, Rucker & Nix, all of Athens, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(148 Ga. 721)

BROOKMAN v. RENNOLDS et al.

RENNOLDS et al. v. BROOKMAN.
(Nos. 837, 838.)

(Supreme Court of Georgia. Feb. 13, 1919.
Rehearing Denied Feb. 24, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 843(1)—CROSS-BILL OF EXCEPTIONS—DECISION.

Where the trial judge renders a judgment granting a new trial based upon a single ground in the motion, and the respondent brings a bill of exceptions, and the defendant in error brings a cross-bill of exceptions, the assignments of error in the cross-bill relating to questions which will probably arise on another hearing will be decided.

2. EXECUTORS AND ADMINISTRATORS \S 524(1)—TRIAL \S 252(3)—FOREIGN LETTERS—SPECIAL ADMINISTRATION—POWER TO SUE—INSTRUCTION—APPLICABILITY TO EVIDENCE.

Letters of administration granted in another state, authorizing an administratrix to administer "personal property, goods, chattels, and credits" of an intestate who died while a resident of the state in which the letters were issued, are special in character, and do not afford authority to the administratrix to maintain a suit in this state to enjoin the cutting of timber and to recover damages for trespass in cutting and removing the timber from the land.

(a) In a suit of the character just mentioned, it is incumbent upon the judge so to frame his charge to the jury as to make it conform to the pleadings and evidence; and the fact that the letters of administration have been admitted in evidence without objection would not authorize the judge to charge that the administratrix was authorized to maintain the suit.

3. ADVERSE POSSESSION \S 38—TESTIMONY—DENIAL.

In a suit to enjoin the cutting of timber and recover damages for trespass on the realty, where both parties relied upon prescriptive title, and the plaintiff contended that the land in dispute was a certain part of her land lying on the north side of a road which separated it from the main body of her land of which it formed a part, and the defendants contended that the land in dispute was a part of their tract, which comprised all the land on the north side of the road, and that they and his prede-

cessors in title had been in actual possession of the land, and a witness for the plaintiff had testified that during the period of the defendants' actual possession the plaintiff's lessees had cut the timber on all of the plaintiff's tract, it was competent to show by the same witness that such lessees did not cut the timber on the land in dispute.

4. APPEAL AND ERROR \S 970(2)—EVIDENCE \S 177—SECONDARY EVIDENCE—ADMISSIBILITY—DISCRETION OF COURT.

In order to admit secondary evidence, it must appear that the primary evidence, for some sufficient cause, is inaccessible to the diligence of the party. The question of diligence is ordinarily addressed to the discretion of the court, which will not be interfered with unless flagrantly abused.

5. EVIDENCE \S 229, 256 — ADMISSIBILITY—SURVEYOR'S CERTIFICATE.

One of the defendants' predecessors in title was John M. Tison. A certificate issued by him, signed "John M. Tison, County Surveyor," and tending to show the correctness of a map of the plaintiff's lands, was relied upon as a part of the deed under which she was attempting to prescribe. She did not show that John M. Tison was ever in possession of the land in dispute, but contended to the contrary. The defendants produced evidence to show that John M. Tison was in actual possession of the land in dispute during the period covering the date of the certificate. The certificate was tendered after the introduction of such evidence by the defendants. *Held*, that there was no error in admitting the certificate over the objections: (1) That it did not appear that the certificate was made while Tison was in possession; (2) that it was an official certificate, and would not bind him personally.

6. APPEAL AND ERROR \S 231(5)—EVIDENCE \S 117—ADMISSION OF EVIDENCE—REVIEW.

Under the issues presented by the pleadings and evidence, the authority of one of the agents of the plaintiff's intestate to manage and control his lands was a relevant question; and it was not erroneous to admit a paper purporting to be a copy of the map of his lands covering the land in dispute, when offered in connection with other evidence tending to show that at the time of employment the plaintiff's intestate delivered to the agent the paper as showing the lands he was employed to protect.

(a) The paper contained certain certificates which were not objected to separately; the only objection being to the evidence in its entirety. Under such objection the admissibility of such certificates will not be considered.

7. TRIAL \S 255(8)—ISSUE—INSTRUCTION.

The true location of the dividing line between the lands of the plaintiff and the defendant was a matter of dispute, and under the pleadings and evidence there was a question of whether a line had been established by acquiescence by acts and declarations of the parties or their predecessors, or by actual possession of the defendants and their predecessors for a term of seven years; and it was the duty of the court, without request, to charge the law on that subject.

8. ADVERSE POSSESSION \Leftrightarrow 116(7) — ACTUAL AND CONSTRUCTIVE POSSESSION—EVIDENCE.

The plaintiff's intestate was never in actual possession of the land in dispute, though there was evidence tending to show that he was in constructive possession thereof. There was also evidence to show that the defendants and their predecessors in title were in actual possession of the land in dispute during any period of the plaintiff's constructive possession. Under these circumstances the court, on request, should have charged the jury "that actual possession of land by one person claiming it is inconsistent with the constructive possession of the same land by another claimant."

9. CHARGE OF COURT.

The charge complained of in the fifth ground of the amended motion for new trial did not accurately state the contentions of the defendants, and was somewhat confusing.

10. ADVERSE POSSESSION \Leftrightarrow 116(2) — TRIAL \Leftrightarrow 193(2), 253(8)—INSTRUCTIONS—IGNORING EVIDENCE—OPINION OF COURT.

The charge set out in the tenth division of the opinion was applicable to one phase of the case as made by the pleadings and evidence, and was not open to the objections urged against it in the motion for new trial.

11. ADVERSE POSSESSION \Leftrightarrow 116(4) — PRESCRIPTION PERIOD—INSTRUCTION.

The charge set out in the eleventh division of the opinion unduly restricted the period within which the defendants were authorized to prescribe.

12. ADVERSE POSSESSION \Leftrightarrow 116(5)—ACTUAL OR CONSTRUCTIVE POSSESSION — CONSTRUCTION.

The prescription provided for in Civ. Code 1910, § 4168, contemplates actual possession for a period of 20 years, and that provided for in section 4169 contemplates possession under color of title for 7 years, which may be actual or constructive; and in a case where a party relies upon a prescription based upon both sections, the court should not in the charge so confuse the two as to state in effect that, in order to acquire prescription under color of title, the possession relied on as the basis of such prescription must be actual possession of the whole tract.

13. ADVERSE POSSESSION \Leftrightarrow 116(5)—PERMISSIVE POSSESSION—INSTRUCTION.

The evidence authorized a charge upon the subject of permissive possession.

14. SUFFICIENCY OF EVIDENCE.

As the case will go back for another trial, in which the evidence may not be the same, no ruling will be made on the sufficiency of the evidence to support the verdict.

Error from Superior Court, Glynn County; J. P. Highsmith, Judge.

Suit for injunction and for damages by Mrs. Marion P. Brookman, administratrix, against P. J. Rennolds and others. Verdict for plaintiff, motion for new trial granted, and plaintiff excepts, and defendants file a

cross-bill of exceptions. Affirmed on main bill of exceptions, and reversed on cross-bill.

Mrs. Marion P. Brookman, alleging herself to be administratrix upon the estate of Henry D. Brookman, deceased, by appointment of the Surrogate Court in the state of New York, instituted a suit in the state of Georgia to enjoin the cutting of timber on a described tract of land, and to recover damages on account of trespass in cutting and removing the timber. She also prayed for general relief. The case was tried before a jury, and their verdict was for the plaintiff. The defendants made a motion for a new trial on numerous grounds. Upon the hearing the judge granted a new trial on one ground. The plaintiff excepted. The defendants filed a cross-bill of exceptions, assigning error on the failure of the judge to grant a new trial on each of the remaining grounds of the motion.

Adams & Adams, of Savannah, and D. W. Krauss, of Brunswick, for plaintiff.

Bennet, Twitty & Reese, of Brunswick, for defendants.

ATKINSON, J. [1] 1. In *Thornton v. Travelers' Ins. Co.*, 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99, it was held:

"A judgment granting a first new trial will never be reversed unless the law and the facts demanded the verdict rendered; and this is true notwithstanding the grant of a new trial may have been based upon a single ground in the motion, and though this ground may not have been well taken. But where in such a case the defendant in error brings a cross-bill of exceptions, the assignments of error therein relating to matters which will probably arise at another hearing will be decided."

Under this ruling the questions made by the cross-bill of exceptions, which may arise on another trial, will be considered. The case differs from *Southwestern R. Co. v. Smithville*, 134 Ga. 432, 67 S. E. 936.

[2] 2. In *Jones v. Clett*, 114 Ga. 673, 40 S. E. 719, the administrators of the estate of a person who resided in New York at the time of his death, appointed in the Surrogate Court of New York, brought an action in this state to recover a described parcel of land with mesne profits and damages alleged to have been sustained by the cutting and removing of timber from the land. On the trial the plaintiff offered in evidence their letters of administration with the will annexed. It appeared that the will was adjudged by the Surrogate Court "to be a valid will of personal estate only." The letters recited:

That there is granted unto the administrator named "full power and authority, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels, and credits, and to ask, demand, recover, and receive the debts which unto the said testator whilst living and at the time of death did be-

long, and to pay the debts which the said testator did owe, as far as such goods, chattels, and credits will thereto extend and the law require."

The letters were excluded from evidence, on the ground that they were granted for the purpose of administering personalty only, and were insufficient to authorize the plaintiffs to maintain the action; and a nonsuit was granted. On exception it was held:

"An administrator with the will annexed, appointed in another state under a judgment admitting the will to record as 'a valid will of personalty only,' and authorized by the letters of administration issued to him to administer only 'the goods, chattels, and credits' of the testator, has no authority to institute, in the courts of this state, either an action to recover land and mesne profits, or an action of trespass for the recovery of damages to real property."

The principle thus ruled was applied in *Taylor v. McKee*, 121 Ga. 223, 48 S. E. 943, a somewhat similar case, in which it was held:

"Where special letters of administration are presented, limiting the power of the administrator to specific property of the estate of the intestate, his power will not be extended beyond his letters."

The principle announced in the cases cited is applicable to the case under consideration. In this case the plaintiff's right to the relief sought depended upon title to the land in dispute. The plaintiff placed her case on alleged title in the estate of her intestate and her letters of administration issued from the Surrogate's Court of New York. These did not purport to authorize her as administratrix to administer upon any of the estate of the deceased, except "personal property, goods, chattels, and credits." Under the principle of the decisions cited above, these were special letters limited to the administration of specific property, and cannot be so extended as to confer authority upon the administratrix to administer real estate of the intestate in this state. It was urged that the decisions cited did not apply, because in those cases the letters were objected to when offered in evidence, whereas in the present case they were admitted without objection; also that, although the letters had been introduced on a former trial of the case, and had been duly filed and recorded in the court since the commencement of the action, no point had ever been made as to their sufficiency as authority for the administratrix to maintain the suit. These suggestions do not state any valid basis of distinction. The burden was upon the plaintiff to prove her case, and the defendants had the right at any time to urge that the evidence offered for the purpose was either lacking in some respect, or proved a fact that was fatal to her case. In this instance the letters showed affirmatively that her authority to sue was

restricted; and while charging the jury the judge should have so framed his instructions as to adjust them to the issues as presented by the pleadings and evidence. In *Huxford v. Southern Pine Co.*, 124 Ga. 181, 187, 52 S. E. 439, 441, it was said by Cobb, J.:

"A party may allow a deed relied upon by his adversary to go in evidence without objection, but his failure to object does not preclude him from urging in his motion for a new trial that the deed is invalid for some reason appearing upon the face of the same, or for other reason appearing in the evidence."

The court informed the jury in his charge that the plaintiff occupied the same position as her intestate, and that, if he, if living, had made out such a case as would entitle him to recover, she upon the same facts could recover. It was upon this charge that the court granted a new trial. For reasons stated there was no error in the judge granting a new trial.

[3] 3. In this and the succeeding divisions of this opinion assignments of error made in the cross-bill of exceptions will be considered. The plaintiff's intestate and defendants claimed large bodies of land on which was pine timber valuable for sawmill, turpentine, and other purposes which adjoined each other on one side. That claimed by the defendants was called the "plantation tract," and that claimed by the plaintiff was called the "college tract." The plantation tract, which was alleged to contain 762 acres, lies in the fork of "Turtle river" and College creek," both being well-defined tidewater streams. A public road extended from the bridge across Turtle river and the bridge across College creek, and along the north side of the road was a ditch and embankment on which was a fence constructed by the defendants' predecessors in title and claimed as their southern boundary line. It was contended that the land was thus inclosed and used as a pasture for cattle, and some parts of it were cultivated and occupied by tenants of defendants and their predecessors in title for a great many years, dating back to 1860. The plaintiff claimed under a deed executed in 1866 purporting to convey 7,073 acres of land to her intestate, in which the land was described by reciting various grants issued by the state to persons other than the plaintiff's intestate and not shown to be his grantors, comprising as many as 28 tracts, and by referring to a designated unrecorded map as showing the boundary of the great tract composed of the several grants. This map shows the road above mentioned, and that the great bulk of the land embraced therein lay on the south side of the road; that a part thereof, amounting to 245 acres, extended over and lay on the north side of the road, being also adjacent to College creek, bordering some distance on the creek and commencing at the bridge, and bordering also

along the road in the direction of the Turtle river bridge. The land thus claimed by the plaintiff, located on the north side of the road, constitutes the land in dispute. The plaintiff relied entirely upon a prescriptive title based on the deed above mentioned, and possession of a part of the land on the south side of the road for more than seven years. Neither plaintiff nor her intestate were ever in actual possession of any part of the land in dispute. The defendants also relied upon prescription: First, by twenty years' actual possession based on inclosure of the land by Turtle river, College creek, and a fence maintained along the public road and use thereof as a pasture, and occupancy of portions thereof by tenants within such inclosure; second, by seven years' possession exercised by the maintenance of the inclosure above mentioned, and by inclosure and cultivation of fields and occupancy by tenants on portions of the land in dispute for more than seven years under the will of John M. Tison, deceased, probated in 1883, and a decree of court rendered in 1884, partitioning the plantation tract among devisees named in the will, and successive conveyances from such devisees down to the defendants. The defendants also contended that, whatever might have been the true line, the road had become the boundary line between the plaintiff and defendant by reason of acquiescence by acts and declarations upon the part of the plaintiff's intestate and the defendants and their predecessors in title for more than seven years, and by reason of defendants' actual possession for more than seven years prior to the bringing of the suit. The plaintiff disputed all the claims thus made by the defendants, and the defendants disputed the claims so made by the plaintiff; and as a consequence both parties were put upon proof of the respective contentions above mentioned. The plaintiff's intestate resided in New York, and made only occasional visits to the property, and during the whole period after his purchase local agents were employed to look after and protect the property. From 1880 up to the trial of the case one of the agents lived within a few hundred yards of the land in dispute, on the opposite side of College creek, and had actual notice of whatever acts of possession were exercised by the defendants and their predecessors in title on the plantation tract. The agent employed in 1880 subsequently died, and his son, who resided with him and who had the same information as to possession, became his successor as agent of plaintiff's intestate. While the agent last mentioned was being examined as a witness for the plaintiff he testified:

"The timber was cut off the college lands in 1889, and in about four years the Brookmans sold them for timber purposes and leases."

The defendants proposed to prove by this witness that the timber was cut on all of the

college tract, except the land claimed in the suit to be a part of the college tract, and for which the plaintiff is suing, and that the timber on that part was not cut. This evidence was excluded on the ground that it was irrelevant. The evidence, if admitted, would have been a circumstance tending to show that the plaintiff's intestate had knowledge of the defendants' adverse possession up to the road, and also his acquiescence in the division line along the road as claimed by the defendants, and also to qualify the testimony of the witness that the lessees of the plaintiff had cut the timber on all the land claimed as the college tract.

[4] 4. The defendants tendered in evidence a certified copy of a lease, executed by certain of the defendants' predecessors in title, to certain water rights along the shore lines or margins from College creek bridge to Turtle river. This was offered in connection with an affidavit by an agent of the alleged lessees to the effect that he had made search for the original, and that it was lost or destroyed. The evidence was excluded on objection that it was irrelevant, and that there had been no effort to produce the witness, and that proof of the loss of the original could not be made by affidavit. It is declared in Civil Code, § 5759:

"In order to admit secondary evidence, it must appear that the primary evidence for some sufficient cause, is not accessible to the diligence of the party. This showing is made to the court, who will hear the party himself on the question of diligence and the inaccessibility of the primary evidence."

In *Turner v. Elliott*, 127 Ga. 338, 56 S. E. 434, it was held:

"The sufficiency of the examination preliminary to the introduction of secondary evidence of a lost original is left largely to the presiding judge; and where he is satisfied and admits secondary evidence, his discretion will not be interfered with, unless clearly abused."

See *Orr v. Dunn*, 145 Ga. 137, 88 S. E. 669 (2).

The evidence submitted before the judge was insufficient to show that the original document was not accessible to the diligence of the party; and the court did not err in its ruling.

[5] 5. The plaintiff tendered a certificate dated July 16, 1868, purporting to have been made by "John M. Tison, County Surveyor," and appearing on the map of the college tract, which map purported to have been made by "John M. Tison, County Surveyor," on January 8, 1853. The map in question was contended to be the same to which the plaintiff's grantor referred in the deed executed in 1860. The certificate which was tendered, being subsequent in date, could be no part of the deed, but amounted to a mere declaration. The language of the certificate was:

"I hereby certify that I have this day completed a resurvey of the annexed plat of land, and have clearly marked the lines, corners, and stakes around the whole."

It was shown that John M. Tison was the first among the defendants' predecessors in title; and while the plaintiff disputed that John M. Tison was ever in possession, the defendants offered evidence to show that he was in possession during a period covering the date on the certificate, upon which evidence they relied in part to establish their prescriptive title referred to in a preceding division of this opinion. There being such evidence, the declaration so made was admissible against the defendants, who were privies in estate of John M. Tison, for the purpose of explaining the character of such possession. It was contended that in order to lay the proper foundation for such declaration, under the rulings in *Carter v. Buchannon*, 3 Ga. 513, and *Sharp v. Hicks*, 94 Ga. 624, 21 S. E. 208 (3), the party offering the evidence should have made proof of the facts necessary to lay the foundation for its admission, and that it would not suffice to rely upon proof of the same facts by the other party; also that the declaration by John M. Tison in an official capacity as surveyor would not bind him personally. The contentions deal more with form than with substance and afford no reason for excluding the evidence.

[6] 6. The plaintiff tendered a map, purporting to be a copy of the map referred to in the foregoing division, containing the certificate:

"This will certify that this map is a true copy of the said above Tison map or plat on this July 3, 1879.

"[Signed] Geo. H. Day, C. E."

Below the certificate the following appeared:

"I hereby certify that I have, by the request of Mr. F. D. Scarlett, completed a resurvey of all those tracts of land as the college lands, have plainly marked all lines and established all corners which have been destroyed.

"[Signed] R. M. Tison, Surveyor."

When the evidence was tendered, it was objected to in its entirety as immaterial and irrelevant. The court, being of the opinion that "it may be admissible on the question of adverse possession," overruled the objection. When considered in connection with testimony tending to show that, when Mr. Brookman employed the agent (mentioned in a preceding division of this opinion), he delivered this copy map to the agent as showing the land he was employed to look after, the plat was admissible as tending to show the property which the agent was employed to guard. It is a rule of practice that, where evidence is objected to in bulk, some of which is admissible, and some inadmissible, a ruling admitting the evidence will not be reversed.

Had there been an objection that the correctness of the copy had not been proved, or had there been separate objections to the certificates by Geo. H. Day and R. M. Tyson, neither of whom appeared to have had any interest or been in possession of the land at the times the certificates were made, different questions would be presented.

[7] 7. Under the pleadings and evidence the true location of the dividing line between the plantation tract and the college tract was in dispute; and whether the public road had been established as the dividing line by acquiescence by acts and declarations of the parties and their predecessors in title, or by actual possession of the defendants for the term of seven years, as provided in Civil Code, §§ 3821, 3822, was a question for determination. Therefore it was the duty of the court to charge the law on that subject without a request. These provisions of the law are applicable in cases of this character. *Ivey v. Cowart*, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160; *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212.

[8] 8. The plaintiff's intestate was never in actual possession of any part of the land in dispute, though there was evidence to authorize a finding that he was in constructive possession thereof by reason of the deed covering the land, and his actual possession of some other portions of the land embraced in the deed. The evidence also tended to show that the defendants and their predecessors in title were in actual possession of all of the land in dispute during any period of plaintiff's constructive possession. The court was requested to charge the jury "that actual possession of land by one person claiming it is inconsistent with the constructive possession of the same land by another claimant." This request stated a correct principle of law. It was applicable to the case, and was not covered by the general charge.

[9] 9. The charge complained of in the fifth ground of the amended motion for new trial did not accurately state the contentions of the defendants, and was somewhat confusing.

[10] 10. The sixth ground of the amended motion for new trial complains of the following charge to the jury:

"Now, the defendant contends that there is a certain fence running from Turtle river on the one end, Turtle river bridge on one end to College creek bridge on the other, and that this line of fence and the creek and the river constitute actual adverse possession of this parcel of land in question. So that, gentlemen, you will look to see whether or not this fence, in connection with Turtle river on the one side and College creek on the other, was such possession as to constitute actual possession, as defined to you by the law. They contend that this was a substantial inclosure, and was such possession as met all of the requirements of the actual adverse possession referred to by the law. Now, gentle-

men, that is a question for your determination under the evidence. It is for you, as jurors, applying common sense, to look to the evidence and facts and circumstances in this case, and from that determine whether or not this was such possession (the fence, the creek, and the river together) as measured up to the requirements of actual adverse possession."

This charge was adjusted to that phase of the case in which the defendants set up prescriptive title by 20 years' actual adverse possession, and was not erroneous for the reasons assigned: (a) That it excluded from the consideration of the jury certain evidence of possession by occupancy and cultivation of particular parts of the land in dispute included within the general inclosure referred to by the judge in his charge; (b) that it amounted to an expression of an opinion by the judge that the occupancy and cultivation of such particular parts of the land in dispute would not be actual adverse possession.

[11] 11. The court instructed the jury:

"Now, the defendant contends in addition to that, gentlemen, that John M. Tison, made a will conveying this property or bequeathing this property to certain of his children—this was made in 1882, and later probated—and that in 1884 there was a decree of court to divide the property among the heirs to whom it was bequeathed, that later the heirs who had an interest all made a deed to Arabella Tison, and that thereafter, in 1905, the executor of Arabella Tison made and conveyed the property in question—a certain tract of land, including the property in question and the parcel in dispute—to the Downing Company and H. T. McKinnon. In 1905, that thereafter, in 1906, McKinnon conveyed his half interest to the Downing Company, and that later, in 1911, the Downing Company conveyed to James Kelley, and that later, in 1913, James Kelley conveyed to Phillip J. Renolds; and they further contend, gentlemen, that these parties were bona fide purchasers for value, beginning with Arabella Tison, and then the several parties following that were each and severally bona fide purchasers for value, and that between 1892 and the time of the filing of this suit there was such actual adverse possession under these several deeds as color of title to ripen into prescriptive title. That is to say, they claim that these parties, irrespective of what may have been the status of John M. Tison, have acquired prescriptive title by reason of actual adverse possession for a period of seven years or more, since 1892, and under these several conveyances."

There was evidence tending to show unbroken possession of the defendants' predecessors

in title continuously after the death of John M. Tison until the institution of the suit. The defendants relied upon such evidence, in connection with the various documents rectified by the court, to establish a prescription by seven years' possession under color of title. The charge tended to restrict the jury to the consideration of a prescriptive period commencing after 1892; whereas the defendants were entitled to have submitted to the jury their contention that prescription had ripened in their favor prior to that date.

[12] 12. The judge also charged:

"If John M. Tison did not have good prescriptive title to the lands, then it is for the determination of the jury whether or not the defendants have acquired good prescriptive title to the land in question, under the conveyances referred to as color of title, by reason of having had actual adverse possession of these lands for a period of seven years under these titles as color and under such possession as had the elements of prescriptive title."

There was evidence to authorize the jury to find a prescription arising after the death of John M. Tison in favor of the defendants, based on actual adverse possession for a period of 20 years under Civil Code, § 4168; also a prescriptive title based on 7 years' adverse possession under color of title as provided in Civil Code, § 4169. In the former case the possession of the whole tract must be actual; in the latter the actual possession need be only a part of the land described in the color of title. The charge complained of did not notice the distinction, and its language is such as to make the impression that, in order to acquire prescription under color of title, the possession relied on as the basis for such prescription must be actual possession as distinguished from constructive possession.

[13] 13. Another portion of the charge upon which error was assigned was a concrete statement in which the question was submitted whether or not John M. Tison was in permissive possession, if the jury should find that he was in actual possession of the premises in dispute. The evidence was sufficient to authorize a charge on this subject, and the charge as given was not cause for reversal for any reason assigned.

[14] 14. The ruling stated in the fourteenth headnote does not require elaboration.

Judgment affirmed on the main bill of exceptions, and reversed on the cross-bill.

All the Justices concur.

HALL et al. v. BUTLER. (No. 981.)

(Supreme Court of Georgia. Feb. 14, 1919.)

*(Syllabus by the Court.)*1. NEW TRIAL \S 86 — GROUNDS — LACHES — MOTION FOR NEW TRIAL.

The evidence authorized the verdict; and the points that the plaintiff was not entitled to a verdict because he came into a court of equity without clean hands, and after long delay, were not well taken under the general grounds of the motion for new trial, especially as it does not appear that such points were presented or passed upon by the trial judge.

2. WITNESSES \S 150(2) — COMPETENCY — TRANSACTIONS WITH DECEDENT.

In an action brought by the grantor in a deed against the heirs at law of the grantee, to have the instrument canceled because never delivered, the grantor was not an incompetent witness, under Civ. Code 1910, \S 5858, par. 1, to testify in his own behalf to the nondelivery of the deed.

3. TRIAL \S 296(7) — GROUNDS — INSTRUCTION.

The charge of the court as set out in the third division of the opinion was not cause for a new trial.

4. TRIAL \S 280(1) — REQUESTED INSTRUCTIONS — GIVEN INSTRUCTIONS.

The requests to charge, in so far as they embodied correct and pertinent legal principles, were covered by the explicit, correct, and concrete instructions given to the jury.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by E. A. Butler against Cora Hall and others. Judgment for plaintiff, motion for new trial overruled, and defendants except and bring error. Affirmed.

In February, 1917, E. A. Butler brought an action against Cora Hall and others named, all being children of petitioner and of his deceased wife, Julia E. Butler, alleging, in substance:

That on December 17, 1891, petitioner signed a paper in the form of a warranty deed in the presence of two witnesses, one of them a notary public, which purported to convey to Julia E. Butler a tract of land containing about 150 acres, upon the expressed consideration of love and affection and of \$25, the receipt of which was acknowledged in the instrument; that on the same date he had the instrument recorded in the clerk's office of the county where the land was situated; "that in about the year 1891 a proceeding to eject your petitioner from lands then described as follows was filed against him [the land to which the present action relates]; * * * that the sole and only purpose of writing and signing said deed was to give your petitioner the right to disclaim title in the aforesaid ejectment proceedings, but petitioner shows that he did not exercise that right, but did hold and retain both title and possession of the said lands in the aforesaid proceedings; * * *

that said deed, having been written, signed, and recorded for the aforesaid specific purpose, and having served its purpose, was no longer effective as title or evidence of title to said land; * * * that though said deed was written, and signed by him, the same was written by his then counsel * * * and in his office * * * and in the presence of [the witnesses attesting the instrument], but was never delivered to the said Julia E. Butler, but that the same was placed on record by your petitioner, retained and held by him until it was subsequently destroyed by fire; * * * that the said Julia E. Butler was not only not present when the said deed was signed and recorded," but was at home about 15 miles away; that she "at that time was not aware that your petitioner had made a deed and recorded the same as aforesaid"; that "petitioner was and had been, at the time said deed was signed and recorded, and has continuously been and now is in the peaceable, quiet, exclusive, adverse, notorious, and uninterrupted possession of said land where he then, and has since, and is now, operating the same as his own, and notoriously exercising exclusive ownership thereof, no other person having ever been in possession of the same since said time, as tenants or otherwise, except your petitioner, or under his immediate control as landlord of such tenants who may have cultivated some parts of said lands in the meanwhile; * * * that the defendants are now undertaking to set up adverse claim by virtue of the aforesaid deed, and are threatening to sell and convey their alleged interest therein, claiming that your petitioner now has no interest except as a distributive share as an heir at law of the said Julia E. Butler, and by virtue of their pretense as claimants of an interest in said lands, recently asserted by them, your petitioner is being now deprived of the full enjoyment of the same, and that the outstanding recorded paper purporting to be an adverse title is menacing your petitioner's legal rights, and is a cloud upon your petitioner's title, sufficient to deprive him of the exclusive and full enjoyment of the aforesaid premises and its appurtenances; * * * that the said Julia E. Butler never claimed, or pretended to claim, the said lands referred to in said deed, or any title or interest in the same, during her lifetime, nor did the character of your petitioner's possession change at the time said deed was signed and recorded, nor did it subsequently change, but continued as above."

The petitioner and the defendants were the only heirs at law of Julia E. Butler, who died in 1898, intestate, owing no debts, and there has been no administration upon her estate. Among the prayers was one asking for a decree directing the cancellation of the instrument as a cloud upon petitioner's title, and that the title to the land be decreed to be in him. The defendants answered, averring that the deed was delivered to their mother, Julia E. Butler, and that the land in question was owned in common by the petitioner and the defendants, and praying as it was not susceptible of division in kind, that it be sold and the proceeds divid-

ed among the petitioner and the defendants as the heirs at law of Julia E. Butler. On the trial there was a verdict for the petitioner. A motion for a new trial was overruled, and the defendants excepted.

T. E. Hightower, of Dublin, for plaintiffs in error.

R. Earl Camp and J. S. Adams, both of Dublin, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. The motion for new trial contained the general grounds that the verdict was contrary to evidence, and without evidence to support it, and was contrary to law and the principles of justice and equity. There was ample evidence to authorize the verdict. In the brief for the plaintiffs in error it is contended, under the general grounds of the motion for new trial, that a new trial should have been granted because it appeared that the petitioner had not come into the court of equity with clean hands, by reason of the purpose for which he executed the instrument sought to be canceled, and on account of his long delay in asking for this relief. The petition set forth the plaintiff's case, and he submitted evidence sufficient to authorize the jury to find in his behalf. There was no demurrer to the petition, and, so far as the record discloses, no point was made on the trial as to the plaintiff's fraudulent purpose in executing the deed to his wife, or as to his delay in beginning an action for the cancellation of the paper.

[2] 2. The plaintiff testified:

"I never did deliver the deed to anybody. I never authorized anybody to deliver this deed to anybody; it has never been delivered to anybody with my consent. No person ever took possession of this land under this deed; Mrs. Butler, my wife, never did have this deed in her possession or in her hands in her life, in my presence. She never did have this deed in her possession or in her hands, with my consent or knowledge. My wife never did have this deed in her possession at any time when Mrs. Hall was present, or when any discussion was up about selling the land; not when I was present."

This testimony was admitted over the defendants' objection on the ground that the witness was incompetent to testify as set forth, because Mrs. Butler, to whom the deed purported to have been made, was dead, and that the witness, being a party to the action, was incompetent to testify as to transactions and communications between himself and his deceased wife. The witness was not incompetent, and the court did not err in admitting the testimony. Paragraph 1 of section 5858 of the Civil Code declares:

"Where any suit is instituted or defendant by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the op-

posite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person, whether such transactions or communications were had by such insane or deceased person with the party testifying or with any other person."

The plaintiff and the defendants were heirs at law of Mrs. Butler. The defendants, however, were not indorsees, assignees, transferees, or personal representatives of Mrs. Butler, so as to render the plaintiff an incompetent witness, in this action, as to transactions or communications with his deceased wife. In *Boynton v. Reese*, 112 Ga. 354 (3), 357, 37 S. E. 437, 438, it was held:

"A grantee in a deed against whom a petition for the cancellation thereof is brought by an heir at law of the grantor is not, because of the fact that such grantor is dead, disqualified from testifying as to communications and transactions between the deceased and the witness leading up to the execution of the instrument."

Like rulings were made in the following cases: *Oliver v. Powell*, 114 Ga. 592 (5), 601, 40 S. E. 826; *Causey v. White*, 143 Ga. 7 (3), 84 S. E. 58; *Goddard v. Boyd*, 144 Ga. 18, 85 S. E. 1013; *Rudolph v. Washington*, 146 Ga. 605, 91 S. E. 560.

The decision in *Harrison v. Perry*, 86 Ga. 813, 13 S. E. 88, was based on the act of 1860 (Code 1882, § 3854, par. 1), which provided that—

"Where one of the original parties to the contract or cause of action in issue or on trial is dead, or is shown to the court to be insane, or where an executor or administrator is a party in any suit on the contract of his testator or intestate, the other party shall not be admitted to testify in his own favor."

This act was changed by the act of 1889, as amended by the act of 1893, now embodied in the Civil Code, § 5858, par. 1.

The testimony to the effect that the witness never delivered the deed to anybody, nor ever authorized anybody to deliver it, and that it was never delivered to any one with his consent, was not subject to objection that it was the mere expression of his conclusion.

[3] 3. Exception to the following charge was one of the grounds of the motion for new trial, viz.:

"I charge you that if E. A. Butler executed the deed, signed it in the presence of witnesses, and had it recorded in the county where the land lay, this would be prima facie evidence that it was delivered; that is, such evidence as would authorize the jury to believe that it was delivered, unless there was some evidence showing that it was not, and that E. A. Butler did not intend to make and deliver it by what he had done."

The exception to this charge was that in using the words "some evidence" the court

thereby instructed the jury that the onus would be shifted if "some evidence" was introduced by the plaintiff showing that he did not intend to make and deliver the deed in question. We do not think this a fair criticism of the charge. The instruction was to the effect that the prima facie case stated by the court would be overcome if there was "some evidence showing to the contrary," not merely that such prima facie case would be overcome if any evidence submitted tended to show the contrary. "Evidence showing the contrary" means evidence proving the contrary to be true. At any rate, in view of the clear, explicit, and concrete instructions given to the jury, we are of the opinion that this ground of the motion did not require the grant of a new trial.

[4] 4. The requests to charge, in so far as they embodied correct and pertinent legal principles, were covered by the explicit, correct, and concrete instructions on the issues in the case.

Judgment affirmed.

All the Justices concur; ATKINSON, J., specially.

(149 Ga. 37)

NESMITH v. MARTIN, Sheriff. (No. 1225.)

(Supreme Court of Georgia. March 15, 1919.)

(Syllabus by the Court.)

INTOXICATING LIQUORS — SEIZURE — INJUNCTION.

In *Gunn v. Atwell*, 148 Ga. —, 96 S. E. 2, it appeared that a certain automobile in the possession of one Jenkins, and in which intoxicating liquors were found, was seized by police officers of the city of Macon, and the seizure was reported to the solicitor of the city court of Macon, who instituted condemnation proceedings under section 20 of the prohibition laws of this state, approved March 28, 1917 (Acts Ex. Sess. 1917, p. 16). Atwell filed an equitable petition in which he alleged that Jenkins was neither the owner nor a lessee of the car, but that Atwell was the owner thereof, and had no knowledge that Jenkins had used the automobile for the purpose of transporting intoxicating liquors; and Atwell prayed that the officers be required to surrender the automobile, and for injunction and general relief. It was ruled, in the case cited, that section 20 of the act, supra, "provides an adequate remedy at law for an adjudication of all the rights of the defendant in error; and therefore there was no ground for equitable jurisdiction." The facts in the instant case bring it clearly within that ruling; and there was no error in refusing to order the sheriff of the county to deliver the possession of the car to the plaintiff, and to enjoin the pending condemnation proceedings in the city court; the plaintiff having an adequate remedy at law for the adjudication of the rights claimed by her in the petition for injunction.

Error from Superior Court, Decatur County; W. M. Harrell, Judge.

Suit by Mrs. Prassie Nesmith against S. W. Martin, Sheriff. Judgment for defendant and plaintiff brings error. Affirmed.

J. J. Hill, of Pelham, and W. V. Custer, of Bainbridge, for plaintiff in error.

M. E. O'Neal and J. C. Hale, both of Bainbridge, for defendant in error.

GEORGE, J. Judgment affirmed. All the Justices concur.

(149 Ga. 23)

MEDLIN v. STATE. (No. 1127.)

(Supreme Court of Georgia. March 15, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW — 595(8), 668 — HOMICIDE — 188(4) — CONTINUANCE — ABSENCE OF WITNESSES — MATERIALITY OF EVIDENCE.

In making his statement to the jury, as provided for by statute, the prisoner cannot lay the foundation for introducing in his favor evidence that would otherwise be inadmissible. Thus, where there was nothing to show that at the time of the homicide, with the commission of which the defendant was charged, the decedent was the aggressor and was making an attack upon the accused, except the statement of the accused to that effect, evidence offered by him to prove that the decedent was a man of violent character was properly rejected. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64; *Nix v. State*, 120 Ga. 162, 47 S. E. 516.

(a) Nor did the court err in overruling the motion for a continuance, based upon the ground of the absence of witnesses subpoenaed by the defendant, by whom he expected to prove that the decedent was a man of violent character, as the testimony of these witnesses would not have been admissible under the evidence in the case as actually developed.

2. CRIMINAL LAW — 547(1) — ADMISSIBILITY OF EVIDENCE — DEFENDANT'S FORMER STATEMENTS.

An extract, shown to be substantially correct, from a prisoner's statement made on a former trial, was admissible in evidence without offering the entire statement, though it was shown that the statement made at the former trial, as taken down by the official reporter, had been lost.

3. HOMICIDE — 297 — JUSTIFICATION — INSTRUCTION.

That part of the court's charge to the jury in the following language, to wit, "No possible wrong, however heinous, will justify a killing," is not ground for the grant of a new trial, when considered in the connection in which it was used, as the court there was speaking of a past and completed wrong.

4. HOMICIDE — 297 — INSTRUCTION.

The court did not err in charging the jury that "one cannot avenge a wrong by killing without being guilty of murder." This prin-

ciple of law was not irrelevant under the facts; nor did it, when considered in connection with the context, contain an expression of opinion by the court that the accused relied upon a justification of the killing through the avenging of some wrong.

5. CRIMINAL LAW §814(17)—CIRCUMSTANTIAL EVIDENCE—CHARGE.

The court did not err in failing to instruct the jury as to the law of circumstantial evidence, as the case for the state did not rest entirely upon circumstantial evidence.

6. GRANTING OF NEW TRIAL.

The grounds of the motion for a new trial not specifically dealt with show no cause for the grant of a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

W. B. Medlin was convicted of crime, his motion for a new trial was denied, and he brings error. Affirmed.

W. D. McNeill, B. B. Renitz, and Julian F. Urquhart, all of Macon, for plaintiff in error.

Jno. P. Ross, Sol. Gen., of Macon, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

BECK, P. J. Judgment affirmed. All the Justices concur.

OWENSBY v. STATE. (No. 1241.)

(Supreme Court of Georgia. March 13, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §376—HOMICIDE §190 (10)—WITNESSES §406—ADMISSIBILITY OF EVIDENCE—RELEVANCY—CHARACTER EVIDENCE.

"A party to a case has the right to introduce all competent, relevant, and material evidence, either to prove the main issue involved, or to discredit the evidence of a witness for the opposite party." *Tiller v. State*, 111 Ga. 840, 36 S. E. 201(1). Accordingly, on the trial of a criminal case the state may introduce any competent, relevant, and material evidence for the purpose of disproving the contention of the defendant, or for the purpose of discrediting his defense, and it affords no valid ground of objection that such evidence may tend incidentally to put the defendant's character in issue. *Smith v. State*, 148 Ga. —, 96 S. E. 1042(2).

(a) Where the defendant in a homicide case contended that the deceased entertained ill will toward him and had made repeated threats

against him, which threats had been communicated to him, and offered evidence tending to support this contention, it was competent for the state, in rebuttal, to prove any relevant and material fact or circumstance tending to discredit the contention; and there was no error in admitting evidence to the effect that immediately preceding the homicide the deceased and the accused were upon friendly terms, although the circumstances, proof of which were relied upon by the state to show their friendly relations, tended incidentally to put the defendant's character in issue.

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Kit Owensby was convicted of crime, and he brings error. Affirmed.

Griffith & Matthews, of Buchanan, for plaintiff in error.

J. R. Hutcheson, Sol. Gen., of Douglasville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GEORGE, J. Judgment affirmed. All the Justices concur.

WOMMACK et al. v. WOMMACK. (No. 1081.)

(Supreme Court of Georgia. March 13, 1919.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and none of the assignments of error show cause for the grant of a new trial.

Error from Superior Court, Washington County; R. N. Hardeman, Judge.

Action between Mrs. W. S. Wommack, executrix, and others, and W. A. Wommack, Jr. Judgment for the latter, motion for new trial denied, and the former bring error. Affirmed.

Wm. Faircloth, of Wrightsville, and W. M. Goodwin, of Sandersville, for plaintiffs in error.

T. J. Swint and Jordan & Harris, all of Sandersville, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

JOHNSON v. STATE. (No. 1222.)

(Supreme Court of Georgia. March 13, 1919.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE—MOTION FOR NEW TRIAL.**

The evidence authorized the verdict, and there was no error in overruling the motion for new trial, which contained only the general grounds.

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Wright Johnson was convicted of crime, his motion for a new trial was overruled, and he brings error. Affirmed.

M. H. Boyer, of Hawkinsville, for plaintiff in error.

W. A. Wooten, Sol. Gen., of Eastman, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

GEORGE, J. Judgment affirmed. All the Justices concur.

CASH v. STATE. (No. 10232.)

(Court of Appeals of Georgia, Division No. 2. March 7, 1919.)

*(Syllabus by the Court.)***CRIMINAL LAW §1160—VERDICT APPROVED BY TRIAL JUDGE—AFFIRMANCE.**

The motion for a new trial contains the general grounds only, the evidence was sufficient to authorize the jury to convict, the verdict has the approval of the presiding judge, and this court will not interfere.

Error from Superior Court, Butts County; W. E. H. Searcy, Judge.

John Cash was convicted of an offense, his motion for new trial was denied, and he brings error. Affirmed.

C. L. Redman, of Jackson, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

GLOVER v. STATE. (No. 10256.)

(Court of Appeals of Georgia, Division No. 2. March 7, 1919.)

*(Syllabus by the Court.)***1. MOTION FOR NEW TRIAL.**

Under the particular facts of this case, the trial judge committed no error as complained

of in the fourth and fifth grounds of the amendment to the motion for new trial.

2. VERDICT—DENIAL OF NEW TRIAL.

The evidence supports the verdict, and the trial judge did not err in overruling defendant's motion for new trial.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Proceeding between the State and W. H. Glover. From the judgment and the denial of his motion for a new trial, Glover brings error. Affirmed.

J. P. Brooke, of Alpharetta, for plaintiff in error.

Jno. T. Dorsey, Sol. Gen., of Marietta, and Wm. Butt, of Blue Ridge, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

GREEN v. STATE. (No. 10252.)

(Court of Appeals of Georgia, Division No. 2. March 7, 1919.)

*(Syllabus by the Court.)***1. WEAPONS §17(2)—CARRYING WEAPONS—PRESUMPTION AND BURDEN OF PROOF.**

"On the trial of one charged with a violation of the act of 1910 (Acts 1910, p. 134 [Park's Ann. Pen. Code, § 348a]), the state makes out a prima facie case when it proves that the accused carried a pistol on his person, or had manual possession of a pistol, not at his home or place of business, and the burden is upon the accused to show, in answer to this evidence, that he had a license as prescribed by the act." Blocker v. State, 12 Ga. App. 81, 76 N. E. 784 (3). See, also, Russell v. State, 12 Ga. App. 557, 77 S. E. 829; Harden v. State, 17 Ga. App. 322, 86 S. E. 736; Ellkins v. State, 17 Ga. App. 479, 87 S. E. 713.

2. CRIMINAL LAW §1160—VERDICT—AFFIRMANCE.

The motion for a new trial contained only the general grounds, there was evidence to support the verdict, which has the approval of the presiding judge, and the judgment must be affirmed.

Error from City Court of Millen; G. C. Dekle, Judge.

Robert Green was convicted of carrying weapons without having obtained a license, his motion for new trial was denied, and he brings error. Affirmed.

Jas. A. Dixon, of Millen, for plaintiff in error.

W. Woodrum, Sol., of Millen, for the State.

BLOODWORTH, J. Affirmed.

BROYLES, P. J., and STEPHENS, J., concur.

PARKS et al. v. DORSEY, Sol. Gen.
(No. 10306.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⚡1134(3)—**MOOT QUESTION—DISMISSAL.**

The decision of this court in *Parks v. State* (No. 9625) 23 Ga. App. —, 98 S. E. 90, has caused the questions in the present bill of exceptions to become moot. The writ of error is therefore dismissed.

Error from Superior Court, Forsyth County; N. A. Morris, Judge.

Proceeding between Lester Parks and others and John T. Dorsey, Solicitor General. Judgment for the latter, and the former bring error. Dismissed.

H. B. Moss, of Marietta, for plaintiffs in error.

John T. Dorsey, of Marietta, pro se.

BROYLES, P. J. Dismissed.

BLOODWORTH and STEPHENS, JJ., concur.

CROWLEY v. STATE. (No. 10213.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⚡935(1)—**NEW TRIAL—EVIDENCE.**

The defendant's motion for a new trial contained only the usual general grounds. Upon the trial the defendant introduced no evidence and made no statement. The evidence for the state not only authorized, but demanded, the verdict rendered, and the court did not err in refusing to grant a new trial.

Error from City Court of Nashville; C. A. Christian, Judge.

Proceeding between the State and Walter Crowley. From the judgment and the denial of his motion for a new trial, Crowley brings error. Affirmed.

J. C. Smith and W. R. Smith, both of Nashville, for plaintiff in error.

H. L. Jackson, of Adel, and J. H. Gary, Sol., of Nashville, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

DORSEY v. STATE. (No. 10231.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW ⚡935(1)—**VERDICT—MOTION FOR NEW TRIAL.**

The defendant's motion for a new trial contained only the usual general grounds; the verdict was amply authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Proceeding between the State and Bob Dorsey. From the judgment and the overruling of his motion for a new trial, Dorsey brings error. Affirmed.

W. D. Mills and Howell Brooke, both of Canton, for plaintiff in error.

Wm. Butt, of Blue Ridge, and Herbert Clay and John T. Dorsey, Sol. Gen., both of Marietta, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH AND STEPHENS, JJ., concur.

ELAM v. STATE. (No. 10277.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

VERDICT—DENIAL OF NEW TRIAL

None of the special grounds of the motion for a new trial is meritorious, the verdict is amply supported by the evidence, and the court did not err in refusing a new trial.

Error from Superior Court, Lincoln County; B. F. Walker, Judge.

Proceeding between the State and Harry Elam. From the judgment, and from the denial of his motion for a new trial, Elam brings error. Affirmed.

C. J. Perryman, of Lincolnton, for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

ANTHONY v. STATE. (No. 10352.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

CRIMINAL LAW §1160 — MOTION FOR NEW TRIAL—AFFIRMANCE.

The verdict being authorized by the evidence and approved by the trial judge, the judgment overruling the motion for a new trial is affirmed.

Error from City Court of Macon; Du Pont Guerry, Judge.

Proceeding between the State and Artie Anthony. From the judgment, and from the overruling of his motion for a new trial, Anthony brings error. Affirmed.

Hunter & Wimberly, of Macon, for plaintiff in error.

Will Gunn, Sol., of Macon, for the State.

STEPHENS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

McINTOSH v. STATE. (No. 10005.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

FORGERY §10—ALTERATION OF WRITING—MATERIALITY—FIGURES IN CHECK.

For an alteration of a writing to be the basis of a prosecution for forgery the alteration must be a material one.

(a) "The figures in a check, following the words in the body thereof denoting the sum called for, are not a material part of the instrument, the words being controlling in determining the legal effect."

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Thomas McIntosh was indicted for forging and altering a check or draft, his demurrer to the indictment was overruled, and he excepts and brings error. Reversed.

John R. Cooper, of Macon, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BLOODWORTH, J. The indictment charged that the defendant forged and altered a check or draft, "by altering and raising the figures and numerals on said check, to wit, \$2.60, to the figures and numerals, to wit, \$57.60; said check or draft being in substance and tenor as follows:

"Form No. 1840 Southern Railway Company, Account Department, June, 1917.

"Roll 3144 Line 6 Washington, D. C., July 16, 1917. No. 22389. H. C. Ansley, Treasurer, Southern Railway Co., Washington, D. C.: Pay to the order of Thomas McIntosh (\$57.60) [the figures on said draft and check being "\$2.60" before its alteration, and said figures "\$2.60" being falsely and fraudulently altered and made to be "\$57.60" as aforesaid], Two ⁶⁰/₁₀₀ Dollars. Not valid if drawn for more than three hundred (300) dollars. In full for services rendered during the month of June, 1917, when indorsement is in exact accord with name of payee and is guaranteed by an agent of the company. Not negotiable unless countersigned by either A. H. Plant, Comptroller, H. E. Bruce, R. F. Green, P. Herman, K. Hurt, E. Marceron, C. E. Moore, H. T. Rinck, H. E. Bruce."

Printed on margin the following:

"This check will be paid by any of the banks named on the back having sufficient funds of the company in its hands or by any agent having sufficient funds of the company in his hands. It is receivable also in payment of freight or fares. Payable not later than sixty days from date."

Indorsed on the back of the check or draft were the names of a number of banks.

To this indictment a demurrer was filed, as follows:

"(1) Because the said indictment does not allege a crime against the laws of the state of Georgia. (2) Because the alleged alteration in the check described in said indictment is not a material alteration and does not constitute a forgery. (3) Because the check described in said indictment is not alleged to have been altered or changed in amount in the body of said check, the only alteration being in the marginal figures, and therefore the alteration did not constitute a forgery."

The demurrer was overruled, and defendant excepted.

This case has not been without its serious difficulties. That for an alteration of a writing to be the basis of a prosecution for forgery the alteration must be a material one was easily determined from text-books, books of reference, and the opinions of the courts of last resort in many jurisdictions; but the question of what was a material alteration was not so easily settled. After a very thorough examination of the reports and digests in search of precedents, three cases directly in point were found, two of these holding that under facts similar to those in the instant case the defendant was not guilty of forgery, and one that he was. In *Commonwealth v. Hilde*, 94 Ky. 517, 23 S. W. 195, it was held:

"Where 'a check for 'seventy cents,' the amount of which was also written in figures, thus '\$70/100,' near the top of the check, was

altered by inserting the figure '3' between the dollar mark and the figures '70,' leaving the words 'seventy cents' in the body of the check unchanged, the alteration constituted a forgery, although the person to whom the check was presented for payment could, by close observation, have detected the forgery and prevented the consummation of the fraud."

This case is referred to with disapproval by the Supreme Court of Appeals of West Virginia, and by the Supreme Court of Illinois, as will hereafter appear. In *State v. Lotono*, 62 W. Va. 310, 58 S. E. 621, the second and fourth headnotes are as follows:

"An alteration in an instrument, to constitute forgery, must be of a material part thereof; and a material alteration of an instrument is one which makes it speak a language different in legal effect from that which it originally spoke, or which carries with it some change in the rights, interests, or obligations of the parties to the writing. * * * The figures in a check, following the words in the body thereof denoting the sum called for, are not a material part of the instrument, the words being controlling in determining its legal effect."

In the opinion in that case Judge Miller said:

"An alteration in an instrument, to amount to forgery according to the authorities cited, must be such as to make it speak a language different in legal effect from that which it originally spoke or which carries with it some change in the rights, interests, or obligations of the parties to the writing. It follows that an immaterial change—a change which if true would not affect the legal liability of the parties in an action on the instrument—would not amount to forgery. 1 Bish. Cr. L. § 572; *State v. Poindexter*, 23 W. Va. 805. The test is the legal effect of the change or alteration, not whether some one may be misled or deceived by the paper. Here the only change was in what are called in some cases the marginal figures, which, while they might mislead one who should fail to observe the body of the instrument, could not change or affect the legal status of the parties, or tend in legal effect to prejudice another's rights. The alteration of the check in this case did not deceive the bank; and its legal effect was not changed. The materiality of the alteration is a question of law for the court upon the admissibility of the altered instrument in evidence, and, the alteration being shown, nothing remains for the jury to pass upon. *Mfg. Co. v. Watson*, 58 W. Va. 189, 195 [52 S. E. 515]. Was the alteration of the figures in the check a material one? We think not. It is true the figures follow the words in the body of the check denoting the sum called for, as is frequently the case, and are not strictly marginal; but we do not think they form a material part of the paper. They are for ready reference, as if written at the top or in the margin, and for convenience; they are not controlling, and do not change the legal effect of the paper. The words are the controlling portion, and the figures constitute no material part of the instrument. Many authorities so hold. 2 Cyc. 196, 211, and cases cited; *Schryver v.*

Hawkes, 22 Ohio [St.] 808. We are cited to only one case which holds the contrary—*Commonwealth v. Hide*, 94 Ky. 517. That case stands alone, unsupported, and we do not think it states the law correctly."

To the same effect as the *Lotono* Case is that of *Willson v. State*, 85 Miss. 687, 38 South. 46, the first headnote of which is as follows:

"Under Code 1892, § 1106, defining forgery and confining the crime to instances where any person may be affected, bound, or in any way injured in his person or property, the mere alteration of the figures, following the character '\$,' in the upper right-hand corner of a draft, changing '\$2.50' to '\$12.50,' does not constitute forgery where in the body of the instrument the sum ordered paid was distinctly written 'two and 50/100 dollars,' and this is especially true where the paper upon which the draft was written had distinctly stamped upon its face the words 'ten dollars or less,' since the alteration was of an immaterial part of the instrument and could not injure any one."

While the opinion in the *Willson* Case is based upon a local statute, the general principles announced therein are applicable to the instant case. In addition to the above the following cases throw light upon the question at issue. In *State v. Means*, 47 La. Ann. 1535, 18 South. 514, one of the headnotes is as follows:

"The forgery charged, and altering, were not alleged with the required certainty. The extent and character of the altering were not shown; whether the figures (it is alleged) were forged were of a material character, or merely marginal; whether the writing expressed was forged or only the figures."

In the decision Mr. Justice Breaux, speaking for the court, said:

"To constitute a charge of alteration and forgery of an instrument it must be averred that it was altered in a material part. It does not appear with certainty whether the alteration was of a material part. Of course, if the accused feloniously forged and altered the figures '2.75' so as to make them read '29.75' by adding '9' to a material part of the order, he is guilty of forgery; in other words, if there was no writing of the amount, and if the order read, pay '2.75,' and was thus altered, it is forgery. But if the '2.75' was merely marginal, or in character marginal, as relates to a writing of the amount, it was not forgery."

In *Lawless v. State*, 114 Wis. 189, 89 N. W. 891, it was held that—

"Insertion of the figure '5' before the figure '9' in a check reading 'Pay to [defendant] or order \$9—— fifty cents —— Dollars' is a material alteration, constituting a forgery, although the written words remained unchanged and the person cashing the check might by close observation have detected the change and prevented the consummation of the fraud."

In the opinion in that case the *Hide Case*, supra, is referred to as "a case similar in nearly all its aspects." The difference in the two cases is very marked. In the *Lawless Case* the number of dollars was not written out in words, but only expressed in figures, while in the *Hide Case* the amount was expressed in both words and figures.

In *People v. Lewinger*, 252 Ill. 332, 96 N. E. 837, Ann. Cas. 1912D, 239, it was held that—

"Altering the marginal figures of a check to make them correspond with the amount expressed in written words which are not ambiguous or uncertain is not forgery, as the written words, under section 17 of the Negotiable Instrument Act of 1907, control the amount of the check, and the alteration does not change the legal effect of the instrument."

In discussing that case Mr. Justice Cartwright said:

"The alteration of the figures, therefore, did not change the legal effect of the instrument. That was the law as established before the passage of the Negotiable Instrument Act. Other courts have held that an alteration of marginal figures on a check in which the amount payable is plainly expressed in words is not forgery"—citing the *Wilson*, *Lotono*, and *Means Cases*, supra, and *Jackson v. State*, 72 Ga. 28.

While the Supreme Court of Wisconsin referred to the cases of *Lawless* and *Hide*, supra, as similar cases, the Supreme Court of Illinois said in the *Lewinger Case*, "We do not regard them as of the same nature." Nor do we. The difference in the two cases is pointed out above. So it appears that the Supreme Court of West Virginia was right when it said in the *Lotono Case* that the *Hide Case* "stands alone unsupported."

From the foregoing opinions it appears that before the alteration of a check or draft can be the basis of a prosecution for forgery, the change must be such that it would affect the "legal liability of the parties in an action on the instrument." It is well established that when the amount of a check is expressed both in words and figures, and there is a conflict between the two, the amount stated in words controls. See, in this connection, *Bryant v. Georgia Fertilizer & Oil Co.*, 13 Ga. App. 448, 79 S. E. 236. Applying the above rulings to the facts as alleged in the indictment in the instant case, it follows that the change in the check, upon which the prosecution in the instant case was based, was not material, and therefore the court erred in overruling the demurrer to the indictment.

This error rendered the further proceedings nugatory,
Judgment reversed.

BROYLES, P. J., and STEPHENS, J., concur.

WILLIAMS v. STATE. (No. 10225.)

(Court of Appeals of Georgia, Division No. 2.
March 7, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW — §1152(2)—JURY — §90— RELATIONSHIP — QUALIFICATION — QUESTION FOR COURT.

The fact that a juror is related within the prohibited degree to a witness for the state in a criminal prosecution does not render him incompetent to serve as a juror upon the trial of the case. *Atkinson v. State*, 112 Ga. 411, 37 S. E. 747 (1); *Atlantic Coast Line R. Co. v. Mead*, 22 Ga. App. 70, 95 S. E. 476 (1); 18 R. C. L. 259, § 77.

(a) The contention of the accused, as set forth in his motion for a new trial, was that the witness, who was related to one of the jurors, was the "prosecuting witness," and "to all intents and purposes was in fact the prosecutor in said case." Even if this contention were supported by the affidavits submitted, and even if the proof of this contention were sufficient in law to establish the disqualification of the juror, yet, as the evidence submitted by the movant was met by a countershowing by the state, the judge was the trier of this issue, and it does not appear that he abused his discretion in resolving it in favor of the state.

2. RULING ON MOTION FOR NEW TRIAL.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Blackshear; R. G. Mitchell, Jr., Judge.

Proceeding between the State and T. A. Williams. From the judgment and the denial of his motion for new trial, Williams brings error. Affirmed.

Jas. R. Thomas, of Jesup, and W. W. Bennett, of Baxley, for plaintiff in error.

S. F. Memory, Sol., of Blackshear, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

FIRST NAT. BANK OF WEST UNION v. FREEMAN. (No. 73.)

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 49, 96—PAYEE'S SUIT AGAINST MAKER—DEFENSE—ACCOMMODATION.

In a suit by the payee of a negotiable note against the maker, the latter may defend by showing that it was made for the payee's accommodation and without consideration.

2. BILLS AND NOTES \S 473—ACTION AGAINST MAKER—DEFENSE—ACCOMMODATION—SPECIAL PLEA.

In an action of assumpsit by the payee against the maker of a note, the latter may file a special plea setting up facts showing that the note was made for the payee's accommodation and was without consideration, even though such matters are provable under the general issue which he has also pleaded.

Questions Certified from Circuit Court, Doddridge County.

Action of assumpsit by the First National Bank of West Union against W. W. Freeman. There was an order striking out a special plea and question certified. Order striking out plea reversed, and cause remanded.

J. Ramsey, of West Union, for plaintiff.

Law & McCue, of Clarksburg, for defendant.

WILLIAMS, J. The question certified is whether it was error to strike out defendant's special plea, which the court had previously permitted him to file, in this action of assumpsit on a promissory note made by him payable to plaintiff, a national bank. Defendant pleaded the general issue and also filed a special plea, which on motion of plaintiff the court later struck out. The special plea avers, in substance, that defendant was a stockholder and director of the plaintiff bank when the note was executed; that, on making an examination into the financial condition of the bank, the Comptroller of Currency discovered that it had been carrying numerous notes and evidences of debt against certain persons, named in the plea, aggregating \$23,068.74, which he refused to permit it longer to carry as assets, and took temporary control of the bank, requiring it to replenish its assets to the extent of said \$23,068.74; that, at the same time, a number of suits were instituted against certain ones of the bank's debtors; that it would require some time to collect the money due from them, but that it was necessary to replenish the bank's assets, pending those suits, to prevent its being

placed in the hands of a receiver, and rather than raise the money by assessing its stockholders, the bank, through its officers, attorneys, and agents, solicited certain of its friends, among them the defendant, to execute to it their several individual, accommodation notes in order to enable it to supply the necessary asset; that on the representations by the bank's agents that the notes and accounts sued on were good and collectable and as fast as they could be collected the proceeds therefrom would be applied to the payment of said accommodation notes, until they should be fully paid, defendant executed his note, originally for \$2,456.40 payable to said bank in six months, which, together with other notes of like character, executed by others for the same purpose in varying amounts, made up the deficit of \$23,068.74, satisfied the requirements of the Comptroller of Currency and enabled the bank to continue in business; that there was no consideration whatever for said note, but that it was executed solely for the bank's accommodation and for the reasons stated; that, as the bank realized on said suits, the money was applied on said accommodation notes, and defendant's note was renewed from time to time until all the money collectable from the source named had been realized, leaving the defendant's renewal note, now sued on for the sum of \$1,061 wholly unpaid; that at no time when defendant renewed his note was he requested to pay nor did he pay discount, and when he was notified that no more money could be collected by means of the aforesaid suits he refused to pay said note or any part of it, wherefore he prays judgment, etc..

[1, 2] This plea sets up a good defense. The rights of the bank's creditors do not appear to be involved. The note is still in the hands of the payee who brings the suit, and it is a well-settled principle that, as long as a negotiable note remains in the payee's hands, want of consideration may be shown. The plea avers the note was made solely for the accommodation of the bank which is the plaintiff and payee, and, if this fact be proven, it will defeat the action. 3 R. C. L., Bills and Notes, § 336; and Daniel's on Neg. Inst. (6th Ed.) § 189.

"The party for whose benefit accommodation paper has been made acquires no rights against the accommodation party who may set up the want of consideration as a defense to an action by the accommodated party, since as between them there is no consideration, a fact which is always a defense to a suit on negotiable paper between the immediate parties." 8 C. J. 259.

The text is supported by a mass of decisions. The following decisions are in point: Lyons v. Westwater (C. C.) 173 Fed. 111; Peterson v. Tillinghast, 192 Fed. 287, 112 C. C. A. 545; Murphy v. Keyes, 39 N. Y.

Super. Ct. 18; Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540; Second National Bank v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; and Neal v. Wilson, 213 Mass. 336, 100 N. E. 544.

"The fact that notes given to a bank without consideration are given for the purpose of increasing the apparent assets of the bank does not deprive the maker of the defense of want of consideration as between himself and the bank." Chicago Title & Trust Co. v. Brady, 165 Mo. 197, 65 S. W. 303; Moore v. Maddock, 33 Mo. 575; and Williams v. Hasshagen, 166 Cal. 386, 137 Pac. 9.

It is permissible, in an action between the original parties to a note, to show the relation between them, or that the note was executed purely for the payee's accommodation. Brown v. Smedley, 136 Mich. 65, 98 N. W. 856; Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044; and Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518, and authorities there cited.

No reason is assigned for striking out defendant's plea. The court may have rejected it because it thought it set up no defense to the action, or because it thought the defense set up by the special plea was provable under the general issue. If the case were before us on writ of error to a final judgment, the rejection of the plea would not alone be cause for reversal, because the matters averred are clearly provable under the general issue. But notwithstanding they are so provable, defendant had a right, if he so desired, to plead them specially; they being in the nature of a confession and avoidance of the right of action. 1 Chitty on Pleading (11th Amer. Ed.) 480; and Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 373.

Our conclusion is to reverse the order striking out the special plea and remand the cause.

SAYRE v. KUNST. (No. 3609.)

(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919.)

(Syllabus by the Court.)

1. EXECUTION ⚡158(2), 185—CLAIM—BOND—SUSPENSION OF SALE—POSSESSION.

If where a sheriff, fully indemnified, levies an execution upon and advertises for sale property apparently owned by the judgment debtor, another claims to be the owner thereof, and desires an adjudication of such claim, he must give the bond required by section 4, c. 107, Code 1913 (sec. 4495), to suspend the sale until his title is adjusted in the manner provided by sections 5 and 6 (secs. 4496, 4497), and if he desires possession of the property to remain where it was immediately before the levy, pend-

ing the determination of his claim, he must also give the bond required by section 7 to have the property forthcoming on the day and at the place to be appointed for the sale, should his claim thereto be adjudged invalid.

2. SHERIFFS AND CONSTABLES ⚡121—CLAIM—POSSESSION—LIABILITY FOR LOSS TO EXECUTION CREDITOR.

If, when protected only by the delivery bond of the claimant of property levied on and advertised for sale under an execution for the debt of another, and such bond, though good as a common-law obligation, is invalid as a statutory forthcoming bond, and the execution creditor has given a bond of indemnity against such claim, the levying officer permits the possession of the property to remain where it was immediately before the levy, and it is not produced for sale at the time and place appointed, he must respond in damages to the execution creditor to the extent of the loss thereby sustained by him.

3. SHERIFFS AND CONSTABLES ⚡121—LIABILITY OF SHERIFF—EXCUSE—ESTOPPEL.

The approval of the bond by the obligees, the execution creditors, before its acceptance by the sheriff, does not operate to excuse the default of the latter or to estop or defeat recovery by the obligees.

4. EXECUTION ⚡207—FORTHCOMING BOND—LIABILITY OF OBLIGORS.

The obligors in such a bond, having failed to produce the property at the time and place appointed, or in lieu thereof to pay the judgment upon which the execution issued, are liable to the obligees therein for breach of its obligation.

5. SUBROGATION ⚡10(2) — FORTHCOMING BOND—SHERIFF'S SUBROGATION TO RIGHT OF EXECUTION CREDITOR.

And in such case the officer is entitled to be subrogated to the right of the execution creditors to an action on such delivery bond.

6. EXECUTION ⚡207—SHERIFFS AND CONSTABLES ⚡135 — FORTHCOMING BOND—BREACH—LIABILITY.

Though the execution creditors have a valid cause of action against either the sheriff or the obligors in the bond, as between the two the latter are the parties ultimately liable; and where the execution creditors have elected to proceed against the former, it is proper for him to invoke the broad power of a court of equity to make the latter parties defendant, and, if found liable, to shift the burden of the liability upon them, thus making it possible to adjudicate in one suit conflicting claims which, if permitted to proceed at law, will require two actions for final settlement.

7. EQUITY ⚡46—JURISDICTION—REMEDY AT LAW.

To deny equity jurisdiction because of a remedy at law, the legal remedy must be adequate to the demands of the particular case, and as full, complete, and efficacious as that given in equity, and must not leave open for future litigation matters really and substantially involved.

Appeal from Circuit Court, Taylor County.

Suit for injunction by Benjamin F. Sayre against John H. Kunst, executor, etc. Decree for plaintiff, and defendant appeals. Reversed and remanded.

John L. Hechmer, of Grafton, for appellant.

Warder & Robinson, of Grafton, for appellee.

LYNCH, J. The decree complained of by defendants below, appellants here, made perpetual a preliminary injunction theretofore awarded enjoining the further prosecution of two actions at law instituted by them, one against Benjamin F. Sayre, sheriff of Taylor county, for the four-year term beginning January 1, 1901, the other against him and the sureties on his official bond, both apparently being for the same cause of action.

In the year 1891, John H. Kunst, executor of G. H. A. Kunst, together with Adolphus Armstrong, then living, sued in their names for the use of John H. Kunst, administrator of Sara Kunst, and recovered against the defendant, James W. Findley, a judgment of nearly \$1,100, including interest and costs. They caused an execution to be issued on the judgment in 1904, and placed the writ in the hands of Sayre for levy upon the property of the judgment debtor. This he did, or attempted to do, upon the supposition that the property levied on was subject to sale under the writ, the itemized aggregate valuation being \$2,279. Immediately upon being informed of the levy, Irvin Findley, a son of the judgment debtor, denied the ownership of his father, who apparently remained silent in respect thereof, and claimed title in himself; and Sayre, when advised of the claim, demanded an indemnifying bond of Kunst and his co-plaintiff, the judgment creditors, and they furnished the requisite indemnity. Thereupon the claimant and the United States Fidelity & Guaranty Company, surety, entered into and delivered to Sayre a bond binding them to pay the obligees therein, the judgment creditors, an amount double the estimated value of the property, or have it forthcoming for sale at the time and place appointed by the sheriff for that purpose, namely, at the courthouse of Taylor county, October 3, 1904. Before accepting the bond, Sayre alleges he submitted it to the obligees for their inspection and approval or rejection, and also to his legal adviser, and that they approved it before its acceptance by him; whereupon, and with their knowledge and acquiescence, he permitted the property to remain in the possession and control of the claimant on the premises, where it was when found and levied on, whether the pro-

prietor and owner of the premises was the father or the son, their residence being the same.

The judgment and no part of it was paid by James W. Findley or the obligors named in the instrument purporting to be a statutory forthcoming bond, nor was the property or any part of it produced by them or any of them at the time and place mentioned, or a bond given to suspend the sale as authorized by chapter 107 of the Code (secs. 4492-4499). Nor did the claimant, or any other person for him, apply to the circuit court of the county, or the judge thereof in vacation, for the order or orders specified in sections 5 and 6 of that chapter (secs. 4496, 4497), the only orderly and proper procedure provided for where the creditor has given the officer a bond of indemnity. The property not being forthcoming, but theretofore dissipated, and then unavailable in satisfaction of the execution lien, the judgment creditors brought the actions the prosecution of which Sayre asked the court to enjoin, and which the decree complained of did enjoin.

The first movement initiated by the judgment creditors after this situation arose, and before the actions were brought, was a notice of a motion and a motion granted for the award of execution upon the instrument executed by Irvin Findley and the United States Fidelity & Guaranty Company, treating it as a statutory forthcoming bond. To the judgment awarding execution the obligors obtained a writ of error from this court, assigning as grounds therefor rulings upon the sufficiency of the notice and service thereof, a non est factum plea, the evidence, and the adjudging the bond to be valid as a statutory forthcoming bond. What is now important to note, the decision reported in *Kunst v. Findley*, 73 W. Va. 152, 80 S. E. 136, adjudged the bond to be irregular and insufficient to warrant the award of execution thereon as the statute permits to be done in case of a bond for the forthcoming of property levied on to satisfy a debt or judgment, and, if good at all, to be good only as a common-law bond.

Then followed the two actions at law, the declaration in the one against Sayre as the sole defendant only appearing in the record. It contains three counts, all of which are alike except in certain particulars, and, so far as necessary, set forth the facts heretofore detailed. They differ in this, that the first count, after rectifying the execution and delivery of the indemnifying bond, charges the neglect and failure of Sayre to take from Irvin Findley a proper forthcoming bond, and in suffering him to retain possession of the property levied on without their consent and against their will, contrary to his duty in that regard; the second, a wrongful intent on the part of Sayre to deprive them of the benefit of the levy and of the money

then due on the judgment, and that he, without their license or authority, suffered and permitted Irvin Findley to retain possession of the property at his risk until the day of sale, upon giving bond to have it forthcoming at the time and place appointed therefor; and the third, the surrender of the goods and chattels levied on into the possession of Irvin Findley without payment of the judgment, and without a sale of the property, and not afterwards resuming possession thereof, whereby the benefit of the lien, and the payment of the judgment out of the proceeds thereof when sold, was wholly lost to plaintiffs.

There is no question raised as to the character, effect, or sufficiency of the Findley bond as a common-law obligation, or as to the omission of any necessary party or parties, or as to the correctness of the recitals of the bill. The bill is unchallenged except by demurrer for want of equity. Other grounds assigned for reversal are the action of the court in directing an issue to be tried by a jury, first as to whether the property levied on then was the property of the claimant, and, second, whether Kunst and Armstrong approved and accepted the bond as formally sufficient and the surety as adequate. The jury affirmatively answered both questions, but upon most meager proof, and doubtfully questionable both as to competency and sufficiency.

[8, 7] There can be no reasonable doubt of the right of the plaintiff to maintain the bill or as to the relief he prays. The matters involved are intricate, and cover many years of procrastination and controversy, for the adjudication and settlement of which equity has facilities and powers not possessed by or available to courts of law, whose rules of procedure are more rigid and inflexible. Besides, the latter cannot in any form of action, or by any adjudication, settle and determine once and for all the matters in issue. The plaintiff invokes the court to grant him relief by enforcing for his benefit and protection the bond of Findley, should the court adjudge plaintiff to be liable to defendants or any of them for the defaults as regards the execution on the judgment. If entitled to this relief, there is no equally expeditious proceeding at law by which he could obtain it. These and other reasons well recognized as furnishing ample justification for resort to equity warrant the ruling on the demurrer to the bill. "To deny equity jurisdiction because of a remedy at law, the legal remedy must be adequate to the demands of the particular case, and as full, complete, and efficacious as that given in equity and must not leave open for future litigation matters really and substantially involved." *Warren v. Boggs*, 97 S. E. 589, point 7, Syl.

[1, 2] The direction of the issue out of chancery for trial by the jury as to the owner-

ship of the property, unfortunately for the claimant, if it was his, came too late, if the provisions of the statute for his protection are not to be disregarded altogether. Resort to the remedy thereby prescribed must, to avail, necessarily be prompt. Instead of being diligent, he was negligent, and delayed action until resort to the remedies once available has now become impossible. His laches cannot now be excused, and he does not offer any explanation or justification for the delay. Apparently he relied with confidence upon the protection which he evidently assumed the forthcoming or delivery bond furnished him. Such a bond, unaccompanied by a preliminary bond to suspend or defer the sale until his claim was adjusted, as provided by section 4, c. 107, Code (sec. 4495), could not and did not warrant the act of the officer in permitting the property to remain in his possession. He should have required the claimant to give, or the latter voluntarily should have given, the bond allowed by section 4, and thus have suspended the sale until the claim of ownership had been determined by proceedings instituted in the circuit court, as provided by sections 5 and 6. *August v. Gilmer*, 53 W. Va. 65, 73, 44 S. E. 143. That is the mode authorized by the statute for that purpose. Generally it is the debtor who gives a forthcoming bond. The claimant is required by statute to give a suspending bond, though ordinarily after furnishing the latter he must, if he desire the property to remain in such possession as it was immediately before the levy, also give bond for its delivery if upon the trial his right thereto is determined against him. Section 7, c. 107, Code (sec. 4498); *Kunst v. Findley*, 73 W. Va. 152, 154, 80 S. E. 136.

Without the suspending bond the duty of the officer was to exercise the power to convert the property into liquid assets, and discharge the debt represented by the judgment, regardless of the alleged hostile title. The purpose of such bond is to indemnify the officer and the execution creditors against the damages either or both might sustain in consequence of the suspension of the sale, while the officer is further protected by the indemnifying bond which he may demand of the latter to protect him in carrying the execution into effect. Not having brought himself within the provisions of the statute by failing to give both bonds according to the provisions of sections 4 and 7, the claimant cannot, in the face of such prolonged delay, be permitted to invoke to his relief the remedy conditionally allowed by the statute. Besides, by not giving them, he irrevocably bound himself by the one he did give to do at the proper time one of two things as he might elect, namely, to pay the amount due on the execution, or, in lieu of payment in money, to produce the property, and permit it to be sold, and the

proceeds applied according to the command of the writ.

As the property has ceased to exist or has become valueless by lapse of the intervening years, performance of the second alternative is now impossible, and the obligors cannot avoid liability for the performance of the first, no valid defense being interposed, and the bill being taken for confessed against the United States Fidelity & Guaranty Company, duly served with process to answer. This is the only logical conclusion to be drawn from that obligation, considered and construed in the light of the statute. It determines the rights of the parties as regards their liability and the ownership of the property and to each other, so that the consequential damages must finally fall where responsibility first arose; that is, upon the party primarily at fault, or whose neglect furnished the occasion for the loss that has occurred. The first act of omission or neglect is chargeable in the first instance to the obligors in the delivery bond, and only secondarily to Sayre. If the former do not for any legitimate or sound reason respond favorably to their conditional undertaking, the latter must account for his dereliction to the extent the obligees have suffered injury therefrom. *Lyon v. Horner*, 32 W. Va. 432, 9 S. E. 875; *Smith v. Hightower*, 80 Ga. 669, 7 S. E. 165.

[3-5] Armstrong's approval of the bond given before its acceptance by the plaintiff, conceding the fact to be as alleged, does not operate as an estoppel or defeat recovery by the obligees, or excuse the default of Sayre evidenced by his unauthorized act in permitting the property to be lost, and by his failure to retake it and enforce against it the lien of the execution, in the absence of a suspending bond, without regard to the claim of adverse ownership. Though the bond given by him and his co-obligor is not such an instrument as the statute permits for the benefit of a debtor who desires to retain possession of property or pay the debt in the meantime, there is not, as we have said, any question raised as to its sufficiency and legality as a common-law obligation. *Adler v. Green*, 18 W. Va. 201; *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. 4; *Kunst v. Sayre*, 73 W. Va. 152, 80 S. E. 136; *Waterman v.*

Frank, 21 Mo. 108; *Wilson v. White*, 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378. There is a manifest difference between the two—a difference recognized in the former decision. The first, construed in connection with the judgment and execution, has, when the property is not delivered as agreed, and the bond is filed in the office of the clerk who issued the writ, the force and effect of a new judgment against the obligors, and the court may, upon proper notice and motion, award execution leviable upon their property. Sections 3 and 4, c. 142, Code (secs. 5142, 5143): *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442; *Kunst v. Sayre*, supra; *Walker v. Gamble*, 74 W. Va. 706, 82 S. E. 1014. But no such speedy result is possible or allowable upon the second; none of any kind other than by the usual formal action prosecuted by the obligees to final judgment against the obligors.

It follows, therefore, that the sheriff was guilty of neglect of duty in accepting from the claimant what purported to be a statutory forthcoming bond, when only a suspending bond was authorized, and in not requiring the production of the property for sale at the time and place appointed. It further appears that Findley has breached his forthcoming bond, assuming it to be valid as a common-law obligation, in not producing the property at the time and place provided, or paying the judgment in lieu thereof. *Kunst*, therefore, has a valid cause of action against each of them, but, having elected to proceed against the sheriff, it is proper for the latter to invoke the broad powers of a court of equity to make Findley and his surety parties defendant, and, if found liable, to shift the burden thereof upon them as the parties ultimately liable. Thus it is possible to adjudicate in one suit conflicting claims which, if permitted to proceed at law, will require two actions for final settlement, the one by *Kunst* against the sheriff, the other by the sheriff against the obligors in the forthcoming bond.

Therefore we are of opinion that the court correctly overruled the demurrer, but erred in granting the relief it did grant, for which reason we reverse the decree and remand the cause.

PAXTON LUMBER CO., Inc., v. PANTHER COAL CO. (No. 3708.)

(Supreme Court of Appeals of West Virginia.
Feb. 11, 1919. Rehearing Denied
March 26, 1919.)

(Syllabus by the Court.)

1. MINES AND MINERALS §62(1) — COAL MINING LEASE—"RIGHT TO USE TIMBER STANDING OR BEING ON SAID LAND."

A coal mining lease conferring "the right to use the timber standing or being on said land" will be construed to grant the lessee the right to use the timber only for mining purposes, not to authorize a severance and sale or other uses characteristic of an unqualified ownership, unless the authority is conferred in express terms, or in terms so unmistakable as to exclude reasonable doubt as to the lessor's intention.

2. LOGS AND LOGGING §34(1) — QUANTITY OF LUMBER—"TO BE CUT FROM THE MANUFACTURER'S TIMBER HOLDINGS."

Though not every impossibility of full performance of a contract of sale will excuse the vendor, yet, where such contract specifies the quantity of lumber sold as lumber "to be cut from the manufacturer's timber holdings," the contract is to be construed with reference to such qualifying phrase, and not as importing an absolute quantity irrespective of the designated source from which it is to be obtained; and if it shall thereafter appear impossible to obtain the quantity specified from the manufacturer's holdings because of insufficiency of timber thereon to produce the quantity, and neither party was aware of the insufficiency when they entered into the contract, the impossibility necessarily implies an element of mistake such as excuses performance beyond the timber capacity of the land.

3. SALES §71(5)—SALE OF TIMBER—QUANTITY—WARRANTY OR ESTIMATE.

Where a contract purports to sell goods identified by reference to independent circumstances, such as lumber to be cut from the manufacturer's timber holdings, with the qualification "about" or words of like import as to the quantity named, the contract applies to the specific timber thereon, and the specification of the quantity is not regarded as a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

4. SALES §71(3) — QUANTITY OF GOODS—"ABOUT."

But where no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract; the addition of the qualifying words "about" and the like, operating only as a provision against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, About.]

5. SALES §36—IMPOSSIBILITY OF PERFORMANCE—MUTUAL MISTAKE—EXCUSE.

Frequently the impossibility of performing a contract, and mutual mistake excusing performance, when interposed in defense of an action thereon, have somewhat similar characteristics; and where the impossibility is due to a circumstance existing at the time of the bargain, and relating to the subject-matter thereof, without the knowledge of either party, it partakes of the nature of a mutual mistake, and excuses performance to the extent the subject-matter had no potential existence.

6. SALES §36 — PERFORMANCE—EXISTENCE OF SUBJECT-MATTER.

If the parties to a contract enter into it under the belief that the subject-matter is in existence, and in effect condition their contract thereon, no contract exists if the subject-matter is not then in existence, and, if it exists in part only, performance after exhaustion of such part will be excused.

7. PLEADING §367(6)—PARTICULAR STATEMENT OF DEFENSE—MOTION—STATUTE.

Section 63, c. 125 (sec. 4817), Code 1918, authorizing a plaintiff to apply for an order requiring defendant to file a more particular statement of his defense, impliedly requires promptness in making the motion.

8. PLEADING §367(6)—PARTICULAR STATEMENT OF DEFENSE—MOTION—STATUTE.

Ordinarily such a motion, made when the case, is called for trial, approximately six months after issue joined upon the appropriate plea, comes too late.

9. JUDGMENT §199(3) — VERDICT — JUDGMENT NON OBSTANTE VEREDICTO.

A judgment non obstante veredicto must be based upon the merits of the case as disclosed by the pleadings, and it cannot properly be invoked to serve the purpose of a motion to set aside the verdict in determining the sufficiency of the evidence.

Error from Circuit Court, McDowell County.

Suit by the Paxton Lumber Company, Incorporated, against the Panther Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry Roberts, of Bristol, Va., and Sanders, Crockett & Kee, of Bluefield, for plaintiff in error.

Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

LYNCH, J. Paxton Lumber Company, Incorporated, a corporation engaged in the purchase and sale of lumber, sued Panther Coal Company, also a corporation, whose principal occupation or business is the production and sale of coal, and incidentally only the manufacture of lumber, in assumption, upon an account filed with the declaration, for the value of timber contracted by defendant to be manufactured and delivered

to plaintiff, but which, it is alleged, was neither manufactured nor delivered pursuant to the terms and requirement of the contract; and the Paxton Lumber Company prosecutes this writ to review and reverse the judgment for defendant for \$866.51, the balance conceded to be due defendant upon shipments of lumber received and appropriated by plaintiff pursuant to the provisions of the contract.

The contract, dated March 22, 1916, proved and admitted, and alleged to have been breached by defendant June 4, 1917, specifies the quantity, quality, and grades of poplar, oak, chestnut, and basswood to be furnished according to its stipulations, and the prices to be paid for the various grades, and the terms of settlement. The quantity designated is qualified or limited by the word "about"—that is, about 950,000 feet in the aggregate for all kinds and grades of lumber; and the source from which it is to be derived by the phrase, "from the manufacturer's timber holdings," manufacturer being the designation given in the contract to denote the Panther Coal Company. Of the quantity contracted for, not to exceed 150,000 feet were delivered.

The timber which defendant had the lawful right to convert into lumber for its own use in the prosecution of its mining operations was that having a diameter of less than 16 inches, and standing on the tract of 1,500 acres of land in McDowell county, demised, leased, and let to defendant October 4, 1913, by the Sibley Coal & Coke Company, to remove the coal contained therein, and timber of that size could be used by defendant only for mining purposes. Timber over 16 inches in diameter was expressly excepted from the lease, but defendant subsequently purchased part of the timber of that size on the tract from its owners, and that constituted the only timber which defendant had the right to cut for sale to others.

To what extent the Panther Coal Company complied with the requirements of its contract with the Paxton Lumber Company they do not agree, though the quantitative difference does not exceed 40,000 feet, and this disparity is due mainly to a misapprehension as to whether certain lumber, the sale and receipt of which is acknowledged and not disputed, was furnished in fulfillment of the contract, or of a transaction of an independent nature completed between the date of the former and the alleged breach thereof. Though the contract of March 22d calls for no lumber less than $\frac{3}{4}$ inch, except basswood, the corresponding dimension of the controverted quantity was $\frac{1}{4}$ inch, and defendant insists it was taken up and paid for under the first agreement, while plaintiff urges the opposite view. It is doubtful whether basswood was part of the controverted quantity. Whatever may be the truth

as regards these counterclaims, there is no need to enter now upon an investigation of their merits, as the verdict of the jury has eliminated them from further consideration, together with plaintiff's right to any recovery whatsoever, unless we shall conclude that for some cause or upon some ground the judgment based upon the verdict should be set aside and a retrial ordered.

The important questions presented for consideration and decision necessitate a further recital of the facts indisputably established and those about which there is some controversy, and when these are ascertained and viewed in the light of the verdict and judgment, both of which stand upon a presumption in favor of their correctness, we must then determine by what law these facts are controlled and governed.

There was not at the date of the contract and at the time of its breach a quantity of timber owned and controlled by defendant sufficient to permit the manufacture of the requisite amount, grades, and quality called for by the contract; not more, indeed, than defendant manufactured and delivered pursuant to its terms, unless the timber of less than 16 inches in diameter, which the Sibley Coal & Coke Company lease permitted defendant to use for mining purposes, could lawfully be devoted to that purpose. The entire 1,500 acres had theretofore virtually been denuded of merchantable trees, or trees out of which merchantable timber demanded by the contract could be manufactured. The evidence introduced before the jury upon this phase of the controversy seems to be without substantial contradiction. It may without hesitation be said to be conclusive, except as to 584 trees, most, if not all, of which we assume were cut, milled, and delivered to plaintiff; for apparently it was out of these trees that the lumber plaintiff received under the contract was obtained. What doubt may be said to exist, if any does exist, has no reasonable foundation or justification, and nothing was offered to show the fact to be otherwise than as stated.

Though this observation may not be wholly inapplicable to the proof of the smaller timber not cut and still remaining on the leased land, its applicability is not significant or important. It may be conceded, as Leckie, defendant's general manager of the coal mining operations on the land, admits, that probably there remain enough of that sort of trees standing on the large boundary to furnish the lumber required to complete the contract, a fact about which he frankly confesses a very limited knowledge, as he employs his time exclusively in the discharge of duties in no wise associated with the manufacture or sale of lumber. But by no lawful right could this timber, although sufficient to meet the requirements of the contract, be applied to the accomplishment of that end. The lease under the authority of

which the coal mining operations are conducted sufficiently, though inaptly, denies the right to appropriate it except as authorized by that instrument. Its language is:

"The lessee shall have the right to use the timber standing or being on said land within the following boundaries: (All timber on the right of way of the Norfolk & Western Railway, and all timber over 16 inches in diameter on the Richard Lockhart land, the Adam and A. J. Cline land, and the J. J. Cline land excepted.)"

[1] This being a mining lease, its grant of the right to use the timber must be construed as intending only such use as may be necessary to effectuate the purpose of the demise. The provision is not infrequent, but usual, in coal mining leases. Timber is essential and indispensable in the exploitation of coal properties, and ordinarily a provident and cautious prospective operator endeavors to induce the owner of the superincumbent surface to concede the right to appropriate part of the timber thereon to such uses. Rare are leases of this kind that do not grant such concession. It enters into the consideration agreed to be paid for the main privilege and as incidental to it. The right of appropriation, however, seldom is enlarged into an unqualified ownership, such ownership as may be interpreted to authorize a severance and sale without regard to the generally prescribed limitations upon the right to use for mining purposes, except where the authority is conferred in express terms; and, until the lessee finds it necessary to elect to exercise the right, title to the timber remains vested in the lessor or grantor, in this case in the Sibley Coal & Coke Company or its lessors. *Godfrey v. Weyanoke Coal & Coke Co.*, 97 S. E. 186, 189.

[2, 3] These observations introduce the fundamental or basic legal problem the solution of which must determine the issues involved upon this writ. Tersely stated, the problem resolves itself into this question: May defendant lawfully be compelled, directly or indirectly, to acquire and manufacture timber other than that owned by defendant on its timber holdings, and deliver the product to plaintiff, or suffer the damage consequent upon the failure so to do, notwithstanding the explicit qualifications of the contract?

A preliminary remark, founded upon undisputed and unqualified proof, will tend to enlighten the discussion and assist in its apprehension. It was through F. O. Frizzell, plaintiff's inspector and purchaser of lumber, that the negotiations between the Paxton Lumber Company and Panther Coal Company which resulted in the contract of March 22, 1916, were begun. Prior thereto he was upon the holdings of the defendant coal company, and ascertained and inspected the different kinds of trees standing thereon. With

the knowledge thus acquired he took up with William Leckle, general manager of defendant's coal mining operations, and only incidentally the representative of its lumber dealings, the proposal of inducing defendant to manufacture the timber on its "timber holdings" into lumber, and sell the product to his principal; and when Frizzell ascertained through Leckle defendant's attitude toward effecting such a trade, he informed Paxton Lumber Company by letter, evidently specifying the different kinds, quality, and grades of lumber available from such timber. Acting upon the information so acquired, the Paxton Lumber Company prepared and forwarded to Leckle the contract involved. Frizzell, being in the military service of the United States at the time of the trial, was not available as a witness; but it may not improperly be assumed that he possessed the qualification necessary to judge with reasonable accuracy the number and fitness of the trees to meet the requirements contained in the contract. Whether his estimates included the trees under 16 inches in diameter on the tract does not appear. If he did include them, the estimate was not reliable. Counting them, there probably was enough timber on the land to cut the required quantity of lumber, according to some witnesses; for there is some proof of the sufficiency and fitness of the timber on the tract at the time Frizzell examined it, all sizes and grades considered, to produce the lumber contracted for, and the lack of sufficiency if the smaller trees are excluded. Though the Paxton Lumber Company, through its agent Frizzell, may not have had actual knowledge of the nature of defendant's right to use those trees, it did have constructive notice afforded by the recorded Sibley Coal & Coke Company lease, and hence knowledge of the prescriptive limitation.

Finally, what of the legal principles determinative of the question of liability predicated upon these facts? or, what is but another mode of stating the same proposition, what effect must be accorded the word "about" as quantitative description of the lumber sold, and the phrase, "from the manufacturer's timber holdings," as prescriptive of the source from which the timber was to be manufactured as well as of the quantity thereof?

The addition of the qualifying words "about," "more or less," in a contract for the sale and shipment of a quantity of cordwood, says the Supreme Court of the United States in *Brawley v. United States*, 96 U. S. 168, 171, 24 L. Ed. 622, or of iron rails, as in *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 15 (29 L. Ed. 366), is a provision "against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." This, the court says, is the rule of construction

when no independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified then being material and governing the contract. "About," as used in the contract now examined, might, if unaided by other prescriptive terms or phrases, be susceptible of the same interpretation; that is, as providing only against a small discrepancy in quantity. However, in the federal cases cited, its use in another connection is noted by the court, saying:

"Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of 'about,' or 'more or less,' or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it."

The quotation just cited is applicable to this case, for the use of the qualifying phrase, "to be cut from the manufacturer's timber holdings," limits the contract to the specific timber on defendant's lands. See *Crislip v. Cain*, 19 W. Va. 438, pts. 17 and 18 Syl., overruled in part, though not as to the interpretation of these or similar qualifying words, by *Newman v. Kay*, 57 W. Va. 98, 110, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39, and also *Winton v. McGraw*, 60 W. Va. 98, 54 S. E. 506, and *Pickens v. Pickens*, 72 W. Va. 50, 77 S. E. 365, where certain qualifications are noted with respect to these rules in cases involving deficiency in the acreage of land.

[4, 5] In this connection it is relevant to remark, upon the sufficiency of the proof to warrant the finding of the jury as to the good faith of the defendant in its efforts to comply with its engagements, that in the voluminous correspondence regarding plaintiff's demands for shipments to satisfy its customers, and defendant's endeavors to meet such demands, and his assignment of one cause or another for his failure to do so, the latter in no letter and at no time intimated that delay on its part was due to want of timber on land owned or controlled by it; nor was there such an intimation except and until during the progress of the trial, when this defense was brought for the first time to plaintiff's knowledge. These matters and accompanying circumstances, however, as we have said, were submitted to the judgment and arbitrament of the triers of fact, and their verdict cannot be disturbed unless good cause be shown therefor.

As we have also remarked, the qualifying

phrase, "to be cut from the manufacturer's timber holdings," limits the contract to such timber as was on defendant's lands; and, since the amount was only sufficient to yield about one-sixth of the total number of feet contracted for, the questions of impossibility of performance and mistake are at once presented. A pioneer case having some relevancy to the main question in issue is *Lord Clifford v. Watts*, L. R. 5 C. P. 577. The issue was one of liability on the part of the lessee under a demise of a tract of land for the annual production of merchantable clays of not less than 1,000 tons upon a prescribed rental during a specified term. Afterwards it appeared that the premises contained no such clay, and the lease reserved no minimum rent to be paid in that event. An equitable plea was interposed by defendant that no liability attached because he could not at any time within the term dig 1,000 tons of clay a year, as there was not at the date of the demise or since under the land in question so much clay, wherefore performance was impossible, and the impossibility unknown to him when he made the covenant, and he had no reasonable means of ascertaining that fact. The court sustained the plea upon demurrer, and expressed the opinion upon the construction of the deed that it was the intention of the parties that the covenant to dig not less than 1,000 tons of clay in each year should not take effect unless there was clay to that amount in the lands demised. "The covenant is based upon the assumption that there was clay there. It was impossible to perform it unless there was; and the covenantor did not undertake an impossibility, but merely to dig and remove such clay as should be found in the land, to the extent stipulated for."

Scioto Brick Co. v. Pond, 38 Ohio St. 65, reiterates the same doctrine, the contract in issue being a demise to mine clay of a designated quality, and providing that the lessee shall mine or cause to be mined or pay for not less than 2,000 tons every year during the term, and for the payment of a specified sum monthly as the clay is taken away; and, as appears from headnotes, it was held that if clay of that quality, and in quantity sufficient to justify its being mined, existed, the lessee, on failure to mine at least 2,000 tons per year during the term, was bound to pay therefor at the prescribed rate. But if in fact clay of that quality and quantity could not, by the use of due diligence, be found on the land, no such obligation to pay arose, and that the burden rested upon the defendant to prove these exculpatory facts. As sustaining the same proposition, see *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N. W. 427, where it was said that as the lease was made for the purpose of exploring for, mining, and taking out merchantable iron ore, the lease

presupposed the existence of the ore, and that, on its appearing that no such ore was to be found, the purpose failed, and defendant should not be charged with the consideration. *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570, where, construing an iron ore or mining lease, no ore being discovered, the court held to the same effect, and in practically the same language, as in the last preceding case.

The legal propositions enunciated by these decisions appear to be sound and worthy of implicit confidence, and go far to meet the situation disclosed by this case, though they may apply only indirectly to its facts, because here there was only a partial, not a total, failure to discover the thing contracted for, and to that extent the contract was performed. They form a solid foundation upon which to base a similar conclusion upon the merits of this case, for we think the same principles are applicable.

Nor is there want of ample authority to uphold defendant's contention. A like demise for mining iron ore, whose covenants the lessees partly performed, is found in *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144. When sued for a breach thereof the lessees set up the defense, which the court sustained as sufficient to defeat the action, that, although they had operated the mine in a workmanlike and skillful manner for about nine months, yet on account of the nonexistence of sufficient ore, and its inferior and unmerchantable quality, they were unable to continue to mine it at a profit. For the breach thus occasioned the lessors brought an action on the covenant to mine annually 1,500 tons of ore, or in default thereof pay \$525. In the opinion the court said:

"We are not to construe the contract to require the lessees to perform an impossible thing. The \$525 is not a penalty; it is the price of the ore. The grant was of the ore in place, and, if the subject-matter of the contract fail, the price is not payable. If there was no ore to mine, there could be no royalty to pay. As well might the vendor of meat which proved to be putrid, or of a cargo of corn which had no existence, enforce collection from his vendee. We think the manifest meaning or intention of the parties, as exhibited by the terms of the contract, was that fifteen hundred tons 'of clean and merchantable iron ore' were to be mined in each year, if that quality and quantity of ore were there found, and that the contract by necessary implication must be so construed."

See, also, *Boyer v. Fulmer*, 176 Pa. St. 282, 35 Atl. 235; *Ridgely v. Conewago Iron Co.* (C. C.) 53 Fed. 988; *Flavelle v. Red Jacket Consolidated Coal & Coke Co.*, 96 S. E. 600.

Similarly, in a case involving a contract for the sale and delivery of 200 tons of a specific crop of potatoes, to be grown on

defendant's land, and he planted sufficient seed to grow more than the quantity specified in an average year, but the crop was attacked by a disease and he was unable to meet his engagement except in part, it was held that the contract must be taken to be subject to the implied condition that the parties shall be excused if before breach performance becomes impossible because of the perishing of the thing without the contractor's default. *Howell v. Coupland*, L. R. 9 Q. B. 462. As to a like failure of a peach crop sold and in part delivered, but for which the purchaser refused to pay, and sought to defeat the action on the ground of noncompliance with the terms of the contract, see *Ontario, etc., Ass'n v. Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231.

The term "impossible" or "impossibility" of performance employed in these decisions and in some text-books is not wholly appropriate. "Mistake," according to *Williston on Sales*, § 660, is the more apt word:

"The nature of the defense of impossibility is very similar to that of mistake. Indeed, many cases that are ordinarily classed as cases of impossibility should rather be classed under the heading of mistake. Impossibility of performance may be due either to a circumstance existing at the time the bargain was made, or to supervening circumstances which render performance in the future impossible, though not impossible when the bargain was made. Impossibility of the former sort generally involves mistake."

So, in this case, the impossibility of performance being due to a circumstance existing at the time the bargain was made partakes of the nature of a mistake respecting the existence of the subject-matter of the contract. "If the parties to a contract enter into it under the belief that the subject-matter or consideration is in existence, and in effect condition their contract thereon, no contract exists if the subject-matter is not then in existence." 1 Page on Contracts, § 72; 1 Elliott on Contracts, § 102; 13 C. J. 373; *St. Louis, etc., Ry. Co. v. Johnston*, 58 Tex. Civ. App. 639, 125 S. W. 61; *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633.

Though, generally speaking, a promisor is bound to comply with the express terms of his agreement, there appears to be manifestly increasing tendency to afford him relief upon equitable principles, where great hardship necessarily would ensue by forcing him to do what circumstances have rendered practically impossible of performance. This reasonable rule is exemplified or illustrated in the cases cited, and aptly fits the situation appearing in this case, of which plaintiff had, it appears, as much if not more knowledge than defendant had when they entered into the contract. *Frizzell*, we repeat, inspected the timber, knew its quantity and quality, and what he knew his

principal, the plaintiff, knew. He reported separately to each of the contracting parties, gave them the information which served as the basis of the preliminary agreement which later became the written contract, prepared at the instance and direction of the plaintiff without defendant's knowledge of its terms, and without previous consultation with him, and the first intimation the latter had of its contents was obtained upon the receipt of the contract through the mail.

[6] It is not every impossibility of performance that relieves a promisor. But where there is a contract for a specified quantity of lumber qualified by the phrase, "to be cut from the manufacturer's timber holdings," the quantity contracted for will be construed to be limited by the qualifying phrase, thus making it a contract to sell specific lumber to the extent of the quantity named, not an absolute contract to sell that quantity of lumber irrespective of the source; and if it later appears that the manufacturer's holdings do not contain timber in the quantity named, and that the parties were equally ignorant of the true state of facts, the impossibility of obtaining the specified quantity from such lands necessarily implies an element of mistake in entering into the contract, such as entitles to relief from performance beyond the quantity of timber capable of being cut therefrom. It should be noted, however, that if the contract had specified the quantity without any phrase limiting the source of the timber, the absolute duty then would have devolved upon defendant to procure that quantity from any source available.

[7, 8] Plaintiff complains of the refusal of the motion to require defendant to file a more specific statement of the grounds of defense to the action. The statute, section 63, c. 125 (sec. 4817), Code, authorizing such procedure, provides against unreasonable delay, and impliedly requires promptness in making the motion, and proof of good cause therefor. Though the defendant filed the plea appropriate to the action in term time, February 12, 1918, plaintiff did not make the motion until June 12th of the same year, when the court, "after hearing evidence on said motion and maturely considering the same," overruled it and refused to continue the case. Diligence required immediate, not delayed, action in an endeavor to invoke the benefit of the statutory provisions, and seems not to have been exercised by the plaintiff. *Norfolk & Western Ry. Co. v. Spears*, 110 Va. 110, 65 S. E. 482; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 123, 83 S. E. 726.

[9] Nor is the case presented such as warrants resort to the motion for judgment notwithstanding the verdict. We have had occasion recently to say that such a motion is

inappropriate except when justified by the pleadings. It is not proper when based merely upon the lack of sufficient evidence to support the verdict. *Holt v. Otis Elevator Co.*, 78 W. Va. 785, 90 S. E. 333, L. R. A. 1917A, 1194; *Shafer v. Security Trust Co.*, 97 S. E. 290. A request timely made for a new trial is the recognized and only proper procedure in such cases.

It is not necessary to pass seriatim upon the instructions said to be erroneously given, modified, or refused, as it suffices to say that, in so far as they are inconsistent or harmonious with the principles laid down, they were not improperly given or refused.

For the various reasons assigned we are of opinion to affirm the judgment.

PHILADELPHIA CO. OF WEST VIRGINIA v. SHACKELFORD.
(No. 3489.)

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919. Rehearing Denied
March 26, 1919.)

(*Syllabus by the Court.*)

1. MINES AND MINERALS §79(1)—OIL AND GAS LEASE—RECOVERY OF DELAY RENTALS—FAILURE OF CONSIDERATION.

To warrant recovery in an action of assumpsit by lessee against lessor in a lease for oil and gas, of rentals paid for delay in drilling a well, as for money had and received by the lessor for the use of the plaintiff, there must have been a total failure of consideration for such payments.

2. MINES AND MINERALS §79(1)—RECOVERY OF DELAY RENTALS—FAILURE OF CONSIDERATION.

Where such lease for oil and gas calls for 288 acres and the lessor has title only to a one-half undivided interest in the oil under 67 acres thereof, there has not been such total failure of consideration as to warrant recovery of delay rentals paid, in an action by lessee against the lessor as for money had and received.

3. MINES AND MINERALS §79(1)—RECOVERY OF DELAY RENTALS—FAILURE OF CONSIDERATION.

Such a lease confers on the lessee all the rights of the lessor as a co-tenant to enter and operate for oil, and if such right be of any substantial value there has not been such total failure of consideration as to warrant recovery by lessee of the rentals paid for delay in drilling a well, in an action against lessor for money had and received.

4. MINES AND MINERALS §73—RECOVERY OF DAMAGES—FAILURE OF CONSIDERATION—BREACH OF COVENANT.

To warrant recovery of damages by lessee against lessor in such lease for partial failure of consideration or for breach of covenant, the

pleadings must present such an issue or issues; they are not recoverable under the common counts in assumpsit, or upon a special count for money had and received.

5. MINES AND MINERALS §77—RECOVERY—RENTALS OF DELAY—SURRENDER OF LEASE.

Where such a lease confers on the lessee a valuable right in oil, though under only a part of the land leased, the lessee is not entitled after verdict in an action for money had and received, to surrender the lease, and to have the benefits of a new trial, upon the theory of total failure of consideration.

6. APPEAL AND ERROR §238(1)—JUDGMENT §84—ACKNOWLEDGMENT OF PART OF DEBT—ELECTION TO TAKE JUDGMENT.

The plaintiff, on the filing by defendant of his counter affidavit under section 46, chapter 125, of the Code of 1913 (sec. 4800), is then entitled to judgment for the sum thereby acknowledged to be due him, but if he does not then or at any time before trial elect to do so, he cannot when the pleadings do not warrant any recovery by him assign his neglect to take judgment as ground for reversal on writ of error prosecuted by him in this court.

Error to Circuit Court, Gilmer County.

Suit by the Philadelphia Company of West Virginia against John N. Shackelford, with set-off by defendant. Judgment for defendant on a directed verdict, motion for new trial overruled, and plaintiff brings error. Affirmed.

E. A. Brannon, of Weston, and Chas. E. Hogg, of Point Pleasant, for plaintiff in error.

R. F. Kidd and Linn & Craddock, all of Glenville, for defendant in error.

MILLER, P. Plaintiff as assignee of a lease of 288 acres, more or less, for oil and gas, sought by this suit to recover from defendant, the lessor, the several quarterly installments of rent or delay money of \$72.00 each paid by it to him, aggregating, according to the bill of particulars filed, \$864.00.

The declaration, besides the common counts in assumpsit, also contained a special count. According to the averments of the special count right of action was predicated on the theory of a rescission of the contract and total failure of consideration.

By the lease pleaded and proven the defendant and his wife on November 1, 1909, did "grant, demise, lease and let to said Swisher his successors and assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations and structures thereon to take care of said products," the tract aforesaid, described by reference to the lands of adjoiners, as containing 288 acres more or less. By its further provision the lease was to remain in force for the term of ten years from date and as long thereafter as oil and gas or either of them

should be produced from said land by said lessee or his successors or assigns.

And in consideration of said grant the said lessee covenanted and agreed to deliver to the credit of the lessor in the pipe line free of cost one-eighth of all the oil saved and produced from the leased premises, and seventy-five dollars in advance each three months for the gas from each and every gas well drilled the gas from which should be marketed off the premises. And the further covenant of the lease was to complete a well on the premises within three months from the date of the lease or pay at the rate of seventy-two dollars quarterly, in advance, for each additional three months such completion should be delayed.

On appearance by defendant he cravedoyer of the writing sued on, which being read to him and made a part of the record, he interposed his demurrer to the declaration, which was overruled. The only specific ground assigned and relied on was failure of the declaration to allege payment by plaintiff to defendant of the sum of one dollar and surrender of the lease for cancellation, which by the provisions thereof constituted conditions precedent to the right of the lessee to terminate and render said lease null and void, and to absolve him from the payments and liabilities thereafter to accrue thereunder.

On the same day defendant was permitted to file his counter affidavit under the statute, accompanied by a bill of sets-off aggregating \$655.49, alleging in his affidavit that there was not as he verily believed due plaintiff from him on account of the demands stated in the declaration a greater sum than \$208.51, the difference between the amount of the plaintiff's bill of particulars, \$864.00, and the amount of said sets-off, \$655.49.

At this stage of the proceedings the parties went to the jury on the issue joined on the defendant's general plea of non assumpsit, and at the conclusion of plaintiff's evidence, the court on motion of defendant struck out all of plaintiff's evidence and directed the jury to find a verdict for defendant, which was done. The plaintiff then moved the court to set aside the verdict and grant it a new trial, on the ground that the court had misdirected the jury, which motion the court took time to consider.

On a subsequent day, but before the court had acted on the motion to set aside the verdict, plaintiff brought into court its written surrender of said lease together with an affidavit showing payment to defendant by plaintiff of the sum of one dollar as the consideration for the surrender of said lease, and thereupon renewed its motion to set aside the verdict and for a new trial, the following grounds being assigned: First, that the evidence was sufficient to show

plaintiff's right to recover in the action; Second, that the lease at the institution of this suit was without value, and that plaintiff received nothing in the form of money or property from defendant prior to the institution of his suit, wherefore a surrender thereof was not a condition precedent to his right of action; Third, that the institution of the suit, per se, operated as a rescission of the lease, no formal notice of which was necessary in order to maintain the suit; Fourth, that the surrender of the lease and payment of one dollar by the plaintiff to the defendant as a consideration for the surrender, after verdict, in a case of this kind satisfies all the requirements of the law; Fifth, because the court erred in not permitting the witness Gates to show that he had examined the title and found that the lessors had no title to the premises described in the lease, whereupon plaintiff ceased and refused to pay further rental; Sixth, because of the exclusion of certain oral evidence as shown by the record of the official stenographer who took the testimony in the case; Seventh, on the further ground that it would be unjust and inequitable not to set aside the verdict and award plaintiff a new trial, after its surrender of said lease, which would operate as a great hardship, in that the plaintiff might be precluded and barred from maintaining another action to recover back the rentals sued for in this action, should the court decline to award a new trial.

This motion was overruled, and the judgment now under review was that the plaintiff take nothing by its declaration and that defendant go hence without day, and that plaintiff do pay him his costs about his defense in this behalf expended. And plaintiff took exceptions thereto, and on its request the court certified the evidence and its rulings on the trial as a part of the record.

On this hearing an additional ground is assigned for setting aside the verdict and as showing error on the judgment, namely, that as defendant in the counter affidavit admitted liability to plaintiff on the demands stated in the declaration, of \$208.51, the court should at the least have directed a verdict or entered up judgment for plaintiff for that sum. We observe, however, that plaintiff did not elect on the filing of said affidavit, or before or after verdict, to take judgment for the amount so admitted or move the court for judgment therefor, and we must assume it had some reason therefor not clearly apparent from the record.

[1] The special count of the declaration alleges want of any right or title in the lessors at the time of the lease, or prior or subsequent thereto, in the tract of 288 acres or any part thereof, or to the oil or gas thereunder, or under any part thereof, and avers the non existence of any such tract so far as any right or title thereto of the defend-

ants is concerned, and also avers the inability of the lessors or either of them at any time to deliver possession of said tract to plaintiff for the purposes of said lease, wherefore they rendered no consideration for the rentals paid to and received by them from plaintiff.

These averments show clearly that the basis of recovery laid and relied on in the pleadings was want of any title in the lessors and total failure of consideration for the rentals paid and sought to be recovered. It is conceded that to warrant recovery in such cases, for money had and received, there must have been total failure of consideration, or after eviction by a third person, for mesne profits for the period for which rents have been paid. *Gaffney v. Stowers*, 73 W. Va. 420, 424, 80 S. E. 501, and authorities there cited; 1 Chitty on Pleading (11th Amer. Ed.) 355.

[2] Plaintiff's evidence on the trial did not show entire lack of title in the lessors to any land or oil right within the boundaries described in the lease. On the contrary the evidence showed title by reservation in a deed from defendant and his wife to one W. E. Donlan, dated September 29, 1898, for a tract of 67 acres, of an undivided half of all the oil under the land thereby conveyed, and which land plaintiff's evidence locates within the boundaries described in the lease. There was no evidence of eviction or possession by paramount title by a third person amounting to eviction of plaintiff from the 67 acres. So that unless according to the contentions of plaintiff's counsel the lease conferred upon the lessee no right and title to the oil so reserved in said deed, it cannot be said that there was total failure of consideration for the monies paid and sought to be recovered.

[3-5] Certainly the lease was valid and binding between the parties and operated to transfer to the lessee all the rights of a co-tenant to enter in conjunction with all the other co-tenants of the oil, if not of the gas, and drill and produce oil. *Freeman v. Egnor*, 72 W. Va. 830, 79 S. E. 824. There is no evidence that this right was of such a small or trifling value as to amount to no consideration for the rentals paid, and we take judicial notice that such a right even in so small a tract as 67 acres is often worth thousands of dollars, sufficient to warrant payment of the rents required to keep the lease in full force.

However, a very elaborate and ingenuous argument is presented by learned counsel for plaintiff in support of the proposition that there was total failure of consideration shown. They take the position that as the main object of the lease was operation, and it undertook to grant, demise, lease and let to the lessee said 288 acres for the sole and only purpose of mining and operating for

oil and gas, there was an implied covenant of good title and for peaceable and quiet enjoyment, and a mere co-tenant of the oil, not of the gas, under the 67 acres, could not enter and operate unrestrained and unhindered by others with rights as co-tenants, wherefore there was total failure of consideration for the thing which the lease undertook to grant. This upon the principles enunciated in *Hall v. Vernon*, 47 W. Va. 300, 301, 34 S. E. 764, 81 Am. St. Rep. 791. But if it be true that the lease did confer on the lessee a valuable right as co-tenant in the oil under the 67 acres, the argument is of course wanting of a sufficient prop to support it. And it seems to us it is fully met by the reasoning of judge Poffenbarger in *Gaffney v. Stowers*, supra, 73 W. Va. at page 425, 80 S. E. at page 503, where he says in reply to a similar argument based on the defects of title involved in that case:

"Clearly, therefore, having this right from the lessor, they were in a position to deal on advantageous terms with any adverse claim set up under the exception, and could no doubt have acquired it on much more favorable terms than would otherwise have been available. They did not contemplate immediate possession under the lease. Like all other oil and gas leases, it was taken for purposes more or less speculative, and for these purposes the lessees had the benefit of it. So clearly there was not an entire failure of consideration and recovery cannot be had otherwise than upon a special count."

But should there have been a recovery under the pleadings for partial failure of consideration? In the *Gaffney-Stowers* Case, supra, the special count was regarded sufficient as one for the breach of covenant, and for partial failure of consideration. But we have no count in this case other than for total failure of consideration, and no evidence in the case justifying recovery on any other theory. For anything that appears in the record plaintiff may have had knowledge from the beginning of the defect of title or want of title of the defendant to the land covered by the lease and yet have been willing on account of such rights as it conferred to the oil and gas under the 67 acres,

to retain the lease, and pay the rentals. If so he could not retain the lease and recover the rentals paid, for as said in the case last cited voluntary payment of money with knowledge of all the facts is never recoverable.

The next inquiry is, was the plaintiff, after verdict, on showing payment of the one dollar and surrender of the lease, entitled to a new trial? We think not. At the time the suit was brought the lease was in full force. It had not been surrendered or terminated according to its provisions, and besides, its surrender by its provisions would only operate to excuse payments and liabilities thereafter to accrue, not past liabilities thereunder. At the time the suit was brought the lease had been in force nearly three and a half years, and when it was offered for surrender and cancellation, on April 7, 1917, it had been in force over seven years. Having had the benefits of the lease, such as were conferred, for all these years, rents paid could not be recovered back on the theory of a total failure of consideration. And the basis of plaintiff's right of recovery is not strengthened upon the theory of a rescission.

[6] Lastly to be answered is the question of the alleged right of plaintiff to judgment for the sum of \$205.51, acknowledged in the counter affidavit of the defendant. According to section 46, chapter 125 (sec. 4800), of the Code, plaintiff had the right on the filing of that affidavit to take judgment for that amount and go to trial for the residue of its claim, but it did not so elect, and as said before, it did not move for judgment for that amount at any time, perhaps for the reason that the evidence did not justify recovery on any issue presented by the pleadings, and plaintiff did not wish to accept a judgment which might thereafter prejudice its rights in a new suit predicated on a different theory or cause of action.

For the foregoing reasons we find no error in the judgment for which it ought to be reversed, and our conclusion is that it ought to be

. Affirmed.

(83 W. Va. 287)

KEYSTONE COAL & COKE CO. v. HALL
(No. 3617.)(Supreme Court of Appeals of West Virginia.
Feb. 4, 1919. Rehearing Denied
March 26, 1919.)*(Syllabus by the Court.)***1. WITNESSES \Leftrightarrow 154—COMPETENCY—TRANS-
ACTION WITH DECEASED OFFICER OF CORPO-
RATION.**

A party to a contract is competent to testify in his own behalf against a corporation in relation to a personal transaction between himself and a deceased officer of such corporation.

**2. FORCIBLE ENTRY AND DETAINER \Leftrightarrow 12(1)—
EQUITABLE DEFENSES.**

The same equitable defenses are available to a defendant in unlawful entry and detainer as are available under the provisions of the statute in an action of ejectment.

**3. FORCIBLE ENTRY AND DETAINER \Leftrightarrow 12(2)—
DEFENSES—VERBAL CONTRACT OF LEASE.**

In a suit for unlawful entry and detainer of real estate, a verbal contract of lease purporting to create a life tenancy cannot be set up by the defendant to defeat the action, even though it is shown that the consideration has been fully paid, and the defendant put in possession thereunder. Such a contract is cognizable only in equity.

Error to Circuit Court, McDowell County.

Action of unlawful entry and detainer by the Keystone Coal & Coke Company against J. R. Hall. From a verdict and judgment for plaintiff, on appeal to the circuit court, defendant brings error. Affirmed.

Strother, Taylor & Taylor, of Welch, for plaintiff in error.

Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

RITZ, J. The plaintiff instituted before a justice of the peace an action of unlawful entry and detainer to recover possession of the dwelling house occupied by the defendant and his family, situate on its property. The defendant, until a short time prior to the institution of the suit, was an employé of the plaintiff, and while such employé occupied one of the houses owned by it as part of its mining plant. Shortly before the institution of the suit the defendant was dismissed from plaintiff's services, and demand made upon him to vacate the house. This he refused to do, and this suit was instituted before a justice of the peace, resulting, on appeal to the circuit court, in a verdict and judgment in favor of the plaintiff.

[1] The defense set up is that the defendant's wife holds the premises under a verbal contract with the plaintiff, made in the year 1906, by which it agreed to permit her to occupy the dwelling house so long as she

lived, in consideration of the settlement of a suit instituted by her to recover damages for the alleged wrongful death of her husband in the mines of the plaintiff. This defense was rejected by the court below upon the ground, as indicated by the record, that the defendant's wife was an incompetent witness to testify to the contract or agreement she had with the plaintiff company, because of the fact that the officer with whom it was made is now dead. It does not clearly appear that this is the ground upon which the lower court based his ruling, and this contention is not made by plaintiff's counsel in this court. Of course, the fact that the plaintiff's agent, or officer, with whom the alleged contract was made is dead would not, under the provisions of section 23 of chapter 130 of the Code (sec. 4879), make the defendant's wife an incompetent witness. There is no inhibition against such testimony where the transaction is had with a deceased agent. *Board of Education v. Harvey*, 70 W. Va. 480, 74 S. E. 507; *Hains v. Railway Co.*, 75 W. Va. 613, 84 S. E. 923.

The plaintiff, however, does insist that the defense relied upon cannot avail for the following reasons: First. The evidence of Mrs. Hall offered to show the contract does not establish the same. Second. It does not appear that the agent with whom the contract purported to have been made had any authority to make the same. Third. The alleged contract, not being in writing, is invalid under the statute of frauds.

[2, 3] The facts upon which the defendant relies to defeat recovery are substantially that in the year 1906 his wife was then the wife of a man by the name of Meadows, who was an employé of the plaintiff. Meadows was killed while at work in the mines of the plaintiff, and, contending that his death was caused by plaintiff's wrongful act, his administratrix, who was his widow and the wife of the defendant in this case, instituted a suit to recover damages. While this suit was pending, the superintendent or manager of the plaintiff approached Meadows' widow, and, after a conversation, he agreed with her that she should have the right to occupy the house in which she was then living, and in which Meadows had been living before his death, as long as she liked; that she should treat it as her own, without any obligation to the plaintiff company, in consideration that she dismiss the suit for damages claimed because of the death of her husband; that pursuant to this arrangement she did dismiss the suit, and the plaintiff company never after that time charged her any rent, or attempted to collect any rent, for this house until the year 1916, 10 years thereafter; that about 2 years after the death of her first husband she intermarried with the defendant in this case; that he, before his marriage, in a conversation with the superin-

tendent of the plaintiff company, informed said superintendent that he and Mrs. Meadows were about to be married, and inquired if it would make any difference as to her rights in the house which she occupied, and was informed that it would not. From this the defendant contends that his wife is a life tenant in the property, and that the plaintiff cannot maintain this suit.

Before determining whether or not the testimony proves the contract relied upon by the defendant, or whether the agent making the contract had authority, or whether the statute of frauds bars it, or the nature of the right granted thereunder, assuming it was made, we must determine whether it is such a defense as can be made in this action, giving to it all the force for which the plaintiff contends. Defendant contends, of course, that the proof establishes the contract, that his wife paid all of the consideration for the tenancy and that she was placed in possession of the premises, and has been there ever since, and that, notwithstanding it was not in writing this full performance takes it without the statute of frauds. But can such a contract be set up in defense of an action for unlawful entry and detainer? There is no doubt that the defendant's wife would be entitled to relief in equity if the contract is properly interpreted by her, and the agent making the same had authority, or, if without authority, his action was subsequently ratified, either by acquiescence or by some affirmative act on the part of the company. But, unless this is such a defense as can be made in this suit, it would be manifestly improper for us to construe the evidence offered to support the contract, or to determine its legal effect in advance of these questions being raised in a court having jurisdiction to authoritatively determine them. In an action of ejectment, under sections 20 and 21 of chapter 90 of the Code (secs. 4088, 4089), certain equitable defenses are allowed to be made; that is, a defendant will be allowed to set up and rely upon a written contract of purchase, even though it has not been carried into deed. But these sections have been interpreted, not only by this court, but similar statutory provisions have been construed by the courts of Virginia, to exclude the right of a defendant to set up a

purely equitable right not dependent upon a written contract, in defense of an action of ejectment. *Garrett v. Oil Co.*, 66 W. Va. 587, 66 S. E. 741; *Davis v. Teays*, 3 Grat. (Va.) 283; *Suttle v. Railroad Co.*, 76 Va. 284; *Hurley v. Charles*, 110 Va. 27, 65 S. E. 468.

It is quite clear from these authorities that in an action of ejectment such a contract as is relied upon to defeat this action would not avail. While the statute does not in express terms give to a defendant the right to set up an executory contract for the purchase of real estate as a defense in an action of unlawful entry and detainer, it has been held, that, where he has such a contract as would be a defense under the statute in an action of ejectment, he could rely thereon in an action of unlawful entry and detainer for the premises. *Dobson v. Culpepper*, 23 Grat. (Va.) 352; *Williamson v. Paxton*, 18 Grat. (Va.) 475; *Locke v. Frasher's Adm'r*, 79 Va. 409; *Brumbaugh v. Sterringer*, 48 W. Va. 121, 35 S. E. 854. But in the case last above cited it is distinctly held that, to be available as a defense in an action of unlawful entry and detainer, such an executory contract must be in writing; it must be such a contract as the law recognizes, and not one which arises because of the application of equitable principles to a status in which the parties have placed themselves. The statute permitting this equitable defense goes no further than to permit a defense at law under an executory contract in writing. Without the aid of this statute it would take legal title to make a valid defense, and the courts will not permit the defense relied upon here to be effective, unless it comes within the purview of the statute permitting it.

The conclusion is that the defense set up and relied upon in this case is not available at law. Whether or not it can be made effective in a suit in equity will depend upon the interpretation of the contract, its extent, the authority of the agent making it, and the application of the statute of frauds thereto. Having reached the conclusion that this defense, however substantial, is not available in this suit, and that the contract set up and relied upon by the defendant is one cognizable only in a court of equity, we conclude that the action of the circuit court in directing a verdict for the plaintiff must be affirmed.

(83 W. Va. 496)

BUSEMAN v. BUSEMAN et al. (No. 3345.)(Supreme Court of Appeals of West Virginia.
Feb. 25, 1919. Rehearing Denied March 26,
1919.)*(Syllabus by the Court.)***1. PARENT AND CHILD — 2(2) — FATHER'S RIGHT TO CUSTODY AND CONTROL.**

The father, if living, is the natural guardian of his infant children, and, if not incapacitated or unfit, is entitled to their custody, care, and control in preference to the mother.

2. DIVORCE — 296 — CUSTODY OF CHILDREN — DISCRETION OF COURT.

The discretion given by section 11 of chapter 64 of Code 1913 (sec. 3646), upon decreeing a divorce, or where the parties are living separate and apart, to determine with which of the parents their infant children shall remain, and to provide for their care, custody, and maintenance, should be exercised with due regard to the natural and legal rights of the parents, where nothing has intervened justifying denial of such parental rights.

3. DIVORCE — 298(2) — CUSTODY OF CHILDREN — CIRCUMSTANCES.

When in a suit for divorce the mother is decreed to have deserted and abandoned her husband without just cause, and has thereby broken up their home, and a decree of separation is pronounced against her, unless the father has relinquished his rights to another or is financially or physically unable or morally unfit for the trust, the care, custody, and maintenance of his infant children should be committed to him as their natural guardian.

4. DIVORCE — 297 — CUSTODY OF CHILDREN — AGREEMENT BY FATHER.

Where, pending a suit by husband against wife for divorce, he makes a contract with her for the care, custody, and maintenance of their infant child by a stranger, and thereafter consents to interlocutory orders so disposing of the infant, the court on final decree may, unless the interests of the child require a different disposition, respect such contract and continue the custody and maintenance of the child in accordance therewith.

5. DIVORCE — 303(1) — CUSTODY OF CHILDREN — DISPOSITION.

And, having so disposed of the infant, the court will not afterwards, except upon new facts and conditions shown, exercise its authority and jurisdiction to change the custody of the child.

Appeal from Circuit Court, Monongalia County.

Suit for divorce by George T. Buseman against Bessie P. Buseman and others. Decree of divorce and separation depriving plaintiff of care of his infant child, and he appeals. Affirmed.

C. William Cramer, of Morgantown, for appellant.

Cox & Baker, of Morgantown, for appellees.

MILLER, P. Upon a bill by husband against wife, filed July 18, 1913, for a divorce a mensa and for the custody of their infant daughter, based on the alleged desertion of plaintiff by defendant, the decree appealed from, pronounced February 23, 1916, found that defendant had deserted plaintiff in Monongalia County, on April 22, 1912, and it was thereby adjudged and decreed that the plaintiff be granted a divorce from bed and board from defendant, and that they be perpetually separated and protected in their persons and property and that the custody, care, control, education, and training of their infant daughter, Nellie Elizabeth Buseman, be and remain with and that she be thereby committed to George Schaefer and Belle Schaefer, his wife, so long as the court should have the right to direct such custody, care, control, education, and training in all respects in accordance with the terms, conditions and provisions of the decree entered in the cause on March 28, 1914. There is no complaint of the decree of divorce and separation; the appeal is limited to that part of the decree which deprives plaintiff of the custody of his infant child and commits her to the custody and care of the Schaefers, in no way related by blood, but utter strangers to the parents of the child.

The pleadings and proof show wilful desertion of plaintiff by defendant, and we think the decree of separation prayed for must be interpreted as a finding of the essential facts of such wilful desertion or abandonment, without justifiable cause. At the time of her desertion defendant left the state and went to Cleveland, Ohio, taking her child with her, where she placed it in Jones Home for Friendless Children, located in that city, and she obtained employment as a manicurist in a barber shop there; and out of her earnings she says she contributed to that institution one dollar per week for the care and expenses of keeping the child. She remained in Cleveland with the child thus situated until July 11, 1913, when she and plaintiff entered into a written agreement whereby a divorce suit which she had brought in Cuyahoga County, Ohio, was to be dismissed by the court, and whereby it was also agreed that the daughter was to be taken from the children's home and placed by them in the care and custody of said Schaefers in Morgantown, West Virginia, who the agreement recites had agreed to maintain her and bring her up carefully in their own family; but the contract further provided that such custody and control of the child should continue only until the parties thereto should mutually agree otherwise or a different provision should be made by some court of competent jurisdiction on the application of either party, in which case it was stipulated that said agreement should

not be held as prejudicing the right of either party to have the custody of said infant; and another provision thereof was that plaintiff would pay said Schaefer for the board and care of the child not exceeding three dollars per week, and in addition furnish her such medical attendance and care as might be necessary, and each party was to have the right and privilege of visiting the child at all reasonable times, satisfactory to said Schaefer.

Pursuant to this agreement, both parties accompanying her, the child was brought to Morgantown and placed by them in the custody of Mr. and Mrs. Schaefer, where she remained but a few days before the institution of this suit by plaintiff on July 18, 1913, and at which time upon the presentation of his bill an injunction was awarded him restraining and inhibiting the defendant, until the further order of the court from interfering with him in the care, custody, control and education of said child, which was by said order also awarded him until the further order of the court.

Subsequently, on October 25, 1913, upon bill and exhibits and the separate answer of the defendant Mrs. Buseman and upon her motion, and with the consent of plaintiff, another interlocutory order was made in the cause whereby and so long as the court should have the right to control the same the custody, care, education and training of said infant was delegated to A. Ed. Lough and Jane B. Lough, his wife, and it was further ordered that said child should not be allowed to be or remain at the separate home of either of the parents, or at the place where either of them should make his or her home while she should remain in the care and custody of said Loughs, the costs of her maintenance and support to be borne and paid by plaintiff as the court might from time to time order, and for a breach of said order he was to be punishable as for a contempt of the court, and there was also a provision in the decree for visiting the child by both parents, and there were other provisions thereof not important in the disposition of the cause.

On March 26, 1914, upon the petition of said Loughs, they were relieved of their trust and so long as the right of the court to control the same continued, the custody, care, control, education and training of said child was thereby again committed to said Schaefer, with similar provisions also to those contained in prior decrees, but with more stringent terms and with greater detail in barring her from the separate homes of her parents, in relation to parental visits, etc., and with provisions also respecting the duty and obligation of plaintiff to bear and pay the expenses of her care and keeping as aforesaid. The defendant consented to this order, but plaintiff being present did not con-

sent thereto. It was this order to which the final decree appealed from referred as more particularly defining in all respects the terms, conditions and provisions respecting the custody, care, control, education and training of said infant.

[1] That the father, if living, and if he be dead, the mother, if not incapacitated or unfit, is the natural guardian of their infant children, and entitled to their custody, care, and control, is well settled law in this state, if not in most of the states of the Union. It was so at common law, and while the rigor of the ancient rule has been somewhat relaxed, and modified by statute, as well as by judicial decisions, depending on the interest of the child or children, the rule nevertheless prevails, and is to be applied unless for good cause shown in each particular case a different provision should be made. Our decisions from the beginning so holding, and controlling the disposition of the case at bar, are: *Rust v. Vanvacter*, 9 W. Va. 600; *State v. Reuff*, 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676; *Green v. Campbell*, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. 308, 38 Am. St. Rep. 57; *Carliens v. Carliens*, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930; *Dawson v. Dawson*, 57 W. Va. 520, 50 S. E. 613, 110 Am. St. Rep. 800.

[2] Our statute, section 11, c. 64 of the Code (sec. 3646), relating to divorce, provides, among other things, that upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem expedient, concerning the estate and maintenance of the parties, or either of them, and the care, custody and maintenance of the minor children, and may determine *with which of the parents* the children, or any of them, may remain; and also may from time to time afterwards, *upon the petition of either of the parties*, revise or alter such decree concerning the care, custody, and maintenance of the children, and make a new decree concerning the same as the circumstances of the parents and the benefit of the children may require; and whether divorce be granted or not, if the parties be living separate and apart from each other, the court is given power thereby to make such order or decree concerning the care, custody and maintenance of the children or either or any of them, and may determine *with which of the parents* the children, or either or any of them may remain, as to the court may seem proper and the benefit of the child or children may require.

[3-5] The discretion thus conferred upon the court by statute must of course be exercised with due regard to the natural and legal rights of the parents, if nothing has intervened justifying the denial of these rights; the court has no arbitrary author-

ity to take from the parents their natural rights found in nature as well as in law and reason respecting the care, custody, and maintenance of their infant children; but our decisions cited hold with reference to and just regard for these natural and legal rights of parents that they may by voluntary contract with relatives or strangers, acted on by the other contracting party, surrender these rights, or by being or becoming financially, physically or morally unfit for the trust put in the power of the court under the statute to take from them these rights, the interest of the child then becoming the pole of action to guide the court's discretion in the premises.

Although plaintiff at the time of the entry of the decree of March 26, 1914, again giving the care and custody of the infant to the Schaefers withheld his consent thereto, and on final decree pronounced February 26, 1916, he entered his objection to so much thereof as adjudged that the care and custody of the infant should remain with said Schaefers in accordance with the said former decrees, those decrees were both in accord with the contract in writing made between plaintiff and defendant on October 24, 1913. In addition to relinquishing their respective rights to the custody and control of their infant daughter and consenting that she might be disposed of as decreed by the court in each of said decrees, it was further agreed that the parties might with the consent of the court withdraw their pleadings and by amendments eliminate certain charges made therein each against the other, and in the order of October 25, 1913, said amendments were made and certain affidavits filed on behalf of both parties were withdrawn in accordance with said contract.

That the court in the exercise of the discretion given by statute, has the power to respect if not to enforce such agreements, although made with strangers, always however with an eye singled to the interests of the infant child, is well settled by our decisions already referred to. In this case the contract, made under the circumstances disclosed, between plaintiff and defendant, with reference not only to the first but also to the final decree to be made, should be in-

terpreted as a confession on the part of both parties of their unfitness in point of financial ability or otherwise to have the care and custody of their child. And the law of our decisions is, that having made disposition of infant children, the court will not afterwards reconsider the question, except upon some new or altered conditions or facts calling therefor.

Some courts however hold that a contract whereby a parent, the natural guardian of his infant children, seeks to escape the burden and responsibility of such children, is void upon grounds of public policy. Spencer on the Law of Domestic Relations, § 431, and cases cited, including *Hibbette v. Bains*, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839. But Mr. Spencer says respecting such agreements they are not in all cases to be entirely ignored, particularly when they have been relied upon and the custody of the child has been transferred thereunder. See also Schouler on Domestic Relations (5th Ed.) § 251. We think the consensus of the more recent and well considered cases is that while such contracts will not be given effect so as to relieve the parent of the obligation imposed upon him by the law of nature and by general law to care for and provide for his infant children, they may and will be given effect if made in the interest of the child, for the interest of the infant is controlling and not the provisions of the contract.

Wherefore, if hereafter the circumstances and conditions should change, and the interest of the child should demand it, we do not think either parent would be bound by the contract, and the court with the power and jurisdiction conferred by statute may be properly invoked in modification of the decree giving custody of the child to the Schaefers. Indeed we find in the record another contract between the parties, dated September 25, 1915, just before the final decree of divorce from bed and board, which seems to have reserved the right, not inconsistent with the former contract, to acquire the control and custody of the child.

We find no error in the decree and it will be

Affirmed.

STATE ex rel. HUNDLEY et al. v. GOODWYN et al.

(Supreme Court of Appeals of West Virginia.
Jan. 28, 1919. Rehearing Denied
March 26, 1919.)

(Syllabus by the Court.)

1. ASSOCIATIONS §17 — MASONIC GRAND MASTER—JURISDICTION.

A Grand Master of Masons within his jurisdiction has not authority to postpone, either temporarily or indefinitely, an annual communication of the Masonic Grand Lodge that elected him, where the constitution of the order designates the time and the last preceding annual communication selected the place therefor.

2. ASSOCIATIONS §17—AUTHORITY OF MASONIC GRAND MASTER—COMMUNICATION.

In the event of an emergency rendering undesirable or inadvisable the holding of an annual communication of a Masonic Grand Lodge, the time and place regularly appointed and therefor, the Grand Master may cause special communication of the Masonic Grand Lodge at such time and place as he may deem, when so convoked, it alone may determine the feasibility and necessity for such communication.

ASSOCIATIONS §117 — ANNUAL GRAND COMMUNICATION—"QUORUM."

Where an association, as an incorporated Masonic Grand Lodge of Colored Masons, with jurisdiction, is composed of an indefinite number of members, and subject to change from suspension, or expulsion, revocation of charters of subordinate lodges and the grant of additional charters, and the constitution of the Grand Lodge, by-laws, edicts, rules, and regulations do not, nor does any rule of law or relative provision, prescribe a constitutional quorum, the members present at the time and place regularly appointed and selected for such annual grand communication, and qualified and competent to transact the business thereof, constitute a "quorum" for that purpose, though less than a numerical majority of such body.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quorum.]

4. MANDAMUS §128 — SURRENDER OF MASONIC OFFICES.

Mandamus lies to compel the retiring Grand Master of Masons, the Grand Secretary, and Grand Treasurer of a Grand Lodge of Masons to surrender their offices and deliver the books, papers, and other documents, funds, and other things in their possession and under their control pertaining to such official positions, to their successors in office, when their right thereto is established by clear and competent proof, and the property is within the jurisdiction of the court awarding the writ.

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"COMMUNICATION."

The word "communication" is the Masonic equivalent for the word "meeting."

Original mandamus by the State, on the relation of H. B. Hundley, Grand Master of the Colored Masons, and others, against A. E. Goodwyn, late Grand Master, etc., and others. Writ awarded.

Blue & McCabe and McWhorter & Carney, all of Charleston, for relators.

Jo N. Kenna, of Charleston, and Wm. Denney, for respondents.

LYNOH, J. The relators seek the aid of the writ of mandamus to compel respondents to deliver to them possession of all the records, record books, minutes, proceedings, moneys and all other property or properties or things of any kind whatsoever belonging to the Grand Lodge of Colored Masons of this state, which have come into and are in the hands of the respondents, who claim to be officers of the lodge and who hold the property by virtue of such claim.

[5] The respondent A. E. Goodwyn was elected Grand Master of the Colored Masons of West Virginia at the regular annual communication—the word "communication" being the Masonic equivalent of the word "meeting"—of the Grand Lodge held at Clarksburg in June, 1917, and the respondents, Trent and Hughes, respectively, Grand Treasurer and Grand Secretary of the Grand Lodge, at which communication Huntington was selected as the place for the next ensuing annual communication of the Grand Lodge, the time therefor being fixed by the constitution thereof, at which time and place the relators claim to have been elected respectively as the successors of each of the respondents, which succession, or the right thereto, the latter deny, basing their denial upon the proclamation of the respondent Goodwyn as the then Grand Master of Masons dispensing with or "calling off" the Huntington communication because of war conditions then prevailing in this country.

The right to the writ depends upon the answers to three questions: (a) Whether Goodwyn as the Grand Master had authority to postpone indefinitely the holding of the communication at the time prescribed by the constitution of the order and at the place designated by the Grand Lodge in 1917; (b) whether the body assembled at Huntington was legal and constitutional as to empower it to dispatch the business ordinarily transacted by such a body when properly constituted; and if so (c) whether the writ will lie to compel respondents to deliver to relators the property in their possession belonging to the grand body.

The Grand Lodge instituted and conducted by the colored Masons of this state is a chartered body, as the relators and respondents both concede, as they also do that the constitution of the organization requires a grand annual communication at a time definitely

prescribed and at a place to be selected each year at the preceding annual communication, and that upon all questions arising upon this proceeding the principles laid down by Albert G. Mackey in his work on Masonic Jurisprudence, so far as applicable, shall govern and control.

[1, 2] Upon the first question presented for consideration, namely, the power of a Grand Master of Masons to postpone an annual communication of the Grand Lodge: Doubtless Goodwyn and those with whom he consulted and upon whose advice he acted reached the conclusion that as he was Grand Master, and as such the supreme head of the organization that elected him, and had the exclusive authority to preside over its deliberations, wherever and whenever convened, he also necessarily was clothed with ample authority to proclaim and thereby lawfully to effect the indefinite postponement of the annual communication required by the organic law of the fraternity, whose duly elected and constituted chief officer he was at that time. In part the authority assumed is consistent with the authority vested in the office of Grand Master of Masons. Such an officer does, it is true, have the exclusive right to preside when present at any meeting, whether regular or special, of the Grand Lodge within his jurisdiction. That is a recognized prerogative of the office. Though a high prerogative, the conclusion predicated upon it is contrary to and violative of the principles of Masonic jurisprudence as laid down by Mackey. For he says:

"The constitution of the Grand Lodge necessarily must designate a time and place for the annual communication which it is not in the power of the Grand Master to change."

The constitution of the Grand Lodge organized by the colored Masons of this state designates the date, but not the place, for each successive annual communication, but impliedly confers, or some rule or regulation grants, or custom—it matters not which—establishes the right of each annual communication to select the place where the next one shall convene. This right of selection, however, does not affect, modify or render nugatory the positive regulation of the right claimed to defer to a later date or "call off" the 1918 communication of the grand body, as Goodwyn attempted to do. The lack of authority to effect such postponement and the reason and the purpose thereof are not the less obvious and certain because the constitution left undetermined the place of each successive annual communication. But what Mackey says in the paragraph from which we have already quoted manifestly was intended to meet the exigencies that furnished the motive for the attempted postponement; for he says:

"But on the occurrence of any emergency which may in his opinion render a special com-

munication necessary, the Grand Master possesses the prerogative of convoking the Grand Lodge, and may select such time and place for the convocation as he deems most convenient or appropriate. This prerogative has been so repeatedly exercised by Grand Masters, from the earliest times to the present day, that it seems to be unnecessary to furnish any specific precedents out of the multitude that the most cursory reading of the old records would supply."

Whether by this declaration of the law applicable to this phase of the controversy the author intended to say that the special communication was to supersede the annual communication and to dispatch such business as might be transacted at the latter, if convened according to the constitutional provision, is a question that does not arise and with which we are not concerned for the present, for no such special communication was convened.

[3, 4] Then what of the second proposition, namely, whether the body that assembled at Huntington at the time fixed by the constitution and the place selected therefor at the Clarksburg meeting was legally and properly constituted and authorized to transact the business proper to be transacted, had not Goodwyn attempted to postpone the regular annual communication? The constitution, it is agreed, does not prescribe what shall constitute a constitutional majority of such lodge when assembled in annual or special grand session for the dispatch of business or for any other purpose, and, so far as we are informed by counsel or can discover, there is no rule of law or statutory provision which prescribes or fixes a quorum for associations of this character, except the general provision governing corporations organized for the purpose of profit, and none whatever fixing such a quorum for fraternal organizations.

Notwithstanding Goodwyn's proclamation, the representatives of 10 of the 37 subordinate lodges acknowledging allegiance to the Grand Master of Colored Masons, several Past Masters, a Past Grand Master, Grand Senior Deacon, Grand Pursuivant, one of the three Grand Trustees, and a District Deputy Grand Master met at Huntington on June 11, 1918, and organized and held a grand communication for the dispatch of business, and thereafter continued in session for the usual length of time, and, among other things, elected the relator H. B. Hundley Grand Master of Masons within his jurisdiction, the relator S. B. Moon Grand Secretary, and the relator I. M. Carper Grand Treasurer, of the same Grand Lodge. Did the persons so convened constitute such quorum as empowered them, or the body of which they were members, to do such acts as we must recognize as lawful and binding? A regular corporation, it must be conceded, is not bound by the action of a minority of its directors or stockholders, though in each in-

stance what they did was done at the time and place fixed for such meetings for the transaction of the corporate business, but this is because of the protective provision of the statute. What would be the result in the absence of such a statute is a question with which we are not now concerned and need not answer, except to remark that the statute may have originated from the abuse of the power claimed and exercised on behalf of minorities, and it is now generally recognized that neither a minority of a board of directors nor of stockholders of a business corporation, though duly and legally convened at the proper time and place, can lawfully transact any business for the corporation. The same principle applies to any organization having a definite number of constituents or members not subject to constant change in numerical strength, for when changes of this character do occur, the record of a corporation usually discloses the succession. Masonic bodies, however, are constantly changing; the membership seldom remains the same. Some die every year; others are suspended or expelled or demitted; new members join; and Masons from other jurisdictions may increase the number by affiliation; new lodges are organized; while for various reasons charters may be withdrawn from some subordinate lodges and charters granted to others, so that, as we have said, the membership of the body is constantly fluctuating, sometimes is large, at other times small. To avoid the difficulty which may arise, it is usual to fix a quorum sufficient to constitute a Grand Lodge of Masons much smaller indeed than would be required in most other organizations. As an illustration, the only other Grand Lodge of Masons in this state has fixed as a constitutional majority the representatives of five subordinate lodges, though it has jurisdiction over more than two hundred of them.

As apropos this question and as important in this connection Chancellor Kent says:

"There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation." 2 Kent Com. (14th Ed.) *293.

And even if a bare majority of a board of directors or the stockholders be present at a regular meeting, the corporation may, nevertheless, be bound by the acts of a minority, for then apparently the vote of a minority can determine the policy of the corporation. Thus five constitute a quorum of nine directors, and where there are only

five present, three may control. The same general principles are stated by Morawetz on Private Corporations (2d Ed.) vol. 1, § 476. "In the absence of an express provision to the contrary, the rule is," the author says, "that such of the shareholders as actually assemble at a properly convened meeting constitute a quorum for the transaction of business, and a majority of that quorum have authority to represent the corporation." For this proposition he cites *Field v. Field*, 9 Wend. (N. Y.) 395; *Everett v. Smith*, 22 Minn. 53; *Madison Avenue Baptist Church v. Baptist Church*, etc., 28 N. Y. Super. Ct. 649; *Craig v. First Presbyterian Church*, 88 Pa. 42, 32 Am. Rep. 417; *Brown v. Pacific Mail Steamship Co.*, 5 Blatch. 525, Fed. Cas. No. 2025.

The question involved upon this point may not improperly be illustrated by the case of *Rex v. Varloe*, Cowper, 248, where the policy of a borough was to be determined by the vote of its freemen, a corporation which necessarily consisted of an indefinite number, and that number subject to change from time to time; and the conclusion reached was that the major part of the freemen present, whether large or small, were entitled to act. The same principle was applied in the *Madison Avenue Church Case*, cited above, for the same reason, as it was also in the case of *Craig v. Church*, also cited. The decision in each case was based upon the regularity of the assemblage and of the time and place fixed therefor and the indefiniteness and uncertainty of the number of those entitled to participate. The same principle was discussed in *King v. Miller*, 6 T. R. 268, 101 Eng. Reprint, 547; *King v. Bellringer*, 4 T. R. 810, 100 Eng. Reprint, 1315; 1 Cook on Stock & Stockholders (3d Ed.) § 607; 2 Kent's Com. *293. And while these cases deal with elections by the voters of municipal corporations or by the directors or stockholders of business corporations, they announce the principle which we think governs the question we are discussing, that wherever the constituent number is indefinite and variable, the acts of those who assemble, although a minority, at the regular time and place provided for the assemblage and act for and on behalf of the associated body, are regular and entitled to judicial approval. Therefore it must follow that the meeting of the Grand Lodge at Huntington was regular and lawful and not subject to the criticism urged against it by respondents.

The third and last proposition, whether the writ lies or not, seems to be quite clear. Goodwyn's term of office ended, it is said, by the provisions of the constitution, by-laws, rules, or regulations of the order with the expiration of the year for which he was elected, and by rotation Hundley was his regular and legitimate successor. But the cessation of his authority as Grand Master of Masons does not depend solely upon custom or legis-

lation. He ceased to be such an officer upon the election of Hundley by a legally constituted Grand Lodge, and thereafter possessed none of the powers or the prerogatives pertaining to the former position, and hence in duty was bound to recognize the authority of his successor. And so of Trent and Carper. And there appears to be no substantial reason or excuse for his refusing obedience to the principal command of the alternative writ. Mandamus lies to compel the admission to office of a party having a clear prima facie right thereto, and as a necessary incident to compel the delivery of the appurtenances of the office. *Kline v. McKelvey*, 57 W. Va. 29, 49 S. E. 896. That such relief will be given to compel the surrender of the office to a claimant where the right seems clear appears to be the settled policy of this state, and as part of such relief the restoration and delivery to the rightful claimant of the property pertaining thereto. *State ex rel. v. James*, 73 W. Va. 753, 81 S. E. 550. See, also, *Coldwater Mining Co. v. Gillis*, 170 Mich. 123, 135 N. W. 901, Ann. Cas. 1915A, 410.

Writ awarded.

(83 W. Va. 355)

SIMPSON v. GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al. (two cases). (Nos. 3598, 3648.)

SMITH v. SAME (two cases). (Nos. 3597, 3647.)

(Supreme Court of Appeals of West Virginia. Feb. 11, 1919. Rehearing Denied March 28, 1919.)

(Syllabus by the Court.)

1. ASSOCIATIONS §20(2)—SUITS AGAINST ASSOCIATION BY NAME—JURISDICTION—SUIT AGAINST MEMBERS.

In the absence of a statute authorizing such procedure, an unincorporated society or association cannot be sued as an entity by its name, nor can a judgment be rendered against it merely by name. To confer jurisdiction, the persons composing it, or some of them, must be named as parties and process served upon them individually.

2. COURTS §37(1)—SUBMISSION TO JURISDICTION—AMENDMENT OF PLEADING AND PROCESS—JUDGMENT.

If such a society or association, being sued as a corporation, files a plea denying its corporate existence, and such plea is ascertained to be well founded, its failure to object to an amendment of the process and pleadings, so as to treat it as a fraternal benefit society, under a statute permitting actions against certain classes of such societies by name, does not amount to a submission to the jurisdiction of the court, to such an extent or in such manner

as will sustain a judgment against it, unless the proof shows it to be such a society as may be so sued by virtue of the statute.

3. CORPORATIONS §34(8), 505, 519(1)—ASSUMED NAME—SUIT—PROOF OF INCORPORATION.

Though a corporation contracting under an assumed name may be sued by such name, and is estopped to deny its existence for the purposes of the litigation, proof of incorporation of the individuals so contracting is essential to the maintenance of the action.

4. CORPORATIONS §34(8)—DENIAL OF CORPORATE EXISTENCE—ESTOPPEL.

The doctrine of estoppel is not available to persons dealing or contracting with an unincorporated association, with knowledge of its character, in an effort to prevent it from denying corporate existence on its part.

5. INSURANCE §687—"FRATERNAL BENEFIT SOCIETY"—STATUTE.

An unincorporated association paying no death benefits nor any disability benefits in excess of \$500 in one year to any one person is not a fraternal benefit society, within the meaning of chapter 55A of Barnes' Code (Code 1913, c. 55A [secs. 3226-3263]).

6. INSURANCE §687—SUIT AGAINST ASSOCIATION AS CORPORATION—JURISDICTION—STATUTE.

Nor is such an association identical with an incorporated life and accident insurance association, or an incorporated building association, or an unincorporated pension association, composed of members of the general association to which they are related, in such sense as to make it amenable to judicial process as a corporation, or to bring it within the statute authorizing judicial procedure against fraternal benefit societies, by name.

7. ASSOCIATIONS §16—JUDGMENT §237(2)—ACTION EX DELICTO—JURISDICTION—JUDGMENT AGAINST MEMBERS.

An action ex delicto against such an association and individual members of one of its subordinate lodges or divisions, predicated upon alleged wrongful and illegal expulsion from such subordinate organization, may be prosecuted to judgment, against the individual defendants, on failure of jurisdiction of the association itself, the parties being liable jointly and severally, if liable at all.

8. ASSOCIATIONS §10—WRONGFUL EXPULSION OF MEMBER—LIABILITY—GROUNDS.

An inquiry as to the liability of an unincorporated association and members thereof, for alleged wrongful and illegal expulsion, participated in by a subordinate body acting under the orders of a superior officer constituting the official head of the association, involves consideration of the rights, duties, powers, and obligations of the members, the subordinate bodies and superior officers and tribunals, as determined by the constituting articles of agreement, by-laws, rules and regulations, often designated as the constitution, statutes, and rules, and the usages and precedents of such organizations.

9. ASSOCIATIONS ¶5—CONSTITUTION AND RULES—CONSTRUCTION—CONCLUSIVENESS.

Like other written instruments, such laws, rules and regulations are proper subjects of interpretation, and the reasonable construction given them by the officers and tribunals expressly or impliedly charged with the duty of interpretation, or of which they are reasonably and fairly susceptible, is binding upon the members and subordinate organizations of the order, and also upon the courts in the administration of justice in causes involving the rights of members, if it does not contravene public policy or any public law.

10. ASSOCIATIONS ¶10—EXPULSION OF MEMBER—ACTION OF SUPERIOR OFFICER—CONCLUSIVENESS.

Right of an officer of an unincorporated association, designated in its constitution, as its official head, and authorized by that instrument to exercise full control over the order in general, and to sign all charters and decide all controversies appealed to him, subject to a power of review by a triennial convention of the order, whose enactments and decisions upon all questions are declared to be the supreme law of the association, and to whom such officer reports his transactions, to exercise appellate power in a case in which a member tried on a charge of infraction of a rule, justifying his expulsion, if guilty, has been acquitted, in the absence of an appeal and of his own volition, falls within a reasonable and fair construction of the laws and rules conferring his authority, wherefore a court cannot consistently deny its existence, in the trial of an action for damages for illegal expulsion, in the absence of a denial thereof by the association's tribunal of last resort.

11. ASSOCIATIONS ¶10—APPELLATE POWER OF SUPERIOR OFFICER—SUSPENSION OF MEMBER.

Nor can it be judicially determined by a civil court that such an officer having additional power and authority to suspend the charter of the subordinate organization in which such trial has occurred may not exercise his appellate power in such manner and his power of suspension conjointly and simultaneously, so as to compel expulsion or loss of the charter, the evidence adduced on the trial affording bases for two honest and reasonable opinions as to whether it preponderates decidedly against the innocence of the accused member.

12. ASSOCIATIONS ¶10—SECOND TRIAL OF MEMBER—PRESUMPTION—CONSTITUTION OF ASSOCIATION.

The legal presumption, if any, against right in the tribunals of an unincorporated association, to subject a member thereof to a second trial for the same offense, is overthrown and excluded by the terms of the constitution of such an association, making the enactments and decisions of its highest tribunal its supreme law.

13. ASSOCIATIONS ¶10—EXPULSION OF MEMBER—DAMAGES—MALICE.

An inference of malice on the part of members of a subordinate association, in voting for an expulsion of a member, after having voted for his acquittal of the charges preferred against him, sufficient to sustain a verdict predicated on

such theory, is not deducible from their mere change of attitude, especially when a superior officer claiming authority to do so, not negated by any express provision of the laws and regulations of the order, nor by any decision of the association's tribunal of last resort, has intervened and annulled the first decision on the ground that the acquittal was plainly contrary to the weight of the evidence.

14. ASSOCIATIONS ¶10—EXPULSION OF MEMBER—ACTION OF SUPERIOR OFFICER—MALICE.

Nor does the presence, on the occasion of the expulsion, of a member between whom and the accused there has been previous animosity or ill feeling, and who advised and encouraged a superior officer to demand rescission of what was deemed an unjustifiable acquittal, and, on the occasion of the expulsion, gave his reason for doing so, but was excused from voting, on his own motion, raise an inference of malice sufficiently strong to sustain a finding thereof.

Error to Circuit Court, Mercer County.

Suits by J. W. Simpson and by G. A. Smith against the Grand International Brotherhood of Locomotive Engineers and others. Verdict for plaintiffs against the Grand International Brotherhood of Locomotive Engineers, and in favor of the other defendants, and recovery in the Smith case reduced on motion for new trial and in the Simpson case motion for new trial overruled, and defendant Brotherhood in each case brings error. Judgment against defendant the Grand International Brotherhood of Locomotive Engineers reversed, and verdict against it set aside, and judgment in favor of the individual defendants affirmed, and as to defendant Brotherhood causes remanded, with leave to plaintiffs to acquire jurisdiction of its members.

Sanders, Crockett & Kee, of Bluefield, and William H. Werth, of Tazewell, Va., for plaintiffs.

J. M. McGrath, of Princeton, and French & Easley, of Bluefield, for defendants.

POFFENBARGER, J. In each of these two cases involving the same general principles and procedure, and giving rise to similar questions, two writs of error were obtained. In each a number of individuals were joined with the unincorporated association known as the Grand International Brotherhood of Locomotive Engineers as defendants. Under instructions from the court, the jury in each returned a verdict for all the individual defendants, and a verdict against the association, assessing the damages in the Smith case at \$15,931, and in the Simpson case at \$11,000. In each the jury in response to interrogatories propounded by the court itemized its assessment of the damages, allowing Smith \$1,531 as compensation for the loss of his insurance, \$2,400 for other compensatory damages, and

\$12,000 as punitive damages; and Simpson \$4,500 as compensation for the loss of insurance, and \$6,500 as additional compensatory damages. On a motion for a new trial, the court eliminated the punitive damages in the Smith case, and rendered judgment for the residue of the verdict, amounting to \$3,931. In the other, the motion for a new trial was overruled and judgment rendered for the entire amount of the verdict. Writs of error were awarded to both plaintiffs on their complaints of the action of the court in directing a verdict for the individual defendants, as well as other assignments of error set forth in their petitions; and on numerous assignments of error like writs were awarded to the Brotherhood.

Both actions seek damages for wrongful expulsion of the plaintiffs from the N. H. Smith Division No. 448 of the Brotherhood, on account of alleged violations of rules and regulations of the association, under coercion by Warren S. Stone, Grand Chief Engineer of the Brotherhood, the division having previously exonerated them on two occasions, once by a mere resolution and again by a formal vote in accordance with the association laws and regulations. Stone, being a nonresident and not served with process, was eliminated from the case by a dismissal. The other 33 individual defendants in each case, residents of the state, were made parties under the impression that they were liable in damages to the plaintiffs, by reason of their having voted for their expulsion from the division. As to 14 of them, Smith's action was dismissed on his own motion, leaving 19. The other action was prosecuted to final judgment as to all of the individual defendants. On the assumption of their identity with the Brotherhood, the Locomotive Engineers' Mutual Life & Accident Insurance Association and the Locomotive Engineers' Building Association, both foreign corporations, were also joined as defendants, but the actions were dismissed as to the former on its demurrers to the declarations, and as to the latter on its special pleas denying the jurisdiction of the court as to it.

[1-4] A preliminary inquiry of vital importance in some aspects of the case is whether the Grand International Brotherhood of Locomotive Engineers has been brought within the jurisdiction of the court by sufficient process and pleadings. Upon the assumption that it was a corporation qualified under the laws of the state to do business here, the summons in each case, as to it, was served upon the auditor of the state, and it was impleaded as a corporation. It filed special pleas at rules denying that it was a corporation, to which the plaintiffs replied generally, and the issues thus raised were determined in favor of the defendant, and the actions accordingly dismissed as to it. But in the same order in which the dismissal

was formally adjudged, the plaintiffs were permitted to amend both the summons and the declaration in each case, by striking out the words "a corporation," and inserting in lieu thereof the words "a fraternal beneficiary association." Assignments of error claim the benefit of the technical dismissals entered upon the record; but, going beyond that, objections to the amendments are based upon other grounds. Deeming itself to be out of court, by reason of the dismissals, at the time of the making of the amendments, the association entered no objection, but the individual defendants objected and excepted to the action of the court in permitting the amendments. The course pursued by the plaintiffs was adopted upon two theories: (1) Identity of the Grand International Brotherhood of Locomotive Engineers with the Locomotive Engineers' Mutual Life & Accident Insurance Association and the Locomotive Engineers' Building Association; and (2) liability of the association to be sued by its association name under the provisions of chapter 55A of Barnes' Code 1918.

Of course a corporation, like an individual, may do business under an assumed or false name and be sued by such name (*Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. 299); but in order to apply this doctrine incorporation by some name must be established. One who contracts with and receives money from certain persons acting as a corporation under a valid charter granted under a general law, but acts within both the charter and the general law, cannot avoid the obligation of the contract by denial of the corporate existence of the persons so contracted with. *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 764, 12 S. E. 771. But this involves action in a corporate capacity or name. In the absence of evidence to the contrary, there is a presumption that persons representing themselves to be incorporated and contracting in a corporate name are what they represent themselves to be, and the situation of the parties and circumstances are often such as to estop them from denial of the fact. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903. Lack of proof of the element of representation of corporate existence renders this principle unavailable to the plaintiffs. And, in the absence of proof to the contrary, very slight evidence of incorporation will sustain a finding that a party to a contract is a corporation, though not so described in the contract. *Brotherhood of Locomotive Firemen v. Cramer*, 60 Ill. App. 212; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625, 14 N. E. 42. Under some of these decisions, the adoption of a name by which the organization shall be known and the use of a seal, as disclosed by correspondence

found in the record, might be sufficient evidence to establish the corporate existence of the association, contrary to the finding in the trial court, in the absence of proof to the contrary, but direct and positive evidence that it is a voluntary and unincorporated association clearly overthrows a mere inference arising from these circumstances. There is no proof that the contracts of membership made between the plaintiffs and the association were understood or deemed by them to have been made in a corporate name. On the contrary, both admit in their testimony that the association is not incorporated. Not having been misled nor deceived as to the capacity in which the association made its contracts with them, they are not in a position to invoke the doctrine of estoppel.

[5, 6] The amendments were permitted and the association held to answer, under the impression that the Brotherhood is a fraternal benefit society, within the meaning of the provisions of chapter 55A of the Code, represented by the state auditor, for purposes of service of process, and liable to be sued in its association name. It filed special pleas denying that it is such a society as is contemplated by that chapter, and averring itself to be within an exception provided by section 29 thereof. That section declares nothing contained in the act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows, Knights of Pythias, the Junior Order of United American Mechanics, nor to similar societies that do not issue insurance certificates. This exemption applies to societies paying death benefits, if such benefits do not amount to more than \$300 to any one person, and to those paying disability benefits not exceeding \$500 to one person in one year. The Brotherhood proper pays no death benefits, nor anything in the nature of a disability benefit, except an allowance out of what is known as the indigent fund, which, under no circumstances, can exceed \$30 per month to one person. Within the order, there is a pension association, but its benefits go only to those who contribute to its maintenance. It is self-sustaining, and cannot in any event create a liability upon the Brotherhood. The Pension Association might come within the statute, but the Brotherhood is a separate and distinct, though an allied or connected, organization. Section 1 of the chapter defining the fraternal benefit society includes provision for the payment of benefits, in accordance with the provisions of section 5. Other elements of the society required by section 1 are defined by sections 2 and 3, and the whole chapter, as originally passed, contemplated organizations providing benefits in the nature of indemnities for their members. Some additions subsequently made confer certain privileges on fraternal organizations which they did not formerly

enjoy, but nothing in the later acts altered the purpose or effect of the original statute. The Brotherhood is not within the statutory definition of a fraternal benefit society, because it pays no benefits, ordinarily, and never in such an amount as to deprive it of the exemption allowed by section 29 of chapter 55A of the Code.

The Grand International Brotherhood of Locomotive Engineers and the Locomotive Engineers' Mutual Life & Accident Association, the two corporations to which reference has been made, are not identical. The Grand International Brotherhood covers vastly more ground than the insurance association. Its purpose is the promotion of the general interests of railway locomotive engineers. The insurance association merely provides life and accident indemnities for such members of the Brotherhood as become certificate or policy holders therein, and the building association is a corporation owning and managing a Brotherhood building in the city of Cleveland, Ohio. Though all members of the Brotherhood having the necessary physical qualifications are expected or required to become members of the insurance association, and membership in the Brotherhood is a condition both precedent and subsequent to right of membership in the insurance association, all members of the Brotherhood are not members of that association. The estimated number of those who are not members of the latter, because they are physically disqualified from such membership, is estimated at about 4,000. The insurance association limits the scope of its insurance business, as any other insurance corporation might, to members of the Brotherhood in good standing, and makes its collections of assessments for payment of indemnities through the officers of the local division of the Brotherhood. Nevertheless, the insurance association is a distinct entity from the Brotherhood. It is a corporation capable of contracting, suing, and being sued and owning and holding property as fully and completely as an individual may own and hold it, and the association known as the Brotherhood has no such capacity and is not in any legal sense the owner of the assets of the insurance association, nor liable on its contracts of insurance. That an unincorporated society and an incorporated insurance association, composed of members of the former, and affiliated with it, are not identical has been expressly decided in *Hajek v. Bohemian-Slavonian Benevolent Society*, 66 Mo. App. 568. Relationship of the institutions is not determinative of the question of identity. Almost anything conceivable bears some sort of relation to everything else. The common features of animals do not make them identical. Nor does the close relation of parent and offspring in the same species. Obviously, these organiza-

tions are not actually nor legally identical. Nor does the relation subsisting between them make the Brotherhood a fraternal benefit society within the meaning of the statute. The legislative intent in this respect is rendered clear by the express provision exempting the Junior Order of United American Mechanics, except the insurance branch of the order.

Whether or not the filing of the special pleas denying incorporation, or failure to object to the amendments until a term subsequent to the one at which they were made, might constitute a legal submission to the jurisdiction of the court, under circumstances different from those obtaining here, is an academic inquiry to which no time or labor need be devoted. An essential element of submission to jurisdiction is the existence of some persons capable of performing the act. The law courts take no cognizance of unincorporated associations, organizations, or societies, in the absence of a statute authorizing them to do so. A partnership cannot be sued by the firm name. The law courts do not recognize it as an entity, wherefore it is necessary, in order to obtain jurisdiction of it, to make the individuals composing the firm parties and serve process upon them. *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583; *Brown v. Gorsuch & Sons*, 50 W. Va. 514, 40 S. E. 376. If an association is not incorporated, and there is no statute authorizing procedure against it by its name, the action must be brought against the individuals composing it. 29 Cyc. 218; *Bacon, Life & Accident Ins.* § 612. It can neither waive errors nor enter an appearance as an entity. If the theory of a technical submission can be sustained, it would avail nothing, for there can be no judgment against a voluntary unincorporated society by name. The judgment must in all cases be against the individuals composing it, or some of them, unless a statute provides otherwise. *O'Connell v. Lamb*, 63 Ill. App. 652; *Hajek v. Bohemian-Slavonian Benevolent Society*, 68 Mo. App. 568; *Lumber Co. v. Oliver*, 65 Mo. App. 435; *Moore v. Stemmons*, 119 Mo. App. 162, 95 S. W. 313; *Crawley v. American Society of Equity*, 153 Wis. 13, 139 N. W. 734; *Bacon's Life & Accident Ins.* § 612.

Lack of jurisdiction of the Grand International Brotherhood of Locomotive Engineers makes reversal of the judgment against it inevitable, and also renders it unnecessary, as well as improper, to pass upon any of the numerous rulings made in the course of the trials, in so far as they might, if it were a party to the cases, affect its interests. Without having brought the association within its jurisdiction, the trial court could not properly decide anything against it, nor can this court do so. But, since the court acquired jurisdiction of the individual defendants, it is necessary to determine wheth-

er it properly directed verdicts in their favor.

With a single exception, they are all members of the N. H. Smith Division No. 448. One of them is a member of another division. Through their respective divisions, they are no doubt members of the grand international organization. Membership in the general organization seems to be attainable only by means of membership in the local divisions. If, by virtue of its jurisdiction over them, the court had jurisdiction pro tanto of the Brotherhood, the measure of relief to which the plaintiffs are entitled, if any, is a judgment against them in their individual capacities. *Crawley v. American Society of Equity*, 153 Wis. 13, 139 N. W. 734. This is true not only because the individual defendants, if jointly liable with others and not otherwise, did not plead the nonjoinder of other necessary parties, but also because the actions are for damages for wrongs, not breaches of contract, and the plaintiffs have their election to sue all of the wrongdoers or only one or more of them. *Cunningham v. Sayre*, 21 W. Va. 440; *Riverside Cotton Mills v. Lanier*, 102 Va. 148, 45 S. E. 875.

[7-8] Although the plaintiffs claim to have been injured by wrongful and illegal acts of the defendants, the injuries of which they complain were deprivation of contractual rights. Both their right of membership in the division and in the Brotherhood and the powers, privileges, and rights of the defendants within the same organizations are measured and defined by the organic or fundamental laws thereof, called the constitution and statutes, and its rules and regulations: For convenience, these documents constituting the agreement are called the laws of the organization, and breaches and violations thereof are termed offenses. Likewise, the tribunals of the organization, charged with the duty of determining whether or not the contract has been violated, are regarded as judicial or quasi judicial bodies. This contract governs not only the rights of individual members and local divisions, but the higher tribunals and their officers as well. The inquiry as to liability, therefore, involves consideration of the relations of all the parties to the action, plaintiffs and defendants, the division to which they belonged, the Grand Chief Engineer, and what is known as the Grand International Division.

Both declarations are framed upon the theory of lack of right, power and authority in the Grand Chief Engineer to make certain rulings in obedience to which the division expelled the plaintiffs; lack of right in the division to adopt the procedure ordered by the Grand Chief Engineer, resulting in their expulsion; malicious and wrongful action on the part of individual members of the division, in voting for expulsion on the trial which resulted in such action; and

wrongful, malicious, and concerted action on the part of such members and the Grand Chief Engineer, amounting in legal effect to a conspiracy for the accomplishment of illegal and injurious expulsion of the plaintiffs.

The alleged misconduct of the plaintiffs for which they were expelled related to an alteration or disturbance of working conditions or service on a certain portion of the line of the Norfolk & Western Railway, within the jurisdiction of the general adjustment committee, to which the members of the N. H. Smith Division No. 448 were subject. At that point, the equipment of the railroad company was pooled so as to afford the engineers and firemen an equitable and just apportionment of employment. The motive power consisted of steam locomotives and electric motors. Under the pooling arrangement, all of the engineers handled indiscriminately both classes of motors, taking their turns regularly in the service. This arrangement was changed by the road foreman of engines and the electric motors given permanently to certain men, two of them to Smith and Simpson. This action resulted in serious disturbance of some of the other employees. It necessitated a general rearrangement, occasioning loss of employment or wages to some of them. Twelve members of the N. H. Smith Division No. 448 preferred written charges against the plaintiffs, accusing them of having procured this alteration, "the cutting of the Elk Horn pool," in violation of sections 20 and 35 of the standing rules of the organization and article 11(a) of what is known as the Chicago Joint Working Agreement. These charges were referred to an investigating committee composed of three members, who sustained them and gave the accused members notice to appear at a division meeting to be held May 21, 1916, for trial. At that meeting, Smith and Simpson appeared and denied the truth of the charges. The chairman of the investigating committee stated that J. S. Mastin, the road foreman of engines, by whom the alteration of crews was made, had told him the Elk Horn crews would not have been cut off had not Smith and Simpson come to his office. Thereupon the accused presented a statement in writing from Mastin, saying they were not responsible for the action complained of, and that the trouble was in his office and would have been corrected, when he came in, if no one had said anything about it. On this statement, the division passed a resolution exonerating both of the men. A brief but comprehensive and dispassionate report of the action of the division was immediately made by the secretary, to S. H. Huff, chairman of the general adjustment committee of the Brotherhood of Locomotive Engineers, on the Norfolk & Western Railway, who transmitted it to

the Grand Chief Engineer. This official, on June 9, 1916, wrote a letter to the secretary of the division requesting a copy of the charges, the evidence, and the notice to appear for trial. Huff no doubt was responsible in some degree for the preferment of the charges and this action on the part of the Grand Chief Engineer. He had been called to Bluefield, by a telegram, in connection with the Elk Horn trouble, before the charges were preferred, and he later had interviews with Stone, the Grand Chief Engineer, at New York and Washington, concerning the Smith and Simpson cases, before they were finally disposed of. After having received these papers, Stone disapproved the method of procedure adopted by the division, as well as the result. In such cases, the statutes of the organization require the decision to be made by ballot. He therefore ordered the cases to be reopened and disposed of in accordance with the laws of the organization. In obedience to this direction, the accused parties were notified to appear again for trial on the same charges on July 16, 1916. On the occasion of this second trial, Mastin was present, and the record of the proceedings represents him as having admitted that Simpson and Smith caused the cutting of the crews. Marra, chairman of the investigation committee, is represented as having made a contradictory statement assented to by Mastin. The record further states that Mastin, in response to a question by Simpson, denied that the accused had requested the cutting of the crews, and said that they had come to his office at the request of the assistant road foreman, E. M. Bill. The evidence having been thus adduced, ballots were taken which resulted in acquittals, 8 black balls, and 15 white ones having been cast in Simpson's case, and 12 black ones and 20 white ones in Smith's. In his report of this trial, to the Grand Chief Engineer, dated July 21, 1916, Wade Miller, Chief Engineer of Division No. 448, did not stop with the statement of the result, but commented rather extensively upon the procedure and the merits of the controversy. He said Mastin had not denied having admitted to the committees that Smith and Simpson had caused the cutting of the crews, but had endeavored, in his oral statement to the division to cover it up and leave the impression that the disturbance of the crews was due to a mistake in his office, made by Bill, the assistant road foreman. He also said Ballengee, a member of the division, had overpersuaded and misled the members in their voting, by a speech he had delivered on the occasion. He concluded by saying the officers of the division had done all in their power to make the laws of the organization effective in the cases, but had found it impossible to do so. In his reply, dated July 24, 1916, the Grand Chief Engineer expressed

confidence in the integrity of the officers of Division No. 448, and then proceeded as follows:

"It is also very evident that Bro. Mastin (regardless of the fact that he is an officer of the company) not only uses his official position to play favorites, but with a few of his followers dominates the division, and defeats the carrying out of the plain language of the law. In our opinion, the time has arrived when, if over 200 loyal members will stand by and allow this condition to exist, Division 448 should cease to exist. We will place the entire matter before the advisory board of Grand Officers at our first opportunity, and if they concur in our opinion the charter of 448 will be suspended, pending action of the next convention."

On August 6, 1916, a resolution to rescind the action of July 16th was offered and consideration thereof was postponed until the next meeting, held August 13, 1916, and at that meeting it was unanimously adopted. On August 14, 1916, the investigating committee again signed a report sustaining the charges originally made on April 22, 1916, and notified the accused to appear for trial at a meeting to be held August 20, 1916. Appearing on the last-named date, in response to the notice, Simpson and Smith objected to trial, on the ground of their having filed an appeal to the Grand Chief Engineer from the action of the division at the last preceding meeting. This appeal is in the form of a letter dated August 18, 1916, and addressed to the Grand Chief Engineer. It denied the validity of the rescission of the results of the former trials and the right of the division to subject the accused parties to another trial. In view of this situation, the division postponed action and directed the secretary to write the Grand Chief Engineer for advice and instruction in the premises. By a letter dated August 23, 1916, that officer overruled the contention of the accused, and by another dated August 26, 1916, advised the division through its secretary that it had undoubted authority to rescind or set aside the results of the former trials and reopen the cases and proceed with the trial thereof. That trial took place on September 17, 1916, and resulted in the expulsion of Simpson by a vote of 21 to 10, and Smith by a vote of 18 to 12. The evidence, as recorded, was similar to that used on the two former occasions, but more witnesses testified. Mastin is reported as having said the crews might not have been cut so soon if Simpson and Smith had not been down to the office. Huff was present for the first time, and made an extensive statement, but, on his own motion, was excused from voting. On a joint appeal from these actions, the Grand Chief Engineer declined to reopen the cases, but advised the appellants of their right to appeal from his decision to the next convention, or Grand International Division. Of

this last right of appeal they did not endeavor to avail themselves.

Section 35 of the Standing Rules, under which the charges were preferred, reads as follows:

"Any member who by verbal or written communication to railroad officials or others interferes with a grievance that is in the hands of a committee, or at any other time makes any suggestion to any official that may cause discord in any division, shall be expelled as per sections 49 and 54 of statutes, when proven guilty: Provided, however, this law shall not apply to a brother in official position when called upon to express an opinion in his official capacity."

Section 20 of said rules affirms the right of a committee of the Brotherhood of Locomotive Engineers to handle all questions and matters pertaining to engineers, except such of them as are firemen, working as engineers, they being under the jurisdiction of the committee of the Brotherhood of Locomotive Firemen and Enginemen. The Elk Horn pool, the dissolution of which by the action of Mastin, alleged to have been induced by the plaintiffs, resulted in the proceedings complained of, affected both classes of engineers, in consequence of which there was a general reduction in rank and position among the engineers and firemen as well as loss of time. In view of this result, the plaintiffs were charged with having violated the Chicago Joint Working Agreement, entered into by the two organizations, the Locomotive Engineers and Locomotive Firemen. This agreement was operative among the members of the two organizations on the Norfolk & Western Railway, but had not been assented to by the railway company. It is a rather lengthy document, and some of its provisions bear directly upon the relations subsisting between the engineers and firemen in the Elk Horn pool.

Simpson held three certificates or policies of insurance, calling for \$4,500 and Smith one, calling for \$1,500. Under the rules and regulations of the insurance company by which the certificates had been issued, they were expressly made valid for a period of one year after the expulsion of the members to whom issued but no longer. The president of the insurance association, testifying in the case, said the insurance certificates of the plaintiffs would have been maintained by him, on payment of the assessments called for by them, if appeals had been taken to the Grand International Division, notwithstanding the lack of express authority to do so. The import of his testimony is that formerly the convention or Grand International Division met annually, and that the provision for continuance of insurance certificates for one year was designed to keep them in force, after expulsion, pending the prosecution of appeals; and that, by an amendment of the constitution, making the

convention triennial instead of annual, the right of maintenance of insurance pending an appeal had been apparently interfered with by oversight. Hence he says he would have recognized the certificates and endeavored to keep them in force if the expelled members, the plaintiffs here, had taken appeals to the convention. Their only reply to this is lack of duty on their part to take appeals at a period earlier than 30 days before the meeting of the Grand International Division. They tendered assessments for a while, without appealing, but they were not accepted.

[10, 11] Section 8 of the constitution requires the Grand Chief Engineer to devote his entire time to the interest of the Brotherhood, declares him to be the official head of the order and expressly vests in him power to exercise full control over the grand office and the order in general. It also clothes him with authority to entertain appeals, and makes his decisions final and conclusive until the triennial meeting of the Grand International Division. Section 66 of the statutes provides that any division willfully violating any rule or regulation of the Grand International Brotherhood may have its charter suspended by the Grand Chief Engineer, until the next meeting of the Grand International Division. The terms of these provisions are broad enough to include both executive or administrative powers and quasi judicial authority. Since the order is composed of its subordinate bodies, as well as its members, authority vested in the Grand Chief Engineer to exercise full control over the order in general may reasonably be construed as carrying a power of visitation and direction over the divisions, and as effectually excluding the theory of lack of authority in this official to act otherwise than upon an appeal formally taken to him. Of course, his power over the order is not absolute nor unlimited. It is vested in him not for purposes of destruction, dissolution, or perversion, but to enable him to see that the laws and regulations of the order are enforced and its integrity and efficiency preserved. It would not be unreasonable nor inconsistent with the language of section 8 to hold that, on the development of a situation rendering it necessary in his opinion to make an investigation for the purpose of ascertaining whether a division has violated any rule or regulation of the general organization by any act of omission or commission, he may institute an inquiry of his own volition and without initiation or suggestion from any other source, and, after having ascertained the facts, determine whether or not the division has willfully violated any of the rules or regulations, subject to a right of review by the Grand International Division. Such power in the hands of such an organization may be essential to the maintenance of its integrity. Other-

wise a subordinate division might wholly fail to discharge its duties, with impunity, for, by mutual assent, its officers and all of its members might refrain from bringing its wrongful acts to the attention of the superior authority. Irremediable conduct of that kind might soon demoralize the entire association. Section 66 of the statutes might reasonably be deemed to be an interpretation of a portion of section 8 of the constitution, as well as a means of carrying it into effect. The appellate jurisdiction of the Grand Chief Engineer is not questioned here. It is expressly conferred by section 8 of the constitution. One of the contentions seems to be that he had no authority or power to intervene or interpose in the cases pending in division No. 448, because neither the division, on the one hand, nor the accused members, on the other hand, had prosecuted an appeal, so as to bring the controversy within his jurisdiction as conferred by that section of the constitution, and because he seems to have acted in the matter at the instance of Huff. Manifestly, the question thus raised was one for decision, in the first instance by the Grand Chief Engineer, and ultimately and finally in the Grand International Division, to which an appeal might have been taken. If the interpretation of the constitution were, for all purposes, within the jurisdiction of this court, and the position taken by the attorneys for the plaintiffs accepted as sound, it might be adopted as the basis of the decision. But the construction of the organic agreement, by-laws, rules and regulations of a benefit society or other unincorporated voluntary association belongs, not to the court, but to the board, council, or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense, or fairness, nor contravene public policy or the laws of the land, in their conclusions and decisions, the courts cannot interfere with them. *State ex rel. Smith v. County Court*, 78 W. Va. 168, 88 S. E. 662; *Republican Executive Committee v. County Court*, 68 W. Va. 113, 69 S. E. 522; *Boggess v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *Peyre v. Mutual Relief Society*, 90 Cal. 240, 27 Pac. 191; *Screwmen's Benevolent Association v. Benson*, 76 Tex. 552, 13 S. W. 379; *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *State v. Grand Lodge, K. of P.*, 53 N. J. Law, 536, 22 Atl. 63; *Burt v. Grand Lodge, F. & A. M.*, 44 Mich. 208; *Anacosta Tribe No. 12 v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; *Spilman v. Supreme Council*, 157 Mass. 128, 31 N. E. 776; *Connelly v. Masonic Mut. Ben. Ass'n*, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296;

Levy v. U. S. Grand Lodge, 9 Misc. Rep. 633, 80 N. Y. Supp. 885; Weiss v. Musical Mut. Pro. Union, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820; Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156; Ryan v. Cudahy, 157 Ill. 108, 41 N. E. 760, 49 L. R. A. 353, exhaustive note, 48 Am. St. Rep. 305; Wilcox v. Supreme Council, Royal Arcanum, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806, note.

Practically all of the positions taken in argument, for the plaintiffs below, are rendered untenable by this general principle. Whether Huff's position as chairman of the General Adjustment Committee gave him such official interest in the proceedings pending in the division as justified his complaint to the Grand Chief Engineer, against the result of its action, and whether that official was bound to refrain from procedure in the premises, because the information tending in his opinion, to establish the evasion of duty on the part of the division, was communicated by Huff, whose alleged animosity toward Simpson may have been known or suspected, are questions of such character as bring them within the provinces of the officers and tribunals of the association for determination. Huff was subordinate to Stone in rank and authority. The charges made against the plaintiffs related to a matter over which he may have had some authority. Under his diagnosis of the situation, Simpson and Smith had a grievance, deprivation of their right, as senior engineers, to run the electric motors, that should have come up regularly and possibly have passed through the hands of the committee or the local committee whose determinations might directly or indirectly have required action on his part reviewable by Stone. As chairman of the general adjustment committee, he was the highest official of the order on the Norfolk & Western Railway, and, whether directly chargeable with any duty respecting the cutting of the Elk Horn crews or not, the propriety of the dissolution of the Elk Horn pool was manifestly a matter concerning which he might be called upon to act officially, by way of review or otherwise. Whether he acted strictly within his duty or not, nothing in the rules or regulations forbade his giving his superior information which both deemed to be for the good of the organization, nor acceptance thereof by the latter. Whether their conduct in this respect was proper or not, the written laws of the order leave undetermined, and it was not so unreasonable or unjust as to place it beyond the scope of a reasonable interpretation of the rules and regulations.

Stone's exercise of his power of suspension and appellate jurisdiction conjointly and simultaneously, so as to compel the expulsion of the accused members, or loss of the charter, and thus restrain the liberty

of members in respect of their action in the trials is harsh and drastic on its face and decidedly variant from the course of ordinary judicial procedure. But it must be remembered that the association was not formed in absolute accord with the scheme or plan of the state government. The mere reversal of a finding of not guilty by a division would not effect an expulsion of a guilty member. He can be eliminated only by the action of the division itself, and the chief's power over the division is his control of its charter. In what other way could he compel an obdurate division to expel members plainly and indisputably guilty of the most reprehensible conduct? Must the division be permitted, if it so wills, to let all of its rules and regulations become dead letter law, and thus make itself an impediment to the maintenance of an efficient organization, an obstruction to the achievement of the social object, and a disgrace to the association? It cannot be unreasonable to say the two powers vested in the official head of the organization may be conjointly exercised in plain cases. If they can be so used in such cases, the right to determine whether they may be in doubtful cases necessarily follows, and belongs to the association tribunals, not the courts.

[12-14] If the members of a division should expel a member on some ground not recognized by the laws, rules, and regulations, or without notice or trial, or without any evidence against him, under a threat of suspension of the charter, they might be liable, for purely arbitrary and tyrannical action on the part of the official head of the organization would no doubt be inefficacious to protect himself, his association, or those acting under his orders. *People v. New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84; *Society for Visitation of Sick v. Commonwealth*, 52 Pa. St. 125, 91 Am. Dec. 139; *People v. Young Men's, etc., Soc.*, 65 Barb. (N. Y.) 357; *Rex v. Faversham*, 8 T. R. 356. Though the plaintiffs denied the charges preferred against them and may not have been guilty, there was some evidence against them. They had been in Mastin's office just before the crews were cut and held a conversation with him in which reference was made to the electric motors and expressed the opinion that they were, or would be, entitled to them. Moreover, they had previously seen Bill, the assistant, who swears they requested assignment to those motors, and that he communicated their request to Mastin before the crews were cut. Keith, another engineer, swears Simpson invited him to unite with him in a demand for the electric motors, saying they might be able to "bluff" the railroad officials into compliance with their request. In the new assignments they got the electric motors. They may not have been guilty, but the existence of evidence against them cannot be successfully denied.

Whether it was sufficient or not was a question for the division in the first instance, and later for the Grand Chief Engineer if the Grand International Division concurs in his construction of the constitution and statutes. While his opinion that there was a decided preponderance of evidence against the accused may not have been well founded, the evidence afforded bases for two intelligent and reasonable opinions as to the preponderance thereof. Stone swears he has exercised the powers and authority he applied in these two cases on previous occasions without any protest or dissent on the part of the Grand International Division.

Right to expel on the same charges on which the accused has previously been acquitted, under the mandate of a superior officer or tribunal exercising appellate jurisdiction, depends upon the same principle. It is a question of private social law, either determined by the express terms of the constituting instruments, by-laws, rules and regulation, or by fair and reasonable interpretation of provisions thereof, relating to the subject. Neither the constitution, statutes, nor rules of the association forbid the placing of an accused member in jeopardy a second time. If, in the absence of any provision on the subject, there is a presumption of intent to adopt this provision of organic state law, it is clearly overthrown by the practically unlimited powers vested in the Grand International Division to whom the Grand Chief Engineer makes his triennial reports, and whose representative and spokesman he is, when that body is not in session. In the absence of an express provision, guaranteeing immunity from second trial for the same offense, the right of interpretation and construction exists, and that right is vested in the grand Chief Engineer. When his decision is reported to the G. I. D., it is subject to the action of that body, which has "exclusive jurisdiction over all subjects pertaining to the Brotherhood," whose "enactments and decisions upon all questions are the supreme law of the Brotherhood," to which "all divisions and members of the order shall render true obedience." Con. G. I. B. of L. E. § 3. The courts cannot interpose in advance of the decision of a body having such plenary powers, and hold that its representative has no power to do what it clearly has power to ratify or order. The powers thus vested in it expressly exclude any presumption of intent to adopt the limitations and rules of the civil laws, respecting either procedure or substantive rights in the order. They do not override legal limitations imposed upon the powers of such organizations, of course, but nothing in the civil law inhibits a second trial of a member of a voluntary association for the same offense against his will. Ordinarily, the courts deny the existence of any presumption of intent to bind such associations to the modes of procedure prescribed by public law. *Gray v. Christian Society,*

137 Mass. 329, 50 Am. Rep. 310; *Spilman v. Supreme Council of the Home Circle*, 157 Mass. 128, 31 N. E. 776; *People v. St. George Soc.*, 28 Mich. 261; *Kelly v. Grand Circle*, 40 Wash. 691, 82 Pac. 1007; *Marcus v. National Council*, 123 Minn. 145, 143 N. W. 265; *Kulberg v. National Council*, 124 Minn. 437, 145 N. W. 120; *Pepin v. Société St. Jean Baptiste*, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626; *Murray v. Supreme Hive*, 112 Tenn. 664, 80 S. W. 827. An apparently contrary holding is found in *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. (Pa.) 469, but that was a public corporation governed, as to its organization and rights of members, by public law, not by contract. Moreover, there seems to have been no mode of correction by appeal. The corporation was not a subordinate organization of a larger body having supervisory power over it, and the member expelled had had no notice of the second trial.

The propositions on which these observations stand are obvious corollaries of others to which the courts have yielded practically unanimous assent. The expulsion of a member of a voluntary association, whether incorporated or not, after notice, an opportunity to be heard and a trial fairly conducted agreeably to the laws of the association, is conclusive upon the civil courts. *State ex rel. Smith v. County Court*, 78 W. Va. 259, 88 S. E. 796; *Bogges v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *Committee v. County Court*, 68 W. Va. 113, 69 S. E. 522; *Wilcox v. Supreme Council*, 210 N. Y. 370, 104 N. E. 624, 52 L. R. A. (N. S.) 806, note citing numerous cases. "Where the society makes provision for the settlement of controversies between it and its members, or between its members, concerning its government, its dissolution, or its property, courts will refuse to take cognizance of such controversies until those who have grievances, have in the first instance, resorted to and exhausted the remedies provided by the society. * * * The mere provision of such a means abridges the right to appeal to the courts until the prescribed means have been pursued. This rule prevails in matters of discipline, in the expulsion and suspension of members, and arises from the fact that in such cases the controversy springs from the contract of membership, and is a matter of internal regulation." *Niblack, Ben. Soc. & Acc. Ins.* § 111; *Smith v. County Court*, cited; *Grand Lodge, K. of P. v. People*, 60 Ill. App. 550; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *Zeliff v. Grand Lodge, K. of P.*, 53 N. J. Law, 536, 22 Atl. 63; *Whitty v. McCarthy*, 20 R. I. 792, 36 Atl. 129.

Whether malice on the part of the members voting for expulsion, under the circumstances stated, would constitute a good cause of action, need not be determined, for there is no evidence of its existence, sufficient to sustain a verdict founded upon it. The trial court correctly so ruled by his peremptory

instruction to find for the individual defendants. On the last trials, the vote was taken under the mandate of a superior officer, claiming right and power under the laws of the organization, to annul the acquittals on the ground that they were against the clear weight of evidence, and required the division to expel the accused members. This introduced an entirely new element into the cases. It became necessary for each member to determine for himself whether Stone possessed the authority he claimed and whether the law of the association required submission to his orders. The change of attitude of members was on its face a submission to an assertion of superior authority, wherefore it raises no inference of malice or misconduct. Huff and Simpson were not friends. On two previous occasions they had had altercations, but there is nothing in the evidence tending to prove that Huff was actuated by any ill will in what he did respecting the charges. He had not attended the first two trials, and on the last did no more than explain the reason for his having brought the others to the attention of the Grand Chief Engineer. At his own request, he was excused from voting, and there is no proof that he otherwise exercised any personal influence he may have had over other members.

Lack of jurisdiction of the Grand International Brotherhood requires reversal of the judgment, and setting aside of the verdict against it, but the judgment in favor of the individual defendants must be affirmed. the trial court's instruction to the jury to find for them having been properly given. As nothing can be decided against the association without jurisdiction, and the judgment in favor of the other defendants is free from error and completely discharges them, there is no occasion to deal with the numerous assignments of error, based upon the other rulings of the court during the progress of the trial. As to the Grand International Brotherhood, the cases will be remanded, with leave to the plaintiffs to acquire jurisdiction of its members by proper process and proceed with a new trial, if they shall see fit so to do.

(83 W. Va. 525)

KNOTTS v. BARTLETT et al. (No. 3626.)

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)

(Syllabus by the Court.)

1. CONTRACTS §169, 170(1)—CONSTRUCTION OF WRITTEN AGREEMENT—CIRCUMSTANCES.

Where the language of a written agreement is ambiguous or incomplete, or the purpose contemplated obscure, the court, in an endeavor to interpret its meaning and ascertain its subject-matter and purpose, will look to the circumstances surrounding the parties at the time they entered into it, and the acts done by them in carrying it into execution.

2. PLEADING §312—SUIT FOR ACCOUNTING—BILL—INCONSISTENCY—EXHIBIT.

Where a bill alleges the formation of a partnership for the purpose of securing options and leases upon oil and gas properties for oil and gas purposes, and for the actual development and drilling for oil and gas, if deemed advisable and necessary, and also the performance of acts tending to show the concurrence of the parties in such intention, an exhibit filed with the bill, showing an agreement that one of the parties was to pay the traveling expenses of the other in securing such "options," to be taken in the name of the former, and that the net profits were to be divided, when construed in relation to allegations, admitted on demurrer, of acts done pursuant to such agreement, will not be deemed inconsistent therewith.

3. PLEADING §214(3)—BILL FOR DISSOLUTION AND ACCOUNTING—BILL—EXHIBIT—DEMURRER.

Where a bill for the dissolution of a partnership and an accounting alleges the formation of the partnership for certain purposes, and acts done thereunder tending to show such to have been the intention of the parties, and an exhibit filed with the bill is not inconsistent therewith, on demurrer it will be taken as true that a partnership for such purposes was formed.

Appeal from Circuit Court, Marion County.

Bill by J. Bowan Knotts against Fred W. Bartlett and others. Decree for defendant Bartlett, and plaintiff appeals. Reversed and remanded.

W. M. Hess, of Mannington, for appellant.

L. S. Schwenck, of Mannington, and Harry Shaw and W. S. Meredith, both of Fairmont, for appellees.

LYNOH, J. The original and amended bills, dismissed upon demurrer, allege a partnership between plaintiff and defendant Fred W. Bartlett for the purpose of dealing in oil and gas leases or "options" covering lands in Marion, Wetzel, and other counties of this state and elsewhere, and the exploration or development of the leased premises for these products, if the parties so elect, and the actual and profitable development of some of the lands through operations thereon by sublessees, who also are named defendants, and pray for a decree to require Bartlett to account to plaintiff for his share of the oil wrongfully withheld by Bartlett, and for a disclosure by defendant Eureka Pipe Line Company of the quantity of oil produced from the leasehold estates, and for other relief.

[1] The chief argument in support of the ruling upon the demurrer is directed against the agreement copied into and filed with and made a part of the amended bill, particularly as to its sufficiency to show the formation of the partnership alleged in both bills. This is the contract:

4. § For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"December 13, 1915.

"I hereby agree to pay J. B. Knotts traveling expenses in securing an option on the Kingley and Burgess oil property, or any other properties; said options are to be taken in my name and the net profits is [are] to be divided.

"F. W. Bartlett."

J. B. Knotts is the plaintiff, J. Bowan Knotts, and F. W. Bartlett is the defendant Fred W. Bartlett.

The terms of the contract, apparently a mere memorandum of the agreement, are enlarged by the allegations of the bills, and the allegations are admitted by the demurrer. They disclose the real object of the parties in entering into the agreement, namely, to effectuate a common enterprise upon the terms agreed upon as evidenced by the exhibit. That paper appellee Bartlett would have us interpret to mean only that the parties intended a mere joint enterprise devoted exclusively to the acquirement of options to buy and sell oil properties for profit, Knotts to contribute his time and experience, and Bartlett to bear the necessary expense, and both to participate in the net profits realized from the sales. In answer to that argument it is necessary now to say only that neither party acted upon that interpretation, and it is not consistent with the express declarations of the bills. Among other things the bills allege that—

"said Bartlett and your orator (Knotts) on the said 13th day of December, 1915, entered into an agreement between themselves forming a partnership, for the purpose of taking, securing, and handling options and leases upon oil and gas properties * * * for oil and gas purposes and development, and, if deemed advisable and necessary, for the actual development and drilling for oil and gas on such of the leases which they should take or secure, as they should determine to drill and develop, or procure the drilling and development of."

[2, 3] The contracts secured and sublet were leases for the production of oil and gas from lands in Marion county, taken and procured by Knotts in the name of Bartlett as lessee, and delivered to him by Knotts, and with reference to which Bartlett acted in subletting them to Carnegie Natural Gas Company upon condition that if oil were produced, as subsequently it was, Bartlett was to have the well or wells upon his reimbursing the operator for the money expended for that purpose, and the operator to have the well or wells upon the annual payment of rentals if gas only was produced. In other words, Bartlett acted in accord with the charges preferred by the bills, the truth of whose allegations he admits. By this admission he also interprets the contract as the plaintiff interprets it.

The word "option" does not necessarily definitely define or limit the business to which the partnership was to be devoted.

If it may properly be said to have that effect, yet the parties were competent to give it a wider meaning, as they have done, if what Bartlett actually did may be accepted as indicating such an enlargement. Furthermore, interpreting the contract as he suggests, he cannot now lawfully exclude his partner from participation in the emoluments accrued, if he himself has departed from the strict letter of the contract. If the object was, as he says, to sell the leases, or "options" if he prefers that word, and divide the profits, he should have adhered to the accomplishment of that object and not have departed from it. His departure does not justify the wrong complained of or warrant the course pursued by him. For where his acts are construed in connection with the contract, as plaintiff interpreted it in his pleadings, there is concord, not discord, between them. Conceding the language to be of doubtful import or ambiguous, though it seems clear enough as far as it goes to define the relation of the parties to each other, yet where the parties, by their acts and conduct, concur in its construction and interpretation, courts regard and give effect to their exposition, when to do so does not violate the rules of law or infringe upon public policy. *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312. This is an often repeated and well-established canon of construction.

If Bartlett did not intend to say what the language used means, and what he has interpreted it to mean, why did he not make the meaning clear? Why provide for the taking of options in his name if he simply employed Knotts to secure options for him? Many matters are left open by the memorandum, but the door of inquiry into their real meaning is not closed, as counsel would have us believe. It is the duty of a court to ascertain what the parties meant to accomplish, what they had in mind, and, to do so, to give due regard to their intention, their situation, the subject-matter of the agreement, and the method of achieving the object contemplated, unless they themselves have made these things plain. *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754; *Myers v. Carnahan*, 61 W. Va. 414, 57 S. E. 134; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692.

There can be no doubt of the soundness of the doctrine relied on by appellee Bartlett, and quoted from section 1189, Page on Contracts regarding the repository of the common intention of the parties to a contract reduced to writing and unambiguous in its terms; or of the statement of the law in *Donahue v. Rafferty*, 96 S. E. 935, regarding the incorporation of an exhibit in a pleading purporting to file it; or in *Board of Education v. Berry*, 62 W. Va. 433, 59 S. E. 169, 125 Am. St. Rep. 975, and *Freeman v. Carnegie Natural Gas Co.*, 74 W. Va. 83, 81 S. E. 572, regarding the effect of such exhibits upon the pleading. There is, however, doubt as

their applicability to the facts here presented, chiefly for the reasons heretofore given and also in the cases referred to.

In *Donahue v. Rafferty* the issue was whether an exhibit filed to show the terms of a sale of real estate by public outcry could be considered as refuting an allegation of title; in *Board of Education v. Berry and Freeman v. Gas Co.*, whether, in case of discrepancy between them, the exhibits controlled the allegations or the allegations the exhibits. Considered upon the uncontroverted, indeed admitted, facts of the instant case, there is no conflict. Nothing in the paper exhibited is inconsistent with, or in conflict with, any statement contained in the bill. Counsel point us to none. If any existed, the exhibit, being the repository of the actual contract, would, when properly interpreted, control, as held in the decisions cited. But we see neither conflict nor inconsistency, though apparently the parties interested in the contract do not concur in their interpretation of the paper.

The bill alleges acts done by Bartlett, among others the granting to the Carnegie Natural Gas Company of drilling rights on the leases obtained by Knotts, and his submission of the agreement to the latter for his approval, all of which, admitted to be true, tend to establish as a fact that the parties did not deal on the basis of a strict construction of the term "option" in the agreement of December 13, 1915, but apparently gave to it a wider scope, comprehending either a sale of the leases so acquired, or their development when deemed advisable and necessary. In no other way could the profits which were to be divided be obtained. Further, according to the memorandum, the labor of the plaintiff was unlimited as to time and territory. He was to acquire leases wherever they could be had. The employment was not confined to any one transaction. His interest did not by the terms of the contract cease because the leases were taken in Bartlett's name or upon the procurement of any particular lease. Any other

property on which leases could be obtained by Knotts was within the terms of the contract.

Therefore having construed the exhibit not to be inconsistent with the express allegations of the bill setting forth the formation of a partnership for the procurement of options and leases, and their development when deemed advisable and necessary, it will be taken as true upon demurrer that a partnership has been formed for the purposes therein set forth. That fact being admitted, it becomes unnecessary to discuss the effect of the cases of *Sodiker v. Applegate*, 24 W. Va. 411, 49 Am. Rep. 252, *Clark v. Emery*, 58 W. Va. 637, 52 S. E. 770, 5 L. R. A. (N. S.) 503, and *Tyler v. Teter*, 75 W. Va. 217, 83 S. E. 906, relied on by appellee. They have bearing only where the formation of a partnership is a disputed question, not, as here, where it is admitted. Upon the trial of the case upon its merits some of the allegations of the bill may be disproved, and then, when the question of the formation of the partnership is a disputed one on the evidence, the cases will have an important bearing.

Under these circumstances shall we say, as counsel contend we must, that Knotts has no rights that equity can or will enforce; that he has an adequate remedy at law, notwithstanding the allegations of the bills and the need of the discovery for which he prays, and must therefore be relegated to a legal forum for the redress of his grievances? To that question, considered in connection with the facts admitted to be true and the law applicable to them as herein enunciated, the only answer is that facts so admitted bring the case within the often reiterated rule that, to deny the right to relief in equity, the legal remedy must be equally efficacious and capable of adjudicating once and for all the rights involved. *Warren v. Boggs*, 97 S. E. 589.

These reasons lead us to direct the entry of an order reversing the decree and remanding the cause.

(177 N. C. 200)

LANIER v. JOHN L. ROPER LUMBER CO.
et al. (No. 222.)

(Supreme Court of North Carolina. March 19, 1919.)

1. ACTION ¶45(1)—MISJOINDER—INCONSISTENT CAUSE OF ACTION.

Where grantor in conveying large tract of land included land previously conveyed, prior grantee cannot sue to recover, on ground of fraud, purchase money paid subsequent grantee for property, and in same action sue to set aside subsequent deeds, and to recover damages for cutting of timber on the land; the two causes of action being inconsistent.

2. APPEAL AND ERROR ¶193(2)—WAIVER OF DEFECT—MISJOINDER.

Where no objection was made to complaint on the ground that two inconsistent causes of action were joined, the court, on appeal, will consider the causes of action separately.

3. ELECTION OF REMEDIES ¶3(4)—CONVEYANCE TO THIRD PARTY.

Where grantor in conveying tract of land included land previously conveyed, prior grantee cannot claim, from estate of such subsequent grantee on ground of fraud in having his land so included, purchase money paid the subsequent grantee upon the subsequent grantee's conveyance of the property to a third person, and also claim the land from the third person, his only right to the money being on ground that the subsequent grantee acquired title.

4. DEEDS ¶76—FRAUD—VALIDITY—VOIDABLE DEED.

Where deed is procured by grantee after having surveyed land, and included in deed land previously conveyed to third party, with knowledge of prior conveyance, and that prior grantee is in possession, and where grantor, who is able to read, is not prevented from reading deed before signing it, and is not misled into signing paper he had not intended to sign, the deed, if procured by fraud, is merely voidable, and not void; there being no fraud in the factum.

5. VENDOR AND PURCHASER ¶228(3), 233—VALIDITY—REGISTRATION.

Under Connor Act (Revisal 1905, § 980), title to land is in subsequent grantee, where subsequent deed is registered before prior deed, though subsequent grantee had notice of prior deed; notice being insufficient to take place of registration.

6. VENDOR AND PURCHASER ¶232(8)—POSSESSION UNDER UNRECORDED DEED.

Under Connor Act (Revisal 1905, § 980), title to land is in subsequent grantee, whose deed is registered before prior deed, although grantee under prior deed was in possession of land at time of the subsequent conveyance.

7. VENDOR AND PURCHASER ¶239(9)—FRAUD—INNOCENT PURCHASER—TITLE.

Purchaser for value without notice gets title unaffected by fraud of grantor in acquiring title.

8. VENDOR AND PURCHASER ¶238—FRAUD—INNOCENT PURCHASER—CONVEYANCE TO PARTY WITH NOTICE.

Where purchaser for value without notice of fraud conveys property, second purchaser gets good title, though it has notice of the fraud.

9. PLEADING ¶8(15)—FRAUD—CONCLUSIONS.

Allegation that grantor was induced by deceit to sign the deed, without stating the facts, held insufficient allegation of fraud.

Appeal from Superior Court, Duplin County; Gulon, Judge.

Action by B. M. Lanier against the John L. Roper Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action against the Roper Lumber Company to recover damages for cutting certain timber on the land described in the complaint, and against the administrator and heirs of Jefferson Lanier to recover the purchase price of the same.

In 1898 John T. Batts, who was then the owner of the land, executed a deed purporting to convey the same to the plaintiff, who was then under 21 years of age. This deed was not registered until February 5, 1904.

On the 27th of November, 1902, the said Batts sold this land and other lands to Jefferson Lanier, and executed a deed to the said Lanier, purporting to convey the same, which deed was registered on the 27th of December, 1902, prior to the registration of the deed to the plaintiff.

On April 6, 1906, the said Jefferson Lanier sold the timber on said lands to the Blades Lumber Company for \$12,000, and executed his deed conveying the same, which was registered April 11, 1906, and thereafter the Blades Lumber Company sold and conveyed said timber to the defendant the Roper Lumber Company.

The plaintiff became 21 years of age in February, 1910, and this action was commenced October 27, 1918.

The plaintiff claims that the land conveyed to him in 1898 was embraced in the deed to Jefferson Lanier in 1902 by fraud, and that therefore he is entitled to recover damages of the Roper Lumber Company for cutting the timber, and if this is not so that he should recover of the administrator and heirs of Jefferson Lanier the purchase money paid by the Blades Lumber Company.

The defendants deny fraud and plead the ten and three year statutes of limitations, to which the plaintiff replies that he discovered the facts constituting the fraud within three years before this action was commenced.

The plaintiff knew on February 5, 1904, that the land he claims and which is described in the complaint was included in the deed to Jefferson Lanier.

It was admitted that the Blades Lumber Company paid Jefferson Lanier \$12,000 for the timber conveyed in its deed, and there is no allegation in the complaint that the Blades Lumber Company had notice of any fraud or irregularity, or that he knew of the execution of the deed to the plaintiff by Batts.

The allegations in the complaint as to the Roper Lumber Company are that it knew the value of the timber lands of Jefferson Lanier, and did not pay near their value, that it knew of the existence of the deed to the plaintiff at the time of its purchase, and that Jefferson Lanier had bought for much less than the real value, and that the plaintiff was in possession of the land at the time of the purchase. It is also alleged that at the time of the cutting of the timber in 1916 the Roper Lumber Company had notice of the pendency of an action by the plaintiff against the heirs of Jefferson Lanier to set aside the deed executed to him by Batts in so far as it interfered with the deed executed to the plaintiff in 1898, which action resulted in a judgment for the plaintiff.

The allegations of fraud against the administrator and heirs of Jefferson Lanier are that Lanier bought from Batts for much less than the true value; that Lanier knew of the deed to the plaintiff when he bought; that his contract with Batts was for the purchase of the lands owned by Batts, and was not intended to cover the lands conveyed to the plaintiff in 1898, and that Lanier had the land surveyed and included in the deed all of said land. It is also alleged that Batts was an ignorant man and unskilled in business, and that he was induced to sign the deed by the deceit of Lanier, but it is not alleged that Batts could not read, or that any act or representation of Lanier induced the execution of the deed which he signed.

Upon the admissions made by the parties and upon the pleadings his honor rendered judgment in favor of the defendants, holding that the Roper Lumber Company was the owner of the timber, and therefore not liable in damages, and that the cause of action against the administrator and heirs of Jefferson Lanier was barred by the statute of limitations, and the plaintiff excepted and appealed.

Gavin & Wallace, of Kenansville, and George R. Ward, of Wallace, for appellant.

L. I. Moore, of New Bern, and L. A. Beasley, of Kenansville, for appellee Roper Lumber Co.

Stevens & Beasley, of Kenansville, for other appellees.

ALLEN, J. [1-3] The two causes of action alleged in the complaint—one against the Roper Lumber Company to set aside the deeds under which it claims and recover damages for cutting the timber on the land, and

the other against the administrator and heirs of Jefferson Lanier to recover the purchase money of the land—are inconsistent, and cannot be prosecuted at the same time, as one repudiates the deed executed to the Blades Lumber Company, and the other affirms it; but as there is no objection made on the ground of a misjoinder, we will consider the causes of action separately, although we might dispose of the appeal as to the Lumber Company by the admission of the plaintiff, appearing in the judgment, that "in this action he is undertaking to follow the fund received by Jefferson Lanier from said Blades Lumber Company for said timber, to recover his proportion thereof from the administrator and heirs at law of the said Jefferson Lanier, defendants herein, upon the grounds set out in his complaint," which he cannot do except upon the ground that the Blades Lumber Company acquired title to the land which it passed to the Roper Lumber Company. He cannot claim the purchase money of the land, and also the land and timber.

If, however, there was one action against the lumber company alone to recover damages for cutting the timber, would the plaintiff be entitled to recover? The answer to the question depends on who had the title to the timber at the time it was cut, and this requires some investigation into the allegations of fraud.

Assuming these allegations to be sufficient, they consist in an allegation that Lanier knew of the deed to the plaintiff when he bought; that the plaintiff was then in possession of the land; that Lanier had the land surveyed and included the plaintiff's land in his deed, and that he induced Batts to sign the deed by deceit.

There is no allegation that Batts could not read, or that anything was said or done to prevent him from reading the deed before signing, or that the deed was read to him incorrectly, or that he did not sign the paper he intended to sign, and if fraud is alleged it falls within the class of fraud in the treaty or consideration which renders the instrument voidable, and not fraud in the factum.

"An instance of fraud in the factum is when the grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it. See *Gant v. Hunsucker* [34 N. C. 254, 55 Am. Dec. 408], and *Nichols v. Holmes* [46 N. C. 360], *ubi supra*. Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read. 2 Black Com. 304; *Manser's Case*, 2 Coke's Rep. 3. These authorities show that the party was fraudulently made to sign, seal and deliver a different instrument from that which he intended, so that it could not be said to be his deed. Several of the cases in our Reports, referred to above, furnish examples of what is meant by fraud in the consideration of the deed, or in the false representation of some matter

or thing collateral to it. In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it." *McArthur v. Johnson*, 61 N. C. 319, 93 Am. Dec. 593, approved in *Medlin v. Buford*, 115 N. C. 269, 20 S. E. 463; *Griffin v. Lumber Co.*, 140 N. C. 519, 53 S. E. 307, 6 L. R. A. (N. S.) 463.

[4-6] If so, and there was fraud, the deed from Batts to Lanier was valid until set aside, and conveyed the title under the Connor Act, because it was registered before the deed to the plaintiff (*Mintz v. Russ*, 161 N. C. 538, 77 S. E. 851), and this is true although Lanier had notice of the plaintiff's deed, as "no notice to the purchaser, * * * however full and formal, will supply the place of registration" (*Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99, approved in *Tremaine v. Williams*, 144 N. C. 116, 56 S. E. 694), and although the plaintiff was in possession of the land, the protection given under the proviso to Revisal, § 980 (Connor Act), to those in possession under an unregistered deed or against those having notice of the deed, being restricted to cases where the deeds were executed prior to December 1, 1885. *Collins v. Davis*, 132 N. C. 109, 43 S. E. 579. See *Wood v. Lewey*, 153 N. C. 402, 69 S. E. 268, and cases cited, for a discussion of these principles.

[7, 8] Lanier then, having obtained the title conveyed the timber to the Blades Lumber Company for value, and there being nothing on the face of the Lanier deed to put the lumber company on notice, and no allegation that it had notice of any fraud, it was a purchase for value without notice, and its title was indefeasible, and when it subsequently conveyed to the Roper Lumber Company the latter company acquired the title of its vendor, although it might have had notice of fraud, and having title to the timber there can be no recovery against it.

"This principle—that a purchaser with notice, from one without notice, is protected by his vendor's want of notice—is a familiar one, and does not seem to be seriously questioned by counsel. *Bassett v. Norsworthy*, 2 White & T. Lead. (Cas. Eq. 31, notes; 1 Bigelow, Frauds, 402; *Taylor v. Kelly*, 3 Jones' Eq. [56 N. C.] 240; *Wallace v. Cohen*, 111 N. C. 103 [15 S. E. 892]."
Arrington v. Arrington, 114 N. C. 166, 19 S. E. 356.

See 39 Cyc. 1650.

We have thus far considered the appeal in the most favorable light for the plaintiff, but there are really no sufficient allegations of

fraud, of which the Roper Company is said to have had notice, and the allegations against Lanier are defective.

[9] It was not fraudulent in Lanier to have the land surveyed, or to buy with knowledge that the plaintiff held an unregistered deed for a part of the land conveyed to him, or when the plaintiff was in possession, and the allegation that Batts was induced to sign the deed by deceit, without stating the facts, is insufficient, as "it is a fundamental rule of pleading that when a plaintiff intends to charge fraud he must do so clearly and directly, by either setting forth facts which in law constitute fraud, or by charging that conduct not fraudulent in law is rendered so in fact by the corrupt or dishonest intent with which it is done." *Merrimon v. Paving Co.*, 142 N. C. 552, 55 S. E. 370, 8 L. R. A. (N. S.) 574.

The cause of action against the administrator and heirs of Jefferson Lanier is barred by the statute of limitations, as it appears that the plaintiff knew his land was embraced in the deed to Lanier in 1904, and the deed to the Blades Lumber Company was on record in 1906, and he attained his majority in 1910, more than three years before this action was commenced. *Sanderlin v. Cross*, 172 N. C. 243, 90 S. E. 213.

Affirmed.

(177 N. C. 254)

AMERICAN NAT. BANK v. SAVANNAH TRUST CO. et al. (No. 281.)

(Supreme Court of North Carolina. March 26, 1919.)

BANKS AND BANKING — 171(5)—RECEIVING CHECK FOR COLLECTION — NEGLIGENCE — FAILURE TO GIVE NOTICE OF LOSS OR NON-PAYMENT.

If plaintiff bank, after receiving a check for collection and after giving defendant trust company, sender, credit therefor, delayed for 40 days to inform defendant that check had been lost or not paid, and the drawer in the meantime became insolvent, plaintiff cannot recover from defendant the sum lost by such negligent delay irrespective of whether drawee bank would have paid the check if promptly presented.

Appeal from Superior Court, New Hanover County; Lyon, Judge.

Action by the American National Bank against the Savannah Trust Company, and the Wachovia Loan & Trust Company as garnishee. Judgment for plaintiff, and defendants appeal. Error.

This action was brought to recover \$705, with interest, being the amount of the deposit of the plaintiff in the defendant Savannah Trust Company.

The defendant trust company sent to plaintiff bank from Savannah by mail in

November, 1912, a check drawn by Lybrand & Co. on the bank of Swansea, S. C., payable to the Reliance Fertilizer Company. Defendant bank gave credit to the Reliance Fertilizer Company for the amount of the check, and the fertilizer company checked on the same in the usual course of business.

The plaintiff bank received the check at Wilmington on November 22, 1912, credited it to the defendant Savannah Trust Company, and in the usual course of business said credit was balanced off by dealings between the two banks. On the 22d or 23d of November, the plaintiff sent the check directly to the bank of Swansea on which it was drawn for collection. The plaintiff did not mention or intimate to the Savannah Trust Company that the check was not paid until more than a month afterwards by letter dated December 30th, and received by the bank in Savannah Monday, January 2d.

When the defendant notified the payee, the Reliance Fertilizer Company, that the check had not been paid, the defendant trust company requested the fertilizer company to allow the amount to be charged back to them, which said company refused to do because of the length of time that had elapsed, and the defendant trust company admitted its liability on account of the lapse of time.

The check has never been paid, although both the plaintiff and the trust company have tried to collect it; the latter doing so as a courtesy and not a duty. The plaintiff then, because the defendant trust company refused to reimburse the plaintiff, brought this suit attaching the trust company's funds.

From a verdict and judgment in favor of the plaintiff, the defendant appealed.

John D. Bellamy & Son, of Wilmington, for appellants.

McClammy & Burgwin, of Wilmington, for appellee.

CLARK, C. J. When this case was here on the former appeal (Bank v. Trust Co., 172 N. C. 344, 90 S. E. 302), the court held that it was negligence per se for a bank to send a draft or check for collection to the bank on which the check was drawn, and further that when the bank which has committed such negligence sues the bank, which had forwarded the check, for the amount which had been credited, and such original bank sets up as a counterclaim the negligence of the plaintiff in not notifying it of nonpayment, and in the delay of over a month

without inquiry, that this was negligence per se, but that the burden of proof rested on the correspondent bank, which had forwarded the check to the plaintiff bank, to show that it had sustained damages, which raised an issue for the jury.

The defendant asked the court to charge:

"If defendant had paid cash for the draft to the Reliance Fertilizer Company and admitted its liability for same, then if the jury shall find from the evidence, by the greater weight, that the plaintiff was negligent in not notifying the defendant within a reasonable time of the non-payment, and thereby put it out of the ability of the defendant or its customer to collect the check, the defendant would not be liable to plaintiff in this action, and it would be your duty to answer the issue, 'No.'"

The court so charged, but erred in adding:

"Provided you further find the check would have been paid if it had been presented in due course and but for the negligence of the plaintiff."

If the plaintiff, after giving credit to its customer for the check, remitted to it, and though the check would not have been paid if presented, still if for 40 days it delayed to inform the customer that the check had been lost or had not been paid, and in the meantime the drawer, Lybrand, had become insolvent, thus depriving the customer bank of the recovery from Lybrand of the amount which it had credited and paid to the fertilizer company for such check, the plaintiff bank certainly cannot recover the sum thus lost by its customer by such negligent delay, and this irrespective of the fact, if it be a fact, that the drawee bank would not have paid the check if promptly presented, or even if it was presented and payment refused. It was the duty of the plaintiff bank to give prompt notice of the refusal to pay or of the loss of the check, so that the customer bank should have opportunity to protect itself.

If upon the evidence the jury shall find that, if such notice had been given in due course by the plaintiff bank, the customer bank could have saved itself from loss, then the jury should have found upon the issue that the defendant bank was entitled to recover on its counterclaim any loss it sustained by reason of such negligent delay.

It is not necessary in this view to consider the other exceptions.

Error.

(177 N. C. 222)

STATE BOARD OF AGRICULTURE v.
WHITE OAK-BUCKLE DRAINAGE
DIST. et al. (No. 252.)(Supreme Court of North Carolina. March 19,
1919.)1. DRAINS ⇐2(2)—ADVANCEMENT BY STATE
—RECOVERY OF MONEY.

While Pub. Laws 1911, c. 67, § 14, was repealed by Laws 1915, c. 235, § 1, the latter act, in view of section 2 thereof, did not destroy the obligation to repay to the board of agriculture money previously advanced.

2. DRAINS ⇐19 — ADVANCEMENT BY STATE
—LIABILITY OF DRAINAGE DISTRICT.

Under Pub. Laws 1911, c. 67, § 14, a drainage district organized under Laws 1909, c. 442, as amended by the Act of 1911, is liable for money advanced to a drainage engineer according to Laws 1909, c. 442, § 2, although the drainage commissioners did not expressly authorize the expense, and the drainage district did not receive any practical benefit.

3. STATUTES ⇐206—CONSTRUCTION.

An entire statute should be examined to ascertain its meaning, and force and effect should be given to every part of it, reconciling, when reasonably possible, any seeming conflicts by comparing its sections and provisions with each other.

4. DRAINS ⇐20—ADVANCEMENT TO DRAIN-
AGE DISTRICTS—ACTION TO RECOVER—PAR-
TIES.

In action by state board of agriculture against drainage district to recover money paid to drainage engineer employed under Pub. Laws 1911, c. 67, § 14, state treasurer is a proper, if not necessary, party plaintiff, and upon request will be made a party, where he agrees to abide by proceedings and judgment.

Appeal from Superior Court, Wake County; Allen, Judge.

Action by the State Board of Agriculture against the White Oak-Buckle Drainage District and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The state treasurer, on March 25, 1912, paid out of the funds of the state board of agriculture the sum of \$1,125.85, for the compensation and expenses of the drainage engineer of the defendant the White Oak-Buckle drainage district and his necessary assistants. The payment of this amount, and the purpose for which it was paid, are admitted. It is admitted, further, that the bonds issued by the district have been sold, and were sold August 1, 1916. The district was organized under chapter 442, Public Laws of 1909; the engineer was appointed, upon recommendation of the state geologist, and the compensation of the engineer and his assistants and their expenses were paid out of the funds of the state board of agriculture, under section 14, chapter 67, of the

Public Laws of 1911, which reads as follows:

"That the state treasurer shall pay the compensation and expenses of the drainage engineer and his necessary assistants as provided in section 2 of chapter 442 of the Public Laws of 1909, according to an itemized statement approved by the clerk of the court, to whom the petition for a drainage district was made, and the state geologist, upon warrant of the state auditor, out of any money in the state treasury to the credit of the department of agriculture: Provided, that said sum or sums shall be refunded to the state treasurer to the credit of the department of agriculture by the petitioners for the drainage district if the drainage district is not established: Provided further, that if the drainage district is established said sum or sums shall be refunded to the state treasurer to the credit of the department of agriculture out of the first moneys received from the sale of the bonds of said drainage district: Provided, that the total amount loaned by the state treasury out of the funds to the credit of the department of agriculture for the purpose set forth in this section shall never exceed fifteen thousand dollars (\$15,000) at any one time: Provided further, that not more than two thousand dollars shall be advanced to any one district: And provided further, that before any advancement is made for the purposes herein expressed, the bond of the petitioners required by section two of said chapter shall be first approved by the Attorney General."

It was contended, on the argument, that the plaintiff could not recover (1) because section 14, chapter 67, Public Laws of 1911, was repealed by section 1, chapter 235, Public Laws of 1915; (2) because the money was not paid on the request of the commissioners of the drainage district, and has proved to be of no real practical benefit to the defendant.

The court was of the opinion, upon the facts, and so held, that the plaintiff was entitled to recover the amount claimed (\$1,125.85) with interest from March, 1912, and rendered judgment accordingly. Defendant appealed.

C. D. Weeks, of Wilmington, and J. G. Mills, of Wake Forest, for appellants.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for appellee.

WALKER, J. (after stating the facts as above). [1] While section 14, chapter 67, Public Laws of 1911, was repealed by section 1, chapter 235, Laws of 1915, the repealing act was not passed until after the money had been paid and the relation of debtor and creditor existed. Section 14 expressly provided for the refunding or repayment of the amount so paid, whether the district was finally established or not; if established, the amount should be repaid out of the proceeds of the sale of the bonds issued by the district.

The contention of the defendant is that the repeal of the section by chapter 235, Laws of 1915, canceled the obligation, and destroyed the right of the plaintiff to enforce payment. That such was not the intention of the Legislature is clear from the words of section 2, chapter 235, Laws of 1915, as follows:

"That, upon request of the Department of Agriculture, the Attorney General shall bring in the Superior Court of Wake County an action against the drainage commissioners of any drainage district that has failed or may hereafter fail to refund any money advanced by the State Treasurer under the provisions of section 14, chapter 67, of the Public Laws of 1911, the said action to be brought both against the board of drainage commissioners and the bond of the petitioners for the district required by section 2 of chapter 442 of the Public Laws of 1909."

The effect of the act of 1915 was to relieve the state board of agriculture of the burden of advancing money, which was imposed by the act of 1911, but clearly not to destroy the obligation of the debt theretofore contracted. *Blair v. Cookley*, 136 N. C. 405, 48 S. E. 804; *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, Ann. Cas. 1912A, 1189; *McLeod v. Board*, 148 N. C. 77, 61 S. E. 605; *Johnson v. Carson*, 161 N. C. 371, 77 S. E. 307; *Manly v. Abernethy*, 167 N. C. 220, 83 S. E. 343; *Nance v. So. R. Co.*, 149 N. C. 366, 63 S. E. 116; *Clements v. State*, 76 N. C. 199; *Woodley v. Bond*, 66 N. C. 396; *Caldwell v. Donaghey*, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721, Ann. Cas. 1915B, 133, and note. Its operation is prospective in this respect, and was manifestly intended to be. This appears plainly from section 2 of the act of 1915 (chapter 235), which directs the Attorney General of the state to bring an action in Wake superior court against the drainage commissioners and the bondsmen, for the reason that, if it was intended to cancel the indebtedness, such a requirement would not have been made. It would be inconsistent with the defendant's construction of the act of 1915, that it destroyed the debt, if the Attorney General is required to sue upon it at the request of the department of agriculture. How could he recover on a debt which had been forgiven and released to the defendants? A plaintiff cannot recover on a debt when there is no debt.

It is thus apparent that, although section 14 of the act of 1911 (chapter 67), which directed the payment of the money, was repealed, the Legislature preserved, in section 2 of chapter 235 of the Laws of 1915, the right to sue for money already advanced under said act, and, of course, kept the debt alive for that purpose. The money paid by the treasurer was paid under the provisions of the act of 1911, and before its repeal by the act of 1915. As the bonds of the district were not sold until August, 1916, the

district having been established before the money was paid, it is doubtful if suit could have been instituted before August, 1916, the date of the sale of the bonds. The fact that the bond of the petitioners is equally liable to the plaintiff does not affect the primary liability of the drainage district and its commissioners. It was their duty, in any event, to have paid the advancement made by the plaintiff out of the bond money.

[2] The defendants further contend that the plaintiffs cannot sue, because they did not authorize the expense. The answer to this is they organized the district under the act of 1909, as amended by the act of 1911. The act of 1909 (Laws 1909, c. 442) provided for the appointment of the drainage engineer upon the recommendation of the state geologist. This was done. The surveys and estimates and plans were made by him and his assistants, and the district established based upon these surveys and estimates. The district received the benefit of the expense; the statute directed these expenses, as well as the compensation of the engineer and his assistants, to be paid by the state treasurer out of the funds of the plaintiff. The acceptance of the money, advanced under the law, involved the promise to repay, unless it was a mere gift or an appropriation. That it was such cannot be, and is not, claimed. The act under which it was paid expressly provided for its repayment by the district, and it was a liability also secured by the bond of those filing the petition for the creation of the district. Having received the money, the defendant cannot repudiate the obligation imposed by the statute to pay it back. If there was no practical benefit derived, it was not the plaintiffs' fault. We have referred to the question of actual benefit, although there is no finding of fact and no assignment of error in regard to it; the single error alleged being that the court did not give proper force and effect to the repealing law.

[3] We have reached our conclusion in accordance, as we think, with the principle which is stated in the defendants' brief, as to the interpretation of statutes, that—

"The law requires, in the interpretation of a statute, that we should give it that meaning which is clearly expressed, and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature." *State v. Johnson*, 170 N. C. 687, 691, 86 S. E. 788; *McLeod v. Commissioners*, 148 N. C. 85, 61 S. E. 605; *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950; *Abernethy v. Commissioners*, 169 N. C. 631, 86 S. E. 577; *State v. Earnhardt*, 170 N. C. 725, 86 S. E. 960; *People's Bank v. Loven*, 172 N. C. 666, 90 S. E. 948.

The defendants' contention as to the meaning of the act of 1915 would require us to ignore section 2, of chapter 235, Laws of 1915, and confine our construction of the chapter to section 1, repealing section 14 of

the Laws of 1911, c. 67. This would violate the settled rule, as we are required to examine the entire statute to ascertain its meaning, and to give force and effect to every part of it, reconciling, when reasonably possible, any seeming conflicts, by comparing its sections and provisions with each other.

"It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the Legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation." Black's Interpretation of Laws (1896) p. 60, § 32.

And again:

"Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other, they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act." *Id.*; *Bank v. Loven*, supra.

The Legislature undoubtedly intended to change its policy, but as clearly did it manifest the purpose to preserve existing debts and save to the plaintiffs the remedy for their enforcement, and this was a just and righteous purpose.

[4] B. R. Lacy, treasurer of the state, comes into this court and asks to have himself made a party, as one of the plaintiffs; he agreeing to abide by the proceedings and judgment. The request is granted, the court being of the opinion that he is a proper, if not a necessary, party, and that his becoming a party will inure to the benefit and protection of the defendant; he being the receiving and disbursing officer of the fund recovered in this action, under the statute in such cases made and provided. When paid into the state treasury, the money will be held for the benefit of the other plaintiff, and paid out, as directed by law.

There is no error in the record.
Affirmed.

ROYAL et al. v. POPE & PARISH et al.
(No. 218.)

(Supreme Court of North Carolina. March 19, 1919.)

1. NEGLIGENCE — 26 — FIRE — LIABILITY OF FORMER OWNER.

Former owners of standing timber were not liable for fire started by spark from sawmill

cutting the timber, though deed by which they had conveyed the timber was not registered prior to trial.

2. EVIDENCE — 353(11) — DOCUMENTARY — DEED—REGISTRATION.

In action for damages from fire started by spark from sawmill engine, deed was admissible in evidence to show that defendants were no longer owners of the timber, though it had not been filed for registration until the trial week.

3. PARTNERSHIP — 15 — SAWMILL OPERATOR AND OWNER OF TIMBER.

Contract whereby owners of sawmill agreed to cut standing timber and saw it into shingles for owner at stipulated price per thousand did not create a partnership.

4. MASTER AND SERVANT — 322 — INDEPENDENT CONTRACTOR—FIRE FROM ENGINE—LIABILITY OF OWNER OF TIMBER.

Owner of timber standing on the land of another is liable to owner of land and adjoining owners for damages from fire started by sawmill cutting the timber, though sawmill operator was an independent contractor, where engine required a heavy draft for its successful use and had smokestack not over 10 feet high.

5. APPEAL AND ERROR — 1062(1) — REVIEW — HARMLESS ERROR.

In action for fire from engine of sawmill cutting standing timber, submission to jury of question of liability of owner of timber for negligence of sawmill operator is not ground for reversal, where jury found that sawmill operator was not negligent.

6. APPEAL AND ERROR — 215(2) — OBJECTIONS IN LOWER COURT — MISTAKE IN STATEMENT OF EVIDENCE.

A mistake by the court while endeavoring to rehearse the testimony or to give the evidence of a witness, or the admissions of the parties, cannot be made the subject of a valid exception on appeal, unless the mistake is called to court's attention at the time it is made.

7. TRIAL — 194(15) — INSTRUCTION ON TESTIMONY—PROVINCE OF JURY.

In action for fire from sawmill engine, court's statement "that there was no evidence one way or another as to the absence of a spark arrester," followed by instruction to consider facts to determine whether machinery was otherwise defective, was an instruction on the force and legal effect of the testimony.

8. NEGLIGENCE — 121(3) — OPERATION OF SAWMILL ENGINE—PRIMA FACIE CASE.

Evidence that fire originated from spark or sparker from sawmill engine establishes the prima facie case that such fire was due to defective spark arrester.

9. APPEAL AND ERROR — 1064(2) — REVIEW — PREJUDICIAL ERROR.

In action for fire from sawmill engine, court's statement "that there was no evidence one way or another as to the absence of a spark arrester," followed by instruction to consider facts and determine whether machinery was otherwise defective, where there was evi-

dence tending to show that fire originated from the engine, was prejudicial error; such evidence establishing prima facie case of defective spark arrester.

Appeal from Superior Court, Sampson County; Allen, Judge.

Separate actions, by Mrs. J. A. Royal and others, by J. B. Winders and others, by Alex. Blackburn and others, and by J. C. Jones, against Pope & Parish and others, were consolidated and tried together. Judgment for defendants, and plaintiffs appeal. New trial.

These were four several actions against the same defendants consolidated without objection, so far as appears, and tried before his honor, O. H. Allen, judge, and a jury, at August term, 1918, of the Superior Court of Sampson county. The actions were by several adjoining proprietors of land to recover damages caused to their lands by fire wrongfully started, as they allege, by defendants or their agents in operating a steam sawmill on the tract of one of the plaintiffs, J. C. Jones, and under a contract at the time between L. N. Dodd, owner and operator of the mill, and defendant J. D. Pope, the owner of the timber. On denial of liability and issues submitted, the jury rendered the following verdict:

"(1) Are the respective plaintiffs the owners of the lands set out in their respective complaints? Answer: Yes.

"(2) Did defendants negligently set fire and burn the lands of the plaintiffs, as alleged, and, if so, which defendants? Answer: No."

Judgment on the verdict for defendants, and plaintiffs, having excepted, appealed.

I. C. Wright, of Wilmington, for appellants.
Butler & Herring, of Clinton, for appellees.

HOKE, J. On the hearing it was made to appear:

That the defendants, P. F. Pope and W. H. Parish, a partnership trading as Pope & Parish, owned the timber, with the right to cut and remove same, on the lands of J. C. Jones, one of plaintiffs, sometimes designated as the Smith, or Jim Smith, place, and in November, 1915, they sold and conveyed the said timber and all their rights and appurtenances in reference thereto to their codefendant, J. D. Pope, who continued to own same to the time of trial. The deed, executed in November, 1915, and duly proved and filed with the register during the trial week, was allowed in evidence by his honor, and plaintiff excepted. That on the 27th of January, 1916, the defendant J. D. Pope, then owner of the timber, contracted with L. N. Dodd, who owned and operated a steam sawmill, to cut the timber on the said tract of land; the agreement being in terms as follows:

"This Indenture made this the 27th day of January, 1916, by and between L. N. Dodd and J. D. Pope, of Harnett county. L. N. Dodd

agrees to cut all of the longleaf timber on the Smith tract of land for \$1.50 per thousand, and stack each grade separately at mill, convenient for hauling; said timber to be cut clean as he comes to it, down to the 10-inch stumpage.

"J. D. Pope agrees on his part to take said shingles at the mill and advance enough every two weeks to meet the expenses of manufacturing said shingles, and at the end of each month to settle in full for all cut the previous month.

"It is also agreed between the two parties that L. N. Dodd shall have all the cull grade of shingles, and that the tar is to be divided after all the expenses are paid equally."

That, pursuant to the agreement, said Dodd, on the 14th of March, 1916, having duly placed his mill and engine, commenced to cut the timber into shingles and a few hours thereafter the fire caught near the mill, burned over the lands of J. C. Jones where the mill was situated and the lands of the other plaintiffs, adjoining proprietors, doing substantial and extended damage to all of said tracts.

There was testimony on the part of plaintiffs tending to show that the mill had a smokestack, defective in structure, and that it threw sparks and live coals to a degree that was a menace, and there was pine straw, wire grass, and leaves lying around the mill which had not been cleaned away, and where the fire caught, and that the man in charge had been warned by one of plaintiffs not to fire his engine till he cleaned up the straw, leaves, and litter around the mill, and that the owner, Dodd, was heard to say after the fire that "the place where he missed it was in not raking off around the mill." There was evidence on the part of defendant in contradiction to that of plaintiff and to the effect also that the damage done to the land was not near so extensive as plaintiffs claimed, and that some of the land was not injured at all; further, that before contracting with him, J. D. Pope had made inquiry about L. N. Dodd, and had been informed that he was a capable and reliable sawmill man.

[1, 2] On these facts, relevant and sufficiently full for a proper apprehension of the questions presented, we concur in his honor's view that in no aspect of the evidence is a recovery permissible against the partnership of Pope & Parish; they having conveyed the timber several months before by deed absolute in terms and retaining no interest whatever either in the timber or its manufacture. For the purpose presented, the deed, properly established, was sufficient to pass the title without registration, and, the deed having been duly proved and filed for registration with the proper officer, we see no reason why, on the facts of this record and as between the parties, the deed should not be received in evidence as a registered instrument. *Smith v. Lumber Co.*, 144 N. C. p. 47, 56 S. E. 555.

[3] We approve also his honor's ruling

that, under the contract presented, there was no partnership created between L. N. Dodd and J. D. Pope in reference to the manufacture of this timber within any definition of "partnership" recognized by our decisions. *Gorham v. Cotton*, 174 N. C. p. 727, 94 S. E. 450, and authorities cited. The instrument shows that, so far as the shingles were concerned, the millman was engaged in sawing the timber into shingles for J. D. Pope, the owner, at so much per thousand. It was further objected by plaintiff that his honor left it to the jury to determine whether, under the contract between them and the attendant facts, the conditions were so menacing as to deprive defendant J. D. Pope of any defenses which might arise from the fact that L. N. Dodd was at the time an independent contractor. If this relationship be conceded, the exception is hardly presented on the record, for the jury have in their verdict declared that neither Dodd nor Pope is liable, but, as it will no doubt come up on a second trial, we deem it well to make some further reference to the matter. In *Thomas v. Lumber Co.*, 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584, it was held that a company operating a steam railroad for logging purposes is liable in damages for fires caused by its locomotives by reason of its foul right of way, so dangerous that it might reasonably have been anticipated that injury would thereby occur to adjacent owners, and the principle of independent contractor will not avail the employer in such instances, and, again, the operation of a defectively equipped engine or of a good engine not carefully managed or managed by an unskillful engineer is such source of danger to the adjacent landowners from fire that an employer cannot relieve himself of the consequent damage under a contract with an independent contractor. This decision has been cited and approved by us in *Strickland v. Lumber Co.*, 171 N. C. 755, 88 S. E. 340, and many other cases, and in his learned and well-considered opinion Associate Justice Manning, speaking further to fires caused by a defective engine, said:

"We will now consider the view based upon a finding that the fire was caused by a spark emitted by a defectively equipped engine, but not communicated from the right of way. Would the defendant be liable? If the defendant itself had been at the time operating the engine, its liability is governed by the third rule formulated in *Williams v. Railroad*, 140 N. C. 623 [53 S. E. 448], as follows: '3. If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable.' The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that those precautionary measures are adopted rests upon the employer, and he cannot escape liability by in-

trusting this duty to another, though he be employed as an 'independent contractor' to perform it. In *Covington, etc., Bridge Co. v. Steinbrock*, supra [61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375], the principle is thus stated: 'The weight of reason and authority is to the effect that, where a party is under duty to the public or a third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. [Citing numerous authorities.] The duty need not be imposed by statute though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, C. J., in Bower v. Peate*, supra. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract that raises the duty and which the employer cannot shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work.' It cannot be denied that the operation of a defectively equipped engine, or the operation of a good engine not carefully managed or managed by an unskillful engineer, is a source of great danger to property adjacent to the road on which such an engine is operated. Such danger raises the duty which the employer cannot shift from himself to another."

[4] It will be noted that the engine referred to in *Thomas v. Lumber Co.* was a locomotive on a privately owned logging road, and while the principle is probably more insistent on an engine of that character, owing in part to its extended range of action and the greater variety of threatening conditions that are likely to arise, we are well assured that it should be applied also to a case like the present where one owning the timber on another's land contracts with the owner of a steam sawmill to cut the timber with an engine of this kind, always requiring a heavy draft for its successful use, in this instance having a smokestack not over 10 feet high and operated under conditions importing serious menace unless proper precautions were taken. Helpful cases in illustration of the general principle will be found in *Davis v. Summerfield*, 133 N. C. p. 325, 45 S. E. 654, 63 L. R. A. 492; *Jacobs v. Fuller & Hutspin-pillar*, 67 Ohio St. p. 70, 65 N. E. 617, reported in 65 L. R. A. 833, with a full and learned note on the subject; *Thompson v. Lowell, etc., Ry.*, 170 Mass. p. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Dillon v. Hunt*, 105 Mo. 154, 16 S. W. 516, 24 Am. St. Rep. 374; *Bower v. Peate*, L. R. 1 Q. B. D. (1873-76) 321; *Hardaker v. Idle Dist. Council*, [1896] Q. B. D. 335; *Penny v. Welbedon, etc., District*, [1899] Q. B. D. 72. *Aman v. Lumber Co.*, 160 N. C. p. 369, 75 S. E. 931, and *Lawton v. Giles*, 90 N. C. p. 374, are well-considered decisions in our own court giving support to the position that, in

reference to the principle and its proper application, there should be no distinction between locomotive and stationary engines generating and operated by steam, and more peremptorily so when they are defective and used or likely to be used under conditions, as stated, importing menace of substantial injury.

[5] As heretofore stated, the jury having negatived liability on the part of Dodd or J. D. Pope, the results of the trial should not be disturbed by reason of this exception, but we are of opinion that the plaintiff is entitled to have the issues submitted to another jury by reason of another objection to a portion of his honor's charge, in terms as follows:

"Now, the negligence in this case relied upon, as I understand it, is by allowing grass and combustible matter to be near and around the engine that was being used for cutting shingles, and the plaintiffs also contend that there is evidence tending to show that there were defects about the machinery. There were defects about it which caused the sparks to be emitted that set out the fire. (They allege that there was no spark arrester on the mill, but there is no evidence one way or another about that as I recollect it.)"

To that part of the charge in parentheses plaintiffs in apt time excepted.

"(As to other evidence about defects in the machinery, I believe there was some evidence of a short smokestack as contended for by the plaintiffs, and there may be some other evidence which I do not now recall, and if there is you will consider all of the evidence, and say whether or not the defendants or any of them were negligent with reference to the defective machinery, or in permitting any combustible matter to remain there with reference to the fire. And if you find that this combustible matter was allowed to remain there, and that was the cause of the fire, you will answer the issue 'Yes.')

To the above charge in parentheses plaintiffs in apt time excepted.

[6, 7] It is well understood with us both by general rule and precedent that, when a judge, presiding at the trial of a cause, is endeavoring to rehearse the testimony or to give the evidence of a witness or the admissions of the parties and makes a mistake about it, unless called to his attention at the time, this may not be made the subject of a valid exception on appeal (*State v. Lance*, 149 N. C. p. 551, 63 S. E. 198); but, taking this portion of the charge and the exceptions noted thereto as a whole, the statement "that there was no evidence one way or another as to the absence of a spark arrester," being, as it is, in direct answer to an opposing position evidently taken and urged by the counsel for plaintiff, and followed immediately by the instruction "that, as to other defects about the machinery," the jury would consider the facts and say whether the machinery was defective could, by correct interpretation, only

have the significance, and be so understood, that the position taken by plaintiff had no evidence to support it. The court evidently had the testimony relevant to the question well in mind, and gave to the jury a clear charge making full reference to it, and his ruling therefore, in direct denial of plaintiff's position, was one on the free and legal effect of the testimony, and presents a question of law or legal inference properly reviewable on appeal; this being to our mind the true concept of the record. It has been held in numerous cases that, when a fire causing damage of this kind is shown to have been started by a spark or sparker from a defendant's engine, locomotive or stationary, a prima facie case is made that calls for satisfactory explanation and requiring that the cause be submitted to the jury on the issue of defendant's negligence. *Boney v. Railroad*, 175 N. C. 355, 95 S. E. 560; *Simmons v. Roper Lumber Co.*, 174 N. C. 221, 93 S. E. 736; *McRainey v. Railroad*, 168 N. C. 570, 84 S. E. 851; *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448. And a perusal of many of the cases on the subject will disclose that this rule of proof bears with more directness on the absence or presence of a spark arrester or its defective condition. That is its more usual and natural significance. *Hardy v. Lumber Co.*, 160 N. C. 113, 75 S. E. 855, 42 L. R. A. (N. S.) 759; *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 448; *Lawton v. Giles*, 90 N. C. 374; *Aycock v. Railroad*, 89 N. C. 321; *Anderson v. Steamboat Co.*, 64 N. C. 399; *Ellis v. Railroad*, 24 N. C. 138.

[8] Not only were there facts in evidence tending to show that the fire originated from defendant's engine, breaking out within a few hours after defendant Dodd started the operation of his engine and calling for an application of the principle approved in these and many other cases of like kind, but, speaking directly to the defendant's engine and its structure and condition, *Raeferd Smith*, a witness for plaintiff, testified, among other things, and without objection noted, as follows:

"I live near the Jones land; knew the mill. On the 14th of March, 1916, I was dipping turpentine about a half a mile from the mill, heard the whistle, saw the smoke, and ran rapidly to the mill. The fire was burning from the mill with the wind, and eight or ten feet from the mill, was burning back towards the boiler against the wind. The boiler had just been fired up that day. The mill had a short smokestack, about 10 feet high, and would throw out live sparks and hot coals of fire, for I was there loading some shingle blocks a few days after the fire, and if you were not careful it would set your clothes on fire. The pine straw, wire grass, and leaves were lying around the mill on the ground, and had not been raked up or burned off."

[9] On this and other apposite testimony, and under the principles of the authorities

cited, there was error in the ruling that there was no evidence as to the absence of a spark arrester, and we are of opinion that a general new trial should be ordered.

New trial.

REVIER v. STATE. (No. 1242.)

(Supreme Court of Georgia. March 13, 1919.)

(Syllabus by the Court.)

1. HOMICIDE ~~§~~309(5)—CHARGE—EVIDENCE—INVOLUNTARY MANSLAUGHTER.

There was nothing in the evidence for the state or the accused, nor in the statement made by him to the jury, which authorized an instruction as to the law of involuntary manslaughter. In his statement to the jury the accused denied that he shot the person killed, and the evidence submitted in his behalf tended to support his statement: The evidence for the state, considered most favorably for the accused, made out such a case as fell within the rulings made in *Smith v. State*, 124 Ga. 213, 52 S. E. 329 (1), and *Hamilton v. State*, 129 Ga. 747, 59 S. E. 803 (3), where the facts were quite similar to those made by the evidence for the state, and was governed by the proviso, in Penal Code 1910, § 67, "that where such involuntary killing shall happen in the commission of an unlawful act which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder."

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Claude Revier was convicted of crime, and he brings error. Affirmed.

Parker & Gibson and W. A. Covington, all of Moultrie, for plaintiff in error.

C. E. Hay, Sol. Gen., of Thomasville, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

YOUNG v. STATE. (No. 1199.)

(Supreme Court of Georgia. March 13, 1919.)

(Syllabus by the Court.)

1. HOMICIDE ~~§~~203(3)—DYING DECLARATIONS—ADMISSIBILITY.

On the trial of one indicted for murder, a physician testified that he saw the person killed within an hour after he was wounded, that he had been shot three times with a pistol, twice in the abdomen and once through the thigh,

and "was in a very serious condition at the time, in a state of extreme shock, very bad circulation, and clammy and cold. I considered that he was in a dying condition. I so stated to him that he was in a dying condition, and asked him if he realized it, and he said he did. * * * I saw him about 10 o'clock that night, and he died about 6, I think, the next afternoon from these wounds. * * * I didn't state he was dying. I asked him if he realized he was in a dying condition, and he said he did. He never said anything about hoping to get well." Another witness testified that he saw the decedent before the physician arrived; decedent "was mighty bloody, and was talking and groaning like he was in a lot of misery. * * * I didn't have to ask him how bad he was hurt; looked like he was hurt bad. He said he was shot, and shot bad, and said, 'I don't believe I will get over it.'" This witness was afterwards present when the conversation between the physician and the decedent above noted occurred, and testified that the physician said, "Mr. Baughcum [the decedent], you realize that you are shot, and shot pretty bad, and you are likely to die. * * * If you have anything to say, you better say it." Another witness testified that he was present during the conversation between the physician and the decedent, and that the latter told the physician "that he realized he was in a dying condition." Held, that such testimony constituted a sufficient foundation for the admission, as prima facie dying declarations, of statements made by the decedent, at the time indicated, "as to the cause of his death and the person who killed him." Pen. Code 1910, § 1026; *Harper v. State*, 129 Ga. 770, 59 S. E. 792 (3); *Hawkins v. State*, 141 Ga. 212, 80 S. E. 711 (3).

2. HOMICIDE ~~§~~196—MOTIVE—EVIDENCE.

One ground of the motion for a new trial was that, as the defense of the accused was that he shot the decedent on account of his attempted illicit relations with the wife of the accused (the daughter of the decedent), the court erred in refusing to permit a witness to testify in behalf of the accused to the effect that the decedent, in June next prior to August when he was killed, "admitted" to the witness that he, the decedent, "had illicit relations" with the witness' wife, another daughter of the decedent, and stated to the witness that "he [the decedent] would kill the man who caught up with him," and that the witness "told [the accused] about this conversation." This testimony was properly rejected as irrelevant. Pen. Code 1910, § 1019; see *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897 (5); *Alsobrook v. State*, 126 Ga. 100, 54 S. E. 805 (3).

3. HOMICIDE ~~§~~221—DYING DECLARATION—CONSTRUCTION.

The court instructed the jury: "I charge you further that if there was a statement made by the deceased, after he was wounded and before he died, and at a time when he was conscious of his approaching end—his approaching death—as to the cause of his death and the person who killed him, you may consider such statement along with the other testimony in the case, in ascertaining what the truth of the transaction is." The criticism on this charge

is to the effect that it fails to state that the decedent must be in the article of death in order to render a statement of his a dying declaration. The instruction is not fairly subject to the criticism made. Moreover, the charge on the subject of dying declarations, from which the excerpt above quoted was taken, was full and clear, and gave the accused no just cause for complaint.

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Walton County; A. J. Cobb, Judge.

Harlin Young was convicted under an indictment for murder, his motion for new trial was denied, and he brings error. Affirmed.

Rogers & Knox, of Covington, for plaintiff in error.

W. O. Dean, Sol. Gen., of Monroe, Clifford Walker, Atty. Gen., and M. O. Bennet, of Atlanta, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(149 Ga. 24)

STEVENS v. STATE. (No. 1181.)

(Supreme Court of Georgia. March 15, 1919.)

(Syllabus by the Court.)

HOMICIDE \S 309(5) — EVIDENCE — CHARGE — VOLUNTARY MANSLAUGHTER.

Neither under the evidence nor under the statement of the accused was the offense of voluntary manslaughter involved in the case, and the court properly refused to charge the jury upon that subject.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Will Stevens was convicted of murder, his motion for a new trial was overruled, and he brings error. Affirmed.

Colley & Colley, of Washington, Ga., for plaintiff in error.

R. C. Norman, Sol. Gen., of Washington, Ga., Clifford Walker, Atty. Gen., and M. O. Bennet, of Atlanta, for the State.

BECK, P. J. Will Stevens was tried under an indictment charging him with the offense of murder, it being alleged that he did kill and murder one Hattie Thomas. Upon the trial of the case the jury returned a verdict of guilty, with a recommendation. The accused made a motion for a new trial, which was overruled.

The only ground of the motion for a new

trial urged in the brief of counsel for the plaintiff in error is based upon the contention that the court erroneously failed to give in charge to the jury the law of voluntary manslaughter, counsel insisting that this grade of homicide was involved in the evidence in the case. With this contention we cannot agree. The evidence in the case is not voluminous. That which bears upon the only question raised in the case is contained in the testimony of a few eyewitnesses who stated briefly the circumstances of the killing. Excepting the witnesses who were introduced by the state for the purpose of impeaching the testimony of the witness Jim Fink, the testimony for the state made a case of unprovoked murder. Witness Jim Fink testified:

"She [the deceased] called my wife and says: 'Come on out here, Clara. I want you to hear this mess.' Clara went on down there around them, and when I went on down there Gene [the husband of the deceased] tells Will, 'You are a lie,' and Will says: 'You are a lie; I didn't say so.' And Gene's wife, Hattie, was standing up there, and Hattie said: 'Will, you are a lie; you know you did say so.' And Will says: 'Looks like you have got it in for me; I haven't bothered you all.' She turned around and looks at Gene, and Gene looks at her. She pulls a pistol up in her apron like that, a nickel-plated pistol. She pulled it up, I saw it, and Will shot her. He just beat her to it; that's all. If he hadn't shot her, she would have killed him. I ain't going to tell no lie for Gene or Will. I got shot. When Hattie was shot, Gene runs to her and says, 'Gi'me the pistol,' and he grabbed it out of her apron and took out after Will. That's what he done. I will tell the truth about it. She had this hand on her apron. The pistol come out, but when she fell Gene grabbed the pistol and run after him, about a hundred yards, I guess."

Clara Fink testified:

"She [the deceased] come on nearly to my house and called me. She says to me, 'Step out here a little bit,' and I says: 'What do you want? I haven't got time. I am busy.' And she says: 'Come on; it won't take long. I just want you to come down here and hear what me and Gene got to say to Will.' I goes on down there with her, and when I got down there Gene and Will were swapping lies with each other, and Gene says: 'Will, you are a lie; you did say so.' And Will says to Gene: 'You are a lie; I didn't say it.' And Will says: 'Look like you all got it in for me; look like you all want to get something. Don't call me another lie.' Hattie looks to Gene, and Gene looks to Hattie. Hattie repeats the lie there again, and as she repeats it again she had a pistol in her apron, and as she called him a lie again she raised her pistol, and as she raised her pistol up Will shot her, and when he had shot her Hattie was falling. Gene run a little piece, and she fell. As she was falling, Gene says to Hattie, 'Gi'me the pistol, nigger'— called her 'nigger,' to Hattie, but Hattie failed to give him the pistol. She had fallen by that time, and Gene

runs to Hattie and gets the pistol and made after Will; and that all I know."

The defendant, as a part of his statement to the jury, said:

"The way this thing started, Gene Thomas come through the lot where I was feeding, and told me to come on down the path, he wanted to see me; and I went on down there, and his wife was with him, and he stopped and said: 'Let's don't go any further. I want to see you about what you have been telling Mr. Nash I cussed him for.' I says, 'I didn't tell him that.' I told him that 'when Mr. Nash come to my field to see if you were working, that Mr. Nash says for you to go to that new corn, and you says you are getting damn tired of this, and that you was getting damn tired of so much cussing.' One day Mr. Nash and myself were talking along, and I told him, and he went to see Gene, and Gene went to see me; and I says, 'If he sees Gene, Gene will get mad with me,' and so I went to the house and got my pistol. I was expecting him after me. I went on down the path, and he got after me; and I says: 'What is it? You know you told me. What are you going to do about it?' His wife come got close side of me. Gene says, 'You are a lie,' and I says, 'You are a lie, I didn't,' and about that time his wife says, 'You are a lie, you did say it,' and I looked around like that, and when I turned she pulled up her pistol and tried to shoot me, and I had my hand like this, and Gene says, 'I know he has got a pocket full of rocks, but its all right,' and when I looked at her she pulled up a pistol, and I did like that and shot her, and then Gene went and took the pistol from her, but I didn't want to shoot nobody else. I was just defending my own life. I run, but I saw him coming with the pistol in his hand, and I got in some bushes. I said, 'What I done I was obliged to do to save my life, and I am going back.'"

From the evidence quoted and the statement of the defendant, it will be seen that the defendant relied entirely upon the theory of self-defense. The evidence of two of his witnesses and his statement tended to establish the theory that the decedent had in her hand a pistol which she was about to raise, and that, acting under the apprehension that his life was in jeopardy, the defendant fired in his own defense. There was no suggestion in the evidence for the defendant, or in his statement, that the woman whom he killed was making any attempt to use the pistol in any way, except that she was raising, or about to raise, it as if to shoot him, and, acting under the fear that she was about to do so, he shot. If the defendant's theory of the case was true, he acted in self-defense. The evidence for the state, which we will not attempt to set out, made a case of murder—of murder unprovoked except by words. The epithet applied by the woman to the accused could not justify the shooting, nor reduce the homicide from murder to manslaughter. The theory of the state and the

theory of the defense made by the evidence and the defendant's statement were duly presented to the jury in the court's charge, and the failure of the judge to charge the law of voluntary manslaughter affords no ground of complaint to the plaintiff in error.

Judgment affirmed. All the Justices concur.

(149 Ga. 20)

GEORGE v. DORTCH et al. (No. 1107.)

(Supreme Court of Georgia. March 15, 1919.)

(Syllabus by the Court.)

VENDOR AND PURCHASER \S 265(1)—LIEN FOR PURCHASE MONEY—SUBSEQUENT TRANSFERS.

Where one sold land and executed to the purchaser a deed of conveyance, but inserted in the deed a stipulation that the note for the unpaid purchase money, "by express agreement of the maker of this deed, is held as a second mortgage note subject to a certain loan which shall be a prior lien on the property conveyed," this reservation had the effect of creating such a lien on the property as was enforceable by the vendor against any subsequent transferee of the property, or mortgagee, except the one whose loan was expressly provided for in connection with the reservation.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Proceedings between M. M. George and J. R. Dortch and others. Judgment for the latter, and the former brings error. Affirmed.

Richard B. Russell and Holbrook & Corbett, all of Atlanta, for plaintiff in error.

Napier, Wright & Wood, R. Low Reynolds, Dorsey, Shelton & Dorsey, and Phillip N. Jobson, all of Atlanta, for defendants in error.

BECK, P. J. J. R. Dortch owned a tract of land which he sold to T. L. McCurry on April 14, 1916, and executed a deed of conveyance to the same. The grantor undertook to reserve a lien or second mortgage on the land, by writing in the conveyance executed by him to McCurry the following stipulation:

"The consideration of \$2,250.00 hereinabove recited as the consideration of this transfer is as follows: \$1,075.00 cash in hand paid, receipt of which is hereby acknowledged at the time of the delivery of this deed, and one purchase-money note signed by the vendee herein, payable to the vendor herein, and due April 14, 1917, for the sum of \$1,175.00, bearing interest from date at the rate of 8 per cent. per annum, which said note, by express agreement of the maker of this deed, is held as a second mortgage note subject to a certain loan which shall be a prior lien on the property conveyed herein, in the sum of \$1,000.00 in favor of the Georgia Savings Bank, and which said loan the vendee is expressly authorized to make as a first lien on said property herein conveyed."

The conveyance was duly recorded, and subsequently thereto the grantor executed a deed to secure a loan of \$1,000 to the Georgia Savings Bank, thus creating the first lien upon the property as provided for in the conveyance from Dortch to McCurry in the stipulation above quoted. Thereafter, and prior to the maturity of the purchase-money note described in the conveyance from Dortch to McCurry, the latter undertook to create a mortgage lien upon the property in favor of George, the plaintiff in error. The property was afterwards sold under proceedings instituted by the bank, and the lien in favor of the bank was satisfied, leaving a balance in the hands of the sheriff; and, in proceedings duly instituted to distribute this balance between Dortch and George, the question arose as to whether or not the lien in favor of Dortch was superior to that of George. The court held that it was, and awarded the money to Dortch; and the sole question in the case is whether Dortch had, under the stipulation in the deed of conveyance to McCurry, a prior lien to the mortgage lien of McCurry. The court properly awarded the money to the claim of Dortch. The reservation in the deed which the latter executed to McCurry was sufficient to give him a valid subsisting lien against any subsequent lien created by McCurry, except in favor of one whose loan was expressly provided for in connection with the reservation. Any subsequent grantee of McCurry, or mortgagee taking a mortgage upon the property conveyed by Dortch, was bound to take notice of the lien created by the grantor in the deed to McCurry.

Discussion of this proposition is unnecessary. It has been ruled in a case substantially like the instant case. From the statement of facts in the case of *Atlanta Land & Loan Co. v. Halle*, 106 Ga. 498, 32 S. E. 606, it appears that Halle sold certain land to the Atlanta Land & Loan Company, conveying the same by an instrument purporting to be a warranty deed, which was duly recorded, and in this instrument the grantor reserved a lien on the land for the balance of

the purchase-money due. Thereafter the grantee conveyed the land to Mrs. R. C. Halle, who claimed that she paid a valuable consideration therefor without actual notice of the reservation of the lien. In the course of the decision in that case it was said:

"Under the view we take of this case, we think the undisputed evidence demanded a verdict for the plaintiff, and that the court did not err in directing the jury to so find. We think the court below was clearly right in concluding that the contract entered into by the parties when the property in dispute was sold by A. J. Halle to the company created a lien in favor of that grantor and his assigns upon the property for the payment of the purchase money. This contract is evidenced by the deed, and the purchase-money notes specifically recite upon their face that such a lien is retained by the grantor. * * * Even without this recital in the deed under which this defendant claims, she could not have obtained any greater title from the company than that company itself had; and we think she is chargeable with knowledge of the recitals in the deed by virtue of which her grantor held title. It is a well-settled principle of law that recitals in deeds bind, not only the parties thereto, but their privies in estate. Civil Code, § 5150; *Lamar v. Turner*, 48 Ga. 329; *Cruger v. Tucker*, 69 Ga. 557, and authorities cited in the opinion of Speer, Justice, on page 562. The recital of the lien, therefore, in the deed from A. J. Halle to the company, not only bound it, but Mrs. R. C. Halle as grantee of the company; she being its privy in estate."

That decision rules the controlling question in this case. This is not a case where one sells land and conveys the same by an absolute deed and attempts afterwards to enforce a vendor's lien against a bona fide purchaser from the grantee in the absolute deed. Dortch was not relying, in this case, upon any vendor's lien. He was asserting a lien reserved in the deed of conveyance. That reservation will prevail against any one who afterwards took a conveyance from the grantee named in the deed in which the reservation appears.

Judgment affirmed.

All the Justices concur.

(149 Ga. 28)

SMITH v. MILTON, Sheriff. (No. 1235.)

(Supreme Court of Georgia. March 15, 1919.)

*(Syllabus by the Court.)*1. HABEAS CORPUS \Leftrightarrow 56, 72—LEGAL RESTRAINT—REMAND—GENERAL DEMURRER.

Where an application for the writ of habeas corpus affirmatively shows on its face that the restraint complained of is legal, the court before whom the writ is made returnable has the power, on general demurrer, to dismiss the writ and remand the applicant. In such instance the general demurrer, under our practice, serves the purpose of a motion to quash the writ for insufficiency of allegation in the petition.

2. HABEAS CORPUS \Leftrightarrow 29 — DISCHARGE — GRAND JURY—ILLEGALITY.

One imprisoned under a bench warrant regular on its face and issued by a judge of competent jurisdiction will not be released on habeas corpus, because the grand jury that found the indictment on which the warrant issued was illegal.

3. HABEAS CORPUS \Leftrightarrow 4—WRIT OF ERROR.

A writ of error is the available remedy; the warrant not being void, but merely voidable.

Error from Superior Court, Gilmer County; N. A. Morris, Judge.

Petition for writ of habeas corpus by Claude Smith against R. L. Milton, Sheriff. General demurrer to petition sustained, and petition and writ dismissed, and petitioner remanded, and he brings error. Affirmed.

B. L. Smith, of Blue Ridge, for plaintiff in error.

Herbert Clay, Sol. Gen., of Marietta, for defendant in error.

GEORGE, J. Claude Smith, averring that he was being illegally restrained of his liberty by R. L. Milton, sheriff and jailer of Gilmer county, presented to the judge of the superior court his petition for the writ of habeas corpus, alleging substantially the following:

Petitioner is held under and by virtue of three bench warrants issued by the judge of the superior court upon three separate indictments returned by the grand jury of said county at the May term, 1918, charging petitioner with murder, with public drunkenness, and with having in his possession a quantity of whisky. In August, 1916, the legally appointed and qualified jury commissioners of said county revised the jury lists of said county, as required by law, and the lists so revised contained the legally qualified grand and traverse jurors for said county for the two years next ensuing. In April, 1917, two of the jury commissioners having resigned, the judge of the superior court by order, removed the four remaining commissioners and appointed six other named citizens of said county. In May, 1917, in a

mandamus proceeding brought by certain citizens and taxpayers of the county (to which petitioner was not a party) against the newly appointed commissioners, the judge of the superior court ordered a revision of the jury lists of said county, and the defendant commissioners, at the time named, proceeded to revise the lists as ordered. The persons serving as grand jurors at the May term, 1918, of said superior court were drawn from the box thus made up by the new board. Only eight of the persons who acted as grand jurors and returned the indictments against petitioner were in the jury box as legally made up by the old commissioners in August, 1916. The acts of the new board of commissioners are nugatory and void; the indictments against petitioner, as well as the bench warrants issued thereon, are likewise nugatory and void. The jury commissioners revised the jury lists, as required by law, in 1916, and the judge of the superior court of Gilmer county had no authority to order the revision in 1917. Copies of the several orders, of the mandamus proceeding, and of the indictments and warrants, were attached to the petition. The indictments and warrants were in all respects regular in form.

The sheriff answered, denying the illegality of the restraint, but admitting that petitioner was held under the warrants issued by the judge of the superior court upon the indictments returned by the grand jury as alleged. He also demurred generally to the petition for the writ, upon the ground that the allegations thereof affirmatively showed that the restraint was lawful.

[1, 2] The judge sustained the general demurrer, dismissed the petition and writ, and remanded the petitioner. He excepted, and contends that the court should have declined to consider the demurrer to the petition for the writ of habeas corpus, but should have determined the legality of the restraint upon the merits; the writ having issued and he having been brought before the court to receive its judgment. *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305, 43 S. E. 780 (3), 61 L. R. A. 739, is cited to support this contention. In that case it was ruled:

"The technical rules of pleading are not applicable in a proceeding of this character; and where a writ has been issued, and in response thereto the person detained has been brought into court, it is not the proper practice to demur to the petition for want of sufficient allegations. While a motion to quash the writ may be made on this ground, the better practice, when the person detained is before the court, is to inquire into the cause of the restraint and pass such order as the justice of the case requires."

In *Plunkett v. Hamilton*, 136 Ga. 72, 80, 70 S. E. 781, 784 (35 L. R. A. [N. S.] 583, Ann. Cas. 1912B, 1259), it was said:

"It [the writ of habeas corpus] is peculiarly a writ which involves substance, not mere technical skirmishing. The question is whether the detention is lawful or not, rather than whether niceties of pleading and exactness of allegation have been duly followed"—citing the *Simmons Case*, *supra*.

However, the *Simmons Case* admits the power of the court, on motion, to quash the writ because of insufficient averments in the petition, and in the opinion (117 Ga. at page 312, 43 S. E. 783 [61 L. R. A. 739]) it is said:

"Of course, if the petition clearly shows on its face that the detention is lawful, there is nothing to investigate."

We are of the opinion that the petition for the writ in the instant case clearly shows on its face that the alleged illegal restraint was lawful, and that the court did not err in sustaining the general demurrer thereto, which, in a proceeding of this character, serves the purpose of a motion to quash the writ.

[3] Conceding, without deciding, that the names of the persons selected to serve as grand jurors were not on the legally constituted grand jury list, nor in the grand jury box of the county, the case is only the common one of an indictment and warrant of the judge based thereon, merely voidable, not void, and the law's step to make it void is writ of error, not habeas corpus. It is universally recognized that habeas corpus is not a substitute for a writ of error. 1 Bishop's Crim. Proc. § 1410 (2); *McFarland v. Donaldson*, 115 Ga. 567, 568, 41 S. E. 1000. The accused may waive defects in the indictment, gross irregularities in selecting the grand or trial jury, and conceded disqualification of the grand or trial jurors. It has been held that, after a conviction on an indictment regular on its face, yet alleged never to have been found by the grand jury, habeas corpus is not the remedy. *Ex parte Twohig*, 13 Nev. 302. It has also been held that the fact that the grand jury which found the indictment was illegal, will not be considered upon hearing of habeas corpus. *Ex parte Springer*, 1 Utah, 214. See, also, 12 R. O. L. 1190, 1191, and note to *State v. Smith*, 100 Am. St. Rep. 26, 36. Objections to the grand jury must be made by challenge, or raised by plea in abatement, according to the circumstances. *Teem v. Cox*, 96 S. E. 131. Our Penal Code (section 1305) declares:

"No person shall be discharged upon the hearing of a writ of habeas corpus in the following cases: * * * Where the party is imprisoned under a bench warrant regular upon its face."

And section 957 defines a bench warrant to be a warrant "issued by a judge for the arrest of one accused of a crime by a grand

jury." The jurisdiction of the court is not destroyed or taken away by the alleged disqualification of the grand jury; and, the indictments and warrants being regular upon their faces, habeas corpus will not avail the plaintiff in error.

Judgment affirmed. All the Justices concur.

(83 W. Va. 512)

EAKIN et al. v. EAKIN et al. (No. 3688.)

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨161—APPEAL FROM PART OF DECREE—ACCEPTANCE OF BENEFITS.

Generally, a party availing himself of a decree so far as favorable to him cannot appeal from the decree wherein it is not favorable to him, if his acceptance of the benefit on the one hand is totally inconsistent with appeal on the other.

2. APPEAL AND ERROR ⇨161—PROSECUTION OF APPEAL—WAIVER OF ERRORS.

No waiver or release of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of right to reverse the decree or judgment which it is sought to bring in review.

3. APPEAL AND ERROR ⇨161—APPEAL FROM PART OF DECREE—ACCEPTANCE OF BENEFITS—WAIVER OF APPEAL.

Where the parts of a decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another, the party receiving the benefit will not be deemed to have waived his right to appeal.

4. APPEAL AND ERROR ⇨161—APPEAL FROM PART OF DECREE—ACCEPTANCE OF BENEFITS—WAIVER.

Where, after confirmation of a judicial sale, the court later sets it aside because of a higher offer, orders a resale, and directs the return of the money paid and notes delivered by the first purchaser, the portion of the decree directing the return of the money and notes is clearly separable and independent from that part of the decree which totally deprives the purchaser of all his rights under the sale confirmed to him, and the acceptance of the one under protest at the direction of the court cannot reasonably be construed into a waiver of his right to appeal the other.

5. APPEAL AND ERROR ⇨150(1)—VACATION OF JUDICIAL SALE—PURCHASER'S RIGHTS OF APPEAL.

A purchaser at a judicial sale which has been confirmed has acquired such a fixed interest in the property sold as entitles him, though not a party to the original suit, to appeal to a higher tribunal to protect his rights against an improper setting aside of such sale, at least

where the resale has been made and confirmed by the court.

6. JUDICIAL SALES — 34 — CONTROL OF COURT — CONFIRMATION.

There is a wide difference between the court's power of control over a sale before and after confirmation.

7. APPEAL AND ERROR — 983(3) — JUDICIAL SALES — 40 — CONFIRMATION — RIGHTS OF PURCHASER — DIRECTION OF RESALE — DISCRETION.

Before confirmation the rights of the purchaser are inchoate, and upon a showing of inadequacy of price, or upon an offer of a higher bid, properly secured, it is discretionary with the court whether it will confirm the sale or set it aside and direct a resale. The exercise of this discretion depends in large measure upon the facts of each case, abuse thereof when effecting inequities being subject to review by the appellate court.

8. JUDICIAL SALES — 31(3), 38 — CONFIRMATION — RIGHTS OF PURCHASER — AVOIDANCE.

Upon the confirmation of a judicial sale the rights of the purchaser become vested. Thereafter nothing except fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the sale or in opening it for other bids. Mere inadequacy of price or tender of a higher bid will not suffice, unless they themselves clearly import fraud, or are accompanied by other facts or circumstances constituting good causes such as are above stated.

9. JUDICIAL SALES — 43 — VACATION OF CONFIRMATION — DECREE.

The decree setting aside the confirmation should clearly set forth the facts relied on as good cause warranting a resale, and generally it is not sufficient to use the indefinite phrase "good cause appearing."

10. JUDICIAL SALES — 35 — CONFIRMATION — AVOIDANCE.

The general rule that courts have control of decrees during the term at which they are rendered does not confer power to avoid confirmed judicial sales except for such cause as is mentioned in a preceding point.

11. JUDICIAL SALES — 42 — CONFIRMATION — AVOIDANCE.

The only effect of this rule on judicial sales is to enable courts to consider alleged reasons for avoiding them during the term on motion or order to show cause after due notice without requiring formal bills for that purpose.

12. CASE OVERRULED.

Statements in *National Bank of Kingwood v. Jarvis*, 26 W. Va. 785, and 28 W. Va. 805, are overruled in so far as they are inconsistent with this opinion.

Appeal from Circuit Court, Monongalia County.

Suit for partition by Roscoe Eakin and others against Marion B. F. Eakin and others. From a decree setting aside the confir-

mation of a sale to them and ordering a resale, James A. Provins and others, purchasers at former sale, obtained an appeal and supersedeas, and the Hess Coal & Coke Company moves to dismiss appeal. Motion to dismiss denied, and decrees reversed and remanded, with directions to reinstate and reconfirm the sale to appellants upon condition.

E. M. Everly and Cox & Baker, all of Morgantown, for appellants.

Stewart & John and Donley & Hatfield, all of Morgantown, for appellees.

LYNCH, J. In a suit to partition lands there was assigned to infants and decreed to be sold for their benefit upon specified terms and conditions, subject to the usual approval and confirmation by the court, a tract of 22½ acres, part of the estate divided. The right so to dispose of the property by sale and the propriety or necessity therefor are not controverted or questioned in any manner.

The sale first partially effected and reported was not confirmed, but a readvertisement and resale were ordered because the purchaser failed or refused to comply with the terms prescribed in the decree and notice. The second was not accepted or confirmed, and again a readvertisement and resale were ordered, this time because of an increased offer for the property by another prospective bidder. The third was made, reported, and confirmed, and the deed ordered to be executed and delivered to the purchasers, James A. Provins, Lewis Ladone, and Frank Ladone, who before the confirmation had in all respects complied with the terms and conditions of the decree of sale and advertisement by paying to the commissioner the amount required in cash, and by delivering to him the notes for the deferred payments, as to the regularity and adequacy of which there was no objection or exception interposed by anyone interested as a party or otherwise, until after the record entry of the confirmatory decree.

Thereafter and before but near the close of the term, the court, upon the petition and upset bid of Robert E. Guy, an attorney practicing at the bar of the court, who, it is charged and not denied, had notice and knowledge of the proceedings in the cause and the efforts to consummate the sales, set aside the decree of confirmation, and for the fourth time directed the property to be sold, and it was sold, at the bar of the court in the presence and under the supervision of the judge thereof, and purchased by or for the Hess Coal & Coke Company upon competitive bidding for an amount about \$8,000 in excess of the accepted offer of Provins, Ladone, and Ladone, the former purchasers, the sale to whom had been ratified and confirmed without objection and the deed for the land directed to be executed and delivered. From the decree

last referred to, Provins and the Ladones obtained an appeal and supersedeas, and the writ is now before us upon their motion to reverse, made upon leave applied for and granted and notice of the motion duly given and served, and upon a counter motion made without leave first had, but after due notice, by Hess Coal & Coke Company to dismiss the appeal and supersedeas. The motion to dismiss rests solely upon the ground that, as Provins and his copurchasers, pursuant to and as directed by the decree setting aside the sale confirmed to them, accepted from the commissioner the money paid and notes executed by them to him required by the decree of sale, they were not entitled, and should not be permitted, to prosecute this writ. To the hearing of the motion appellants object because no leave of court was applied for or granted.

[1-4] Differently stated, the proposition relied on as warranting dismissal is that, as appellants accepted the benefit of the decree annulling the sale confirmed to them by receiving from the commissioner the money paid and notes executed by them, they waived the right to obtain and prosecute an appeal from the later decree confirming the sale to the appellee. The leave without which it is said the motion cannot be allowed or entertained may not always be essential. Where a meritorious cause for the dismissal of an appellate process exists, a motion therefor can be made at any time when not directly or impliedly prohibited by statute or some rule of law. Our statute, section 26, c. 135, Code 1918, as amended by Chapter 69, Acts 1915 (Code Supp. 1918, c. 135, § 26 [sec. 5006]), however, seems to require leave and notice of a motion to dismiss an appeal for cause, as well as for a motion to affirm or reverse the decree or judgment complained of. Whether it does or not as applied to the situation here disclosed ceases to be important, if, admitting the fact to be as stated by appellee, but not conceding the conclusion based on that fact, and according to the motion the same consideration and force it would justly be entitled to had leave been granted, it nevertheless appears that upon a full hearing upon the merits of the cause the fact relied on cannot avail to dismiss the appeal.

Have the matters urged by appellee the preclusive force and effect attributed to them? That is, does the acceptance of the money paid and the notes executed by appellants after the decree setting aside the sale confirmed to them deprive them of the right to prosecute this appeal? The answer to the question stated depends upon whether or not the acceptance was voluntary or inconsistent with a claim of right to appeal from another portion of the decree. The general rule is that a party who enforces or otherwise accepts the benefit of a judgment, order or decree cannot afterward ask to have it reviewed for error or deny the authority which

granted it. *McKain v. Mullen*, 65 W. Va. 558, 64 S. E. 829, 29 L. R. A. (N. S.) 1; *Bright v. Mollohan*, 75 W. Va. 116, 83 S. E. 298; *Marshall v. McDermitt*, 79 W. Va. 245, 90 S. E. 830, L. R. A. 1917C, 883; 3 C. J. § 552. In *McKain v. Mullen*, cited, 65 W. Va. p. 562, 64 S. E. 831, 29 L. R. A. (N. S.) 1, the basis of the rule is thus stated:

"A person who does a positive act, which according to its natural import is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it." 29 Am. & Eng. Enc. of Law (2d Ed.) 1103. It is this principle of acquiescence and waiver which gives existence to the general rule we have quoted. True, the law favors appeal. The act of waiver must be clear and decisive. And it has been authoritatively said that 'no waiver or release of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring in review.' *Embry v. Palmer*, 107 U. S. 8 [2 Sup. Ct. 25, 27 L. Ed. 346]."

A similar exception to or limitation upon the rule is recognized in *Bright v. Mollohan*, cited, 75 W. Va. 116, 83 S. E. 298, point 3 syllabus, where it is said:

"A party availing himself of a decree as favorable to him cannot appeal from the decree wherein it is not favorable to him, if his acceptance of the benefit on the one hand is totally inconsistent with appeal on the other."

And in 3 C. J. § 552, the same exception is noted:

"The rule does not apply * * * where the parts of the judgment or decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another, * * * or in other cases in which the acceptance of the benefit or partial enforcement of the judgment is not inconsistent with an appeal and reversal." Notes 25 and 27, and cases cited.

Still another form of exception to the rule is applied in *Gay v. Householder*, 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914C, 297. And where the performance of a decree is involuntary, the right of appeal is not affected. *Schaeffer v. Ardery*, 238 Ill. 557, 87 N. E. 343; 3 C. J. § 549.

Here the acceptance under protest of the money paid and notes executed was not such conduct as is inconsistent with a claim of right to reverse the decree. The portion of the decree directing their return is clearly separate and independent from that part of the decree which totally deprives appellants of all their rights under the sale confirmed to them, and the acceptance of the one at the direction of the court cannot reasonably be construed into a waiver of their right to appeal the other. The so-called "benefit" exist-

ed more in name than in fact, for appellants did not desire the return of their advances, but claimed full right in and to the property sold, and, being under protest, their acceptance cannot be said to have been voluntary. Provins, Ladone, and Ladone not only protested against the receipt of the money and notes before accepting them, but on the commissioner, who pressed upon them for his own protection performance of the terms of the decree setting aside the former confirmatory decree, served the notice which we quote:

"To John L. Hatfield, Special Commissioner: We accept the check and notes for the purchase money of the 22½ acres of land, which you sold us as special commissioner, in the suit of Roscoe Eakin v. Marion B. F. Eakin et al., in compliance with the decree entered in the above styled cause, setting aside the sale and confirmation thereof to us, and directing you to return to us the said cash payment and the notes which were executed for deferred payments. But we further notify you that we stand ready, willing and anxious to repay same to you and fully comply with the terms of the decree entered in the above styled cause, confirming the sale of said property to us, if the appellate court shall so direct. This the 9th day of May, 1918. [Signed]."

From these circumstances we cannot say that appellants' acceptance of the money and notes was voluntary or such an expression of full acquiescence in the decree as to amount to a waiver of their rights to an appeal and review of the case. This question, therefore, must be answered in favor of appellants.

[5] The next question for decision is whether appellants can now have, or are entitled to have annulled or held for naught, first, the decree setting aside the sale confirmed to them, and, second, the decree confirming the sale to appellee. The important point to note and bear constantly in mind is that this essentially is a controversy between purchasers of the same property sold at a judicial sale, neither of whom originally was and is not now a party to the suit, though under our decisions they are now properly here presenting and defending their rights in respect of the property. The purchaser at a judicial sale which has been confirmed has acquired such a fixed interest in the property sold as entitles him to appeal to a higher tribunal to protect his rights against an improper setting aside of such sale, at least where, as here, the resale has been made and confirmed by the court. *Kable v. Mitchell*, 9 W. Va. 492; *Childs v. Hurd*, 25 W. Va. 530; *Bank v. Jarvis*, 26 W. Va. 785; *Childers v. Loudin*, 51 W. Va. 559, 563, 42 S. E. 637. No other person is complaining, and none are interested in the result of this appeal except the infants thereby affected; and infants are bound by a judicial sale of their lands, when free of fraud, to the same extent and with like effect as adults, except

when and as provided otherwise by law. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262; *Ammons v. Ammons*, 50 W. Va. 390, 400, 40 S. E. 490; *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; *Litton v. Flanary*, 116 Va. 710, 82 S. E. 692; section 7, c. 132, *Barnes' Code* 1918 (Code 1913, c. 132, § 7 [sec. 4911]).

So that, as remarked, this controversy is limited to an investigation respecting the rights of the purchasers under a decree of sale of the land, the sales being made upon the same terms and conditions, save the consideration to be paid therefor, and each being confirmed. *Hess Coal & Coke Company* at the time of its purchase is presumed to have known what the record revealed as to the prior sale to Provins, Ladone, and Ladone. With this simplification of the issues there is presented for solution the original question as to the substantial rights of the parties involved.

[6, 7] There is a wide difference between the court's power of control over a sale before and after confirmation. *Trimble v. Herold*, 20 W. Va. 602, 612; *Coles v. Coles*, 83 Va. 525, 5 S. E. 673; *Todd v. Gallego Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Insurance Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108. A bid, though accepted by the commissioner conducting the sale, does not become a contract until reported to and confirmed by the court. Up to that time it is merely an offer to buy; but as an offer it becomes binding upon the bidder when accepted and confirmed by the court, and may be enforced against him. *Stout v. Philippi M. & M. Co.*, 41 W. Va. 339, 23 S. E. 571; 56 Am. St. Rep. 843; *Lowman v. Funkhouser*, 78 W. Va. 742, 90 S. E. 340; *Richardson v. Jones*, 106 Va. 540, 56 S. E. 343. Until then the right of the purchaser is inchoate; the sale is an incomplete bargain, merely an offer which the court may or may not accept as circumstances and conditions may require. That is the stage at which the court may open anew the bidding upon an advanced offer, substantial and made in good faith. But even at this stage it is always discretionary with a court whether it will confirm a sale, though made and complied with in all respects as required by its decree, or set it aside and direct a resale. Whether a court will confirm must depend in great measure on the circumstances in each case, abuse of the discretion when effecting inequities being subject to review by the appellate court. *Lowman v. Funkhouser*, supra; 8 Enc. Dig. Va. & W. Va. Rep. 722, 723.

[8, 9] But after it has been approved and confirmed by the court, thus completing the contract, it can be set aside only for good cause. It is then not a matter of discretion with the court, but some special ground must be laid, such as fraud, collusion, accident, mistake, misconduct upon the part

of the purchaser or some other person connected with the sale, or such other cause as would warrant relief in equity had the sale been by the parties interested instead of by the court. *Berlin v. Melhorn*, 75 Va. 639; *Langyher v. Patterson*, 77 Va. 470; *Todd v. Gallego Mfg. Co.*, 84 Va. 586, 5 S. E. 676; *Insurance Co. v. Cottrell*, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108; *Allison v. Allison*, 88 Va. 328, 13 S. E. 549; *Syndicate v. Johnson*, 100 Va. 774, 42 S. E. 995; *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391; 16 R. C. L. 100. Public policy and fair dealing alike demand protection to purchasers at judicial sales, when they have complied with the terms prescribed by the decree and the sale has been confirmed.

The importance which attaches to the confirmation of a judicial sale is shown by the rights and duties which are the purchaser's from that date. After confirmation it is an executed contract, and, if not tainted by fraud or otherwise vitiated by other wrongful acts or conduct participated in by the bidder, such confirmation relates to, and vests title in him from, the date of the sale. *Taylor v. Cooper*, 37 Va. 317, 34 Am. Dec. 737; *Kable v. Mitchell*, 9 W. Va. 492; *Donahue v. Fackler*, 21 W. Va. 124; *Childs v. Hurd*, 25 W. Va. 530, 535; *Cale's Adm'r v. Shaw*, 33 W. Va. 299, 10 S. E. 637; *Stout v. Philippi M. & M. Co.*, 41 W. Va. 339, 350, 23 S. E. 571, 56 Am. St. Rep. 843. See also *Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016. Not only does he get title upon confirmation, but ordinarily he thereby becomes entitled to possession of the property sold. *Hudgins v. Marchant & Co.*, 69 Va. 177; *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. 614. See, also, *Childs v. Hurd*, supra, 25 W. Va. p. 535. And, as said before, when the offer of the bidder is accepted and confirmed, it may be enforced against him.

[10-12] In this case the inducement prompting the court to set aside a sale which it had already confirmed was the upset bid of \$21,500 offered by Robert E. Guy, an advance of \$1,137.33 over the price at which it had been sold to appellants. But the offer of a higher bid alone is generally held not to be one of the substantial reasons for which a sale will be set aside after it has been confirmed. *Berlin v. Melhorn*, supra; *Langyher v. Patterson*, supra; *Todd v. Gallego Mfg. Co.*, supra, 84 Va. p. 590, 5 S. E. 676; *Allison v. Allison*, supra; *Syndicate v. Johnson*, supra; *Morrison v. Burnette*, supra; 16 R. C. L. 100. See, also, *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 367, 12 Sup. Ct. 887, 36 L. Ed. 732; *Watkins v. Jones*, 107 Va. 6, 57 S. E. 608. There is an unusual analogy between the facts of the case of *Berlin v. Melhorn*, just cited, and the facts of the case before us. Several resales of the property had been made and for one cause or another had not been confirmed, except the last sale which was con-

firmed; but at the same term the decree of confirmation was set aside and a resale ordered, but not confirmed. This ruling of the Virginia court is cited, approved, or followed and applied in numerous later decisions of that court, heretofore cited, and in *Nevada Nickel Syndicate v. National Nickel Co. (C. C.)* 103 Fed. 391, 398, and in *Morrison v. Burnette*, 154 Fed. 617, 83 C. C. A. 391.

It must be admitted that the result reached on this question is not consistent with certain statements in *Bank v. Jarvis*, 26 W. Va. 785, and 28 W. Va. 805, 811, where this court sustained a decree setting aside a prior decree confirming a sale and ordering a resale. This was done on two grounds: (1) Because "the rule in this country seems to be that all decrees are in fieri and in the breast of the court and subject to its absolute control, until after the end of the term; that is, that it does not properly become a decree until the term ends." (2) Because it appeared to the court "that the land had been sold at an inadequate price * * * shown by the best possible evidence and in the most conclusive manner by the upset bid for an advance price of more than 20 per cent., * * * of itself sufficient to set aside the confirmation and order a resale. *Kable v. Mitchell*, 9 W. Va. 493."

With respect to the first ground, it is true that all decrees are in the breast of the court until the end of the term; but that does not mean that they may be set aside except for good cause, and it is generally the rule that an advance bid is not such good cause. The case of *Thompson v. Land & Coal Co.*, 77 W. Va. 782, 88 S. E. 1040, is an example of good cause sufficient to justify setting aside a confirmatory decree, for there the first decree "directing a sale of an undivided half interest, had been made through oversight or inadvertence," where "the entire interest in the tract should have been sold."

With regard to the second ground, the court squarely states that an inadequate price evidenced by an advance bid is of itself sufficient to set aside a confirmatory decree, but cites to support that holding only the case of *Kable v. Mitchell*, 9 W. Va. 493, where, because of an advance bid, the sale was set aside before, not after, confirmation, and hence could not be an authority to support that decision. It is the only authority cited in the case of *Bank v. Jarvis*, supra, to support its holding, and, since in that respect it is contra to the generally accepted view, it must be overruled to that extent.

True, as just stated, where the sale is yet inchoate and unconfirmed, it is the rule in this state that, if such sale appears from the tender of a properly secured upset bid to be at an inadequate price, it will be set aside and a resale ordered. *Kable v. Mitch-*

ell, *supra*; *Gillmor v. Rinehart*, 73 W. Va. 779, 81 S. E. 549. But reason, principle, and public policy require that some character of finality be given to confirmed sales, and that they be set aside only for some good cause, other than the offer of a higher bid, clearly set forth in the decree. Otherwise such sales will assume an inconclusive and unstable character, and bona fide purchasers will be deterred from bidding. The interests of the owner are protected by permitting resale on upset bids tendered before confirmation, when sufficient to show a substantial inadequacy of price. In Virginia, however, the courts refuse to set aside sales solely upon upset bids of 10 per cent. advance, even if tendered before confirmation. *Moore v. Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882; *Howell v. Morien*, 109 Va. 200, 63 S. E. 1073; *Hardy v. Coley*, 114 Va. 570, 77 S. E. 458; *Litton v. Flanary*, 116 Va. 710, 82 S. E. 692. See, also, note, Ann. Cas. 1914D, 3. Likewise, according to the rule in this state respecting unconfirmed sales as laid down in the two cases cited above, the amount of advance required to warrant setting aside a sale depends upon the facts in each case.

The mere phrase, "good cause appearing," contained in a decree annulling a prior confirmation decree, cannot be accorded the weight contended for by appellee. The indefinite recital means nothing, and an appellate court cannot lift the veil to see what it conceals. If good cause existed, that is, such cause as the decisions recognize and enforce as sufficient to vacate such a decree, as fraud, accident, mistake, the decree should have disclosed it in the interest of fairness and justice. Such matters ought not be left doubtful, uncertain, or conjectural. The phrase, it is said or implied in argument, was inserted to refer to what had occurred at the bar of the court and in the presence of the judge during the progress of the hearing of the cause before and at the time the sale was made to the appellee. So far as divulged, there appears nothing deserving censure or warranting the action taken in depriving appellants of the benefits attributable to the purchase; nothing to show bad faith, fraud, mistake, or other conduct recognized as lawfully justifying such action. The infants concerned are alike the wards of all courts, appellate and circuit, and an examination is made with regard to this duty. But as said already, protection of their interests does not authorize the punishment of another against whom no charge of wrongful conduct is preferred, or, if preferred, sustained.

Acting upon the faith of the decree ratifying and approving the sale to appellants and undisturbed for nearly two weeks thereafter, E. M. Everly in the meantime inno-

cently acquired rights disclosed by him in answer to the petition of Guy and insisted on by him in court at the hearing upon the petition, knowledge of which appellee must have had then and subsequently. The attempt to deprive Everly and appellants of these rights so acquired in the manner proposed by appellee, itself the owner or operator of coal lands in the same county and perhaps near the land in controversy, and not prevented from bidding earlier so far as appears, does not recommend the course pursued by it, when to do so may work serious results to others relying on rights lawfully vested in them by judicial decree.

Hence it follows that the rights of the appellee are clearly subordinate to, and must yield to, those of the appellants, Provins, Ladone, and Ladone. As other questions raised by counsel cannot affect the result in this or any similar case, they may be dismissed without further discussion. The decrees complained of our order will reverse and hold for naught upon appellants' motion, and remand the cause, with direction to reinstate and reconfirm the sale to them upon the repayment of the cash consideration and the redelivery of the notes for the deferred payments.

(83 W. Va. 503)

HUFFMAN v. MANLEY. (No. 3596.)

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** ⇨122—**EVIDENCE** ⇨423(8)—**ACCOMMODATION MAKERS—COSURETIES—PRESUMPTION.**

As between accommodation makers of a promissory note the presumption is that they are cosureties, and as such liable to contribution to one of their number discharging the obligation, but this presumption may be rebutted by parol evidence showing that the one last signing was and is a surety for the prior accommodation makers, and not their cosurety.

2. **PRINCIPAL AND SURETY** ⇨191—**IMPLIED AUTHORITY OF PRINCIPAL.**

If one sign a note as surety and intrust it to his principal, he thereby gives the latter implied authority to obtain either additional sureties or guarantors indefinitely until the note is fairly launched in the market as a security.

3. **PRINCIPAL AND SURETY** ⇨194(1)—**STIPULATION AGAINST CONTRIBUTION.**

One who signs as surety on such note may stipulate at the time of entering into the obligation that he will not be liable for contribution with other sureties who signed before him.

4. **PRINCIPAL AND SURETY** ⇨191—**STIPULATION—EXTENT OF SURETYSHIP.**

One who thus signs such a note, at the request of the principal debtor, to enable him to

discount it, may, without the knowledge of the prior surety, and without any agreement or understanding with him, stipulate with the principal debtor that he signs only as surety for the prior parties.

5. PRINCIPAL AND SURETY — 191—STIPULATION BY SURETY—CONSTRUCTION—PAROL EVIDENCE.

Such stipulation need not be in writing, and parol evidence is admissible to show an express contract to that effect, or such contract may be implied from facts and circumstances shown.

Appeal from Circuit Court, Marion County.

Suit by Nora Huffman against Charles E. Manley and others. Decree for defendant Manley, dismissing the bill, and plaintiff appeals. Affirmed.

James A. Meredith and M. W. Ogden, both of Fairmont, for appellant.

Harry Shaw, of Fairmont, for appellee.

RITZ, J. Plaintiff brought this suit to compel contribution from the defendant Charles E. Manley upon the contention that he was a cosurety with her upon a note executed by her husband, herself, A. A. Hamilton, and the defendant Manley to Allison S. Fleming. It appears that on the 9th of December, 1910, D. Straud Huffman executed his note for \$1,000 to Allison S. Fleming. The plaintiff, who is his wife, also signed this note as likewise did the defendant A. A. Hamilton and the defendant Charles E. Manley. So far as the face of the paper is concerned they are all makers, and their signatures to the note are in the order above mentioned. The plaintiff's contention is that in fact and in truth D. Straud Huffman is the principal and the other three parties are his sureties, while the contention of the defendant Manley is that so far as he is concerned Huffman and his wife are the principals, and he and Hamilton are cosureties for them. Huffman and Hamilton are insolvent. A judgment being obtained upon the note against all four of the parties, Mrs. Huffman was compelled to pay it, and brought this suit alleging the insolvency of her husband and of Hamilton, and asking that Manley be compelled to contribute one-half of the amount paid by her. The circuit court dismissed her bill, finding that Manley was not her cosurety, but was a surety for her and her husband.

The facts appear without substantial conflict to be that Huffman procured this \$1,000 for his own purposes, and that his wife was not a beneficiary therein; that she signed the note simply as surety to assist him in procuring the money, and that he told her at the time she signed it that Hamilton and Manley would also become sureties; that he then took the note to Hamilton and Manley, and upon the representation that he and his wife were procuring this \$1,000 to make some repairs and additions to their dwelling Hamilton and

Manley signed it as sureties for Huffman and his wife. Huffman denies, of course, that he made such representations to Manley and Hamilton, but it satisfactorily appears from the evidence that Manley refused to become a surety for Huffman alone, and the same appears from the testimony of Hamilton. It is true, Mrs. Huffman knew nothing about the arrangements that her husband had with Hamilton and Manley, nor did Hamilton and Manley have any understanding or agreement with Mrs. Huffman as to the manner in which they should be bound upon the note, whether as cosureties with her, or as sureties for her and her husband. The contention is made by the appellant that, inasmuch as Huffman is shown to be the principal in this transaction and the beneficiary thereof, the other three parties to the note, while they appear as makers, must be cosureties, and are liable to contribution to the one discharging the obligation; while the contention of the appellee is that it may be true that Mrs. Huffman was only a surety for her husband as between them, but so far as he is concerned she and her husband were the principals; that his contract of suretyship was only to become surety for the husband and wife, and not for the husband alone. The appellant contends that this situation not appearing from the face of the paper, it cannot be shown in the absence of an agreement to which she was a party.

[1] It is very well settled that where parties execute a note like this they are prima facie joint makers, but as between them they may show what the real understanding was, and what their real relation is. Of course, so far as the holder of the note is concerned, unless he discounts it with full knowledge and with the understanding that some are sureties for the others, they are all joint makers and equally liable. This proposition is not controverted. In fact both of the parties to this suit are put to the necessity of introducing evidence allunde to show that they are sureties, inasmuch as the face of the paper would make them both principals.

[2-5] But does the fact that Mrs. Huffman was, as between her and her husband, only surety necessarily make her a cosurety with Manley? There is no reason why an accommodation maker on a note cannot enter into an agreement with the principal to fix his liability in any way that he chooses, or that they may agree upon. Prima facie when it is shown, as it is shown here, that there was only one party principally liable for the debt, the others are cosureties, but this presumption may be overcome by proving what the real contract was. Brant on Suretyship and Guaranty, § 291; 21 R. C. L. p. 948; 32 Cyc. 18; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247, and note; Singer Mfg. Co. v. Bennett, 28 W. Va. 16; Harrison v. Lane, 5 Leigh (Va.) 414, 27 Am. Dec. 607

But it is contended by Mrs. Huffman that, even though Manley did sign his name to this note with the understanding that he was only surety for herself and her husband, instead of being a cosurety with her for her husband, she, not being a party to that understanding and agreement, could not be bound or affected thereby. This contention is not tenable. When Manley was asked by Huffman to sign his name to this note as surety he had a right to enter into an agreement with the party who had the note as to the nature of the obligation he was assuming. Mrs. Huffman signed her name to the paper and turned it over to her husband. She put it in his power and conferred upon him authority to get such other or additional sureties as might be necessary, or that he might be advised would be necessary in order to procure the money upon the note, and it necessarily follows that he could make such contracts with the parties so becoming surety as would enable him to procure their signatures to the note. If Mrs. Huffman desired to prevent herself from becoming liable in any other way than as cosurety with Hamilton and Manley, she should not have intrusted her husband with this paper. She having signed the paper, it devolves upon her, if she would limit her liability in the way she now seeks to do, to see that the parties whose names were sought and procured signed it as cosureties with her, in accordance with her understanding with her husband. She was the one who first signed this paper and put it in the power of her husband by reason of having her signature thereon to procure the signatures of the other two parties. One of them declined to sign the paper as surety for her husband. While she did not know this, that fact can make no difference so far as her relation to the note was concerned. Her husband might have taken this note and procured its discount without procuring any other signatures after her own thereon, and she would be bound unless she could show that the party taking the note knew that she was not to be bound unless other sureties joined her thereon. Instead of doing this the party beneficially interested procured others to become surety for him and his wife, instead of discounting the note. Suppose Manley in this case, instead of becoming surety, had discounted this note himself, Mrs. Huffman could not say that she signed this note with the understanding that Manley was to become surety, and therefore that she is not bound thereon except as his cosurety, unless she could say that he had full knowledge of such an understanding. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; 32 Cyc. 18; *Craythorne v. Swinburne*, 14 Vesey, Jr., 160; *Robertson v. Deatherage*, 82 Ill. 511; *Bowser v. Rendell*, 31 Ind. 128; *Bobbit v. Shryer*, 70 Ind. 513; *Baldwin v. Fleming*, 90 Ind. 177; *Houck v. Graham*, 123 Ind. 277, 24 N. E. 113; *Wright*

v. Garlinghouse, 27 Barb. (N. Y.) 474; *Oldham v. Broom*, 28 Ohio St. 41; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345; *Adams v. Flanagan*, 36 Vt. 400; *Sherman v. Black*, 49 Vt. 198; *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Goetchius v. Calkins*, 46 Mich. 328, 9 N. W. 436; *Hunt v. Chambliss*, 7 Smedes & M. (Miss.) 532; *Chapman v. Garber*, 46 Neb. 16, 64 N. W. 362.

Perceiving no error in the decree complained of, the same will be affirmed.

(83 W. Va. 556)

STATE v. CRAWFORD. (No. 3264.)

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)

(Syllabus by the Court.)

1. CRIMINAL LAW §576(9) — DISCHARGE FROM PROSECUTION—TERMS OF COURT.

Under section 25 of chapter 159 of the Code 1913 (sec. 5601), the third unexcused term after the one at which an indictment for a felony was found is countable for the accused on his motion for a discharge from prosecution, notwithstanding lack of termination thereof at the date of the entry of a nolle prosequi setting him at liberty.

2. CRIMINAL LAW §178—WANT OF PROSECUTION—DISCHARGE.

One in whom such right has so vested is entitled to a discharge from prosecution on a second indictment for the same offense, returned several years after the vesting thereof; such dismissal and reindictment being in contravention of the spirit and purpose of the statute.

3. CRIMINAL LAW §1187—REFUSAL TO DISCHARGE DEFENDANT — CONVICTION — REFUSAL.

If, in such case, the motion of the accused, for his discharge, fully sustained by the record and evidence adduced, has been overruled, and he put upon trial and convicted, the judgment will be reversed, and the verdict set aside, on a writ of error, and the appellate court, rendering such judgment as the trial court should have rendered, will sustain the motion and forever discharge the accused from prosecution for the offense so charged.

(Additional Syllabus by Editorial Staff.)

4. STATUTES §181(2) — CONSTRUCTION—VALIDITY.

Statutes must be so construed as to effectuate, and not to defeat, the legislative intent.

5. CRIMINAL LAW §178—NOLLE PROSEQUI—EFFECT.

A nolle prosequi does not preclude a reindictment.

6. CRIMINAL LAW §178—DISMISSAL—REINDICTMENT.

By dismissal before right of discharge vested under Code 1913, c. 159, § 25 (sec. 5601), upon expiration of third unexcused term without

prosecution, the state may always save its right to prosecute on a new indictment.

Error to Circuit Court, Mingo County.

James Crawford was convicted of voluntary manslaughter, his motions for new trial and for a discharge were overruled, and he brings error. Reversed, and defendant discharged.

Goodykoontz & Scherr, of Williamson, and Marcum & Marcum, of Huntington, for plaintiff in error.

E. T. England, Atty. Gen., Henry A. Nolte, Asst. Atty. Gen., and B. Randolph Bias, of Williamson, for the State.

POFFENBARGER, J. If the defense underlying the first assignment of error on this writ is well founded and fully established, there will be no occasion for consideration of any of the others. On a second indictment charging the murder alleged in the first, the accused moved the court for a discharge on the ground of detention without trial, under the former indictment, for such a period of time as confers right of discharge from the offense. The court having overruled his motion, he entered a plea of not guilty and was convicted of voluntary manslaughter. After having unsuccessfully moved for a new trial, he renewed his motion for discharge, which the court overruled, and sentenced him to confinement in the penitentiary for a period of three years.

The identity of the offenses charged in the two indictments is not questioned. Each of them charges James Crawford with the murder of Lewis Rutherford, and the identities of these persons and the homicide averred, respectively, are proved by the oath of the prosecuting attorney. They differ only as to the date of the homicide, but the allegation thereof is an immaterial one.

[1, 2] The motion is founded upon section 25 of chapter 159 of the Code (sec. 5601), reading as follows:

"Every person charged with felony, and remanded to a circuit court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such court, after the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict."

Before the end of the third term of the criminal court of Mingo county after the one at which the first indictment was found, a nolle prosequi was entered, and the principal inquiry is whether that term can be

counted in favor of the accused; continuances having occurred on the motion of the state at the other two terms. That indictment was found at the January term, 1911. In that term there was a continuance on the motion of the accused until April 11, 1911. At the April and July terms, 1911, there were continuances of the case on motions of the state. At the next term, the third after the date of the indictment, the nolle prosequi was entered. At the January term, 1918, the new indictment was returned. On the motion for discharge the accused proved his readiness for trial at the April, July, and October terms. Presumptively the state was unable to prove facts applying the exceptions prescribed by the statute relied upon, so as to deprive the accused of the benefit of any of the terms, for it made no effort to do so. It merely denies his right to count the October term, 1911, because he was not held for trial until it ended.

Whether such a term is to be counted seems never to have been a subject of inquiry in this court or any reported Virginia decision. Upon the legal fiction that a term of court is a single day, the first day thereof, and the tendency of the interpretation urged by the accused to defeat the ends of justice and work a perversion of the statute, it was held in *Bell's Case*, 7 Grat. (Va.) 646, 8 Grat. (Va.) 600, that a person remanded for indictment and trial was not entitled to the benefit of the term in which he was remanded. It had occurred and become complete and full before the remand took place. Besides, a person might be committed for indictment at a date within the term so late as to render it impossible to afford an opportunity for such action. There is a similar holding in *Sands v. Com.*, 20 Grat. (Va.) 800. The first ground of these decisions would bring the October term, 1911, within the statute in this case; for it would make it complete before the entry of the nolle. The other argument is inapt, for there is, under the circumstances obtaining here, time for trial and a total lack of adventitious circumstances working surprise. The Virginia decisions just referred to have been incautiously interpreted as requiring full and complete terms. *Ex parte Anderson*, 81 W. Va. 171, 94 S. E. 31. This observation was made merely arguendo and is therefore simply an obiter dictum. The question here presented was not involved in the case at all, nor was it really considered.

[3] Application of the legal fiction invoked in *Bell's Case* might result in the loss of the third term to the state, if strictly adhered to, for the impossibility of holding a prisoner into the third term without passing the first day thereof is obvious, and, if that day makes the term complete for the purposes of the statute, he could not be held beyond it.

However this may be, the interpretation urged by the attorneys for the plaintiff in error accords with the spirit and purpose of the statute, while that adopted by the state is highly objectionable, because it tends to deprive the accused of the constitutional right for the enforcement and protection of which the statute was passed. When a prisoner has stood ready for trial through two full terms and substantially through the third one, and, no doubt, until the jury has been discharged and the opportunity for trial at that term annihilated, he has substantially performed all the statutory conditions requisite to his right of discharge. Although such a discharge is not the moral equivalent of an acquittal, and he may be guilty, his constitutional right to have his guilt or innocence determined by a trial within a reasonable time cannot be frittered away upon purely technical and unsubstantial ground. Nor is the legislative act designed to enforce such right to be interpreted otherwise than in accordance with the recognized rules of construction. To permit the state to enter a nolle prosequi within the third term and reindict for the same offense, and thus deprive the prisoner of the terms fully elapsed as well as the term about to end, would make it possible to keep the prisoner in custody or under recognizance for an indefinite period of time, on charges of a single offense, unless, perhaps, he could enforce a trial by the writ of mandamus. Such a construction as substantially tends to the defeat or undue limitation of the purpose of a statute is not permissible in any jurisdiction.

[4] That statutes shall be so construed as to effectuate the legislative purpose, not defeat it, is fundamental and all-pervasive in statutory construction. The remedy given by law for failure to accord a prompt trial to one charged with a felony is right to be discharged, not mandamus to obtain such a trial. Whether the latter would be adequate to due enforcement of the constitutional right is a legislative question, not a judicial one. The conclusion indicated by these observations harmonizes with the construction given the statute in *Ex parte Dudley*, 55 W. Va. 472, 47 S. E. 285, in which the state endeavored to prolong the detention by a retirement of the case from the docket. Of course,

there is a difference between a retirement from the docket and a setting at liberty by a nolle prosequi and between a reinstatement and reindictment, but the decision just mentioned emphasizes the inability of the state to prevent a discharge under the statute, or prolong the detention, by a retirement of the case, to do indirectly what it cannot do directly. To nolle and reindict is strictly analogous, and just as clearly contravenes the purpose of the statute. Judge Lynch and I expressed the opinion that it could not be done by an adjournment of the third term of court after the one at which the indictment was found, in *Denham v. Robinson*, 72 W. Va. 243, 255, 77 S. E. 970, 45 L. R. A. (N. S.) 1123, Ann. Cas. 1915D, 997.

[5, 6] That a nolle prosequi does not preclude reindictment is well settled, but that proposition is not inconsistent with the prisoner's right to a discharge by reason of unlawful detention, nor does it argue anything against legislative intent to enforce the constitutional right of speedy trial. By a dismissal before the right of discharge vests, the state may always save its right to prosecute on a new indictment, and, moreover, every accused person does not stand ready for trial, as did the prisoner in this case. That a dismissal and reindictment do not prevent the operation of the statute has been judicially declared in well-considered decisions in other jurisdictions. *Brooks v. People*, 88 Ill. 327; *Newlin v. People*, 221 Ill. 166, 77 N. E. 529; *People v. Helder*, 225 Ill. 347, 80 N. E. 291, 11 L. R. A. (N. S.) 257; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099. The effect of such a discharge depends upon the terms of the statute conferring the right. Ours clearly makes it absolute and equivalent to an acquittal, as regards further prosecution. *Adcock's Case*, 8 Grat. (Va.) 661, 681. For an elaborate review of the cases arising under the statutes of the several states, see the note to *Re Begerow*, 56 L. R. A. 513.

The motion for discharge should have been sustained, and this court, rendering such judgment as the trial court should have rendered, will sustain the motion and enter a judgment forever discharging the accused from prosecution for the offense charged in the two indictments set forth in the record.

MAYNARD et al. v. SHEIN et al.

(Supreme Court of Appeals of West Virginia.
March 4, 1919.)

*(Syllabus by the Court.)***1. EQUITY ⚡90—PARTIES—INTEREST.**

It is a general rule that all persons materially interested either legally or beneficially in the subject-matter involved in a suit, who are to be affected thereby, should be made parties thereto, either as plaintiffs or defendants.

2. CANCELLATION OF INSTRUMENTS ⚡35(1)—ACTION TO SET ASIDE DEED—PARTIES.

Where a suit is brought to set aside a deed because of lack of capacity of the grantor therein or for some other cause, and deeds of trust made by the grantee in such deed to secure certain of his debts, as clouds upon the title of the plaintiffs to the real estate conveyed thereby, and the trustees in such deeds of trust have only a bare power of sale thereunder, the beneficiaries therein are necessary parties to such suit.

3. APPEAL AND ERROR ⚡1177(3)—REVERSAL—WANT OF PROPER PARTIES.

Where a decree is entered without proper parties before the court, the same will be reversed, and the cause remanded, that proper parties may be impleaded.

4. DEPOSITIONS ⚡96—READING OF DEPOSITION—AMENDED BILL—NEW PARTIES.

If after depositions are taken and filed in a cause the plaintiff files an amended bill making new parties, such depositions previously taken cannot be read against the new defendants.

From Circuit Court, Mingo County.

Bill by Young Maynard and others against S. Shein and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded.

Wade H. Bronson and Goodykoontz & Scherr, all of Williamson, for appellants.

F. H. Evans and L. A. Sampselle, both of Williamson, for appellees.

RITZ, J. The plaintiffs, the widow and heirs at law of Martin Van Buren Maynard, deceased, brought this bill to set aside certain deeds made by the said Martin Van Buren Maynard in his lifetime, and deeds made subsequent thereto based thereon, as clouds upon the title of the plaintiffs to a tract of land situate in Mingo county.

It appears that in 1870 Richard Maynard and wife conveyed to their son Martin Van Buren Maynard a tract of land said to contain about 146 acres. As to whether or not a life estate was created by the deed in Martin Van Buren with remainder to the children of himself and his wife is a question of construction of the deed. There is a provision in it, however, authorizing the grantee

to sell and convey said tract of land to any of his brothers or sisters. The grantee in this deed, upon the theory that there was vested in him a fee simple absolute, sold and conveyed the mineral in the tract of land to Henry R. Phillips, trustee. Subsequently, upon the theory that he was not the owner of the fee simple, but had the right to sell and convey it to any of his brothers and sisters, he sold and conveyed the entire tract of land to his sister Harriett Simpkins, who in turn sold and conveyed it to the defendant S. Shein. After the death of Martin Van Buren Maynard this suit was instituted by his widow and children against Shein and his grantor for the purpose of setting aside the deed made by Maynard to Mrs. Simpkins, and by Mrs. Simpkins to Shein, as clouds upon their title to the land, their contention being that Martin Van Buren Maynard had no right to sell the land, he having only a life estate therein, but more particularly averring that he was not of sound mind and had not the capacity to make a deed at the time he made the deed to Mrs. Simpkins. The defendant Shein demurred to this bill, and, his demurrer being overruled, he filed his answer in which, among other things, he averred that since he became the owner of said tract of land he had laid off a part thereof into town lots, and had sold and conveyed a number of such town lots to various parties whose names he gives in the answer, and further that he had executed a deed of trust conveying said land to Wells Goodykoontz, trustee, to secure two certain notes to different parties whose names are given in the answer, and also that he had subsequently executed another deed of trust conveying said tract of land to Harry Scherr and Sigmund Freiberg, trustees, to secure the payment of certain other debts, the amounts thereof and the names of the holders thereof being set out in said deed of trust, a copy of which is exhibited with said answer. Upon this showing said defendant Shein contended that the court did not have jurisdiction to further proceed because of the absence of necessary parties. Plaintiffs thereupon amended their bill and made parties defendants some, if not all, of the grantees of Shein of the town lots, and also the trustees in the two deeds of trust above referred to, but did not make parties defendants the beneficiaries in said deeds of trust. To this bill the trustees demurred because of lack of necessary parties, contending that the beneficiaries in said deeds of trust should be before the court before any decree could be properly entered. This demurrer was overruled. Said trustees thereupon moved the court to suppress certain depositions which had been taken and filed in the case before they were made parties, and moved the court not to read said deposi-

tions to affect any rights which might have been conveyed to them in said deeds of trust, or of the beneficiaries in said deeds of trust. This motion was overruled, however, and upon a hearing the court entered a decree canceling the deed from Martin Van Buren Maynard to Mrs. Simpkins, from Mrs. Simpkins to Shein, the two deeds of trust above referred to, and the deeds from Shein to the various purchasers of lots above referred to, as clouds upon the title of the plaintiffs. From this decree the defendants Shein, Goodykoontz, trustee, and Scherr and Frelberg, trustees, prosecute this appeal.

[1-3] The only grounds of error urged by the appellants are that the court had no jurisdiction to enter a decree canceling the deeds of trust aforesaid, and the other deeds in the chain of title, upon which they are based, without having before it the beneficiaries in said deeds of trust, and that the court should have refused, upon the hearing of the cause, to read the depositions taken and filed before said trustees were made parties. It is well settled that all persons materially interested in the subject-matter involved in a suit who are to be affected by the proceedings and result of such suit should be made parties thereto. It is contrary to the policy of our law that the rights of parties should be materially affected or be entirely destroyed without giving to them an opportunity to be heard. *Poore v. Clark*, 2 Atk. 515; *Horton v. Bond*, 28 Grat. (Va.) 815; *Hill v. Proctor*, 10 W. Va. 59; *Burlew v. Quarrier*, 16 W. Va. 108; *Rexroad v. McQuain*, 24 W. Va. 32; *Sadler v. Taylor*, 49 W. Va. 104, 38 S. E. 583; *Gall v. Gall*, 50 W. Va. 523, 40 S. E. 380; *Bryan v. McCann*, 55 W. Va. 372, 47 S. E. 143; *Beckwith v. Laing*, 66 W. Va. 246, 66 S. E. 354; *Bragg v. Coal Co.*, 70 W. Va. 655, 74 S. E. 946. There can be no question but that the beneficiaries under the deed of trust referred to are interested in this real estate. They hold the same as a security for the payment of their debts. Neither is there any doubt but that their interests are affected by the decree entered. The deeds purporting to create the security to them are canceled and annulled, and this without their presence in court. There are some cases in which the beneficiaries in a deed of trust may not be necessary parties to a suit seeking to affect the interest created thereby, but this is only where the trustees

therein are given full power and authority to control the debts thereby secured, and to do whatever may be necessary to protect the rights of parties, as in the case of *Abney Barnes Co. v. Davy Pocahontas Coal Co. et al.*, decided at this term of this court, 98 S. E. 298. This is not that kind of a case, however. Here the deeds of trust conferred upon the trustees no title or interest in the debts, no right to control them, but simply the naked legal title, with a bare power to sell for the satisfaction of the debts secured. We are clearly of the opinion that it was error to enter the decree canceling these deeds of trust, or any other decree affecting the interest of the parties secured by these deeds, in their absence from the suit. This conclusion, under the authority of *Oil Co. v. Moore's devisees*, 58 W. Va. 540, 49 S. E. 449, and *Ralphsnyder v. Titus*, 63 W. Va. 469, 60 S. E. 494, results in the reversal of the decree complained of and the remand of the cause in order that proper parties may be brought before the court.

[4] The contention that the depositions read upon the hearing of this cause, taken before even the trustees were made parties to the suit, and without notice to them, should not have been considered, is likewise well taken. Every party interested in the result of the litigation is entitled to an opportunity to be present at every stage of it. These depositions, having been taken before the amended bill was filed, and before the trustees were brought into the case, should not have been read on the hearing over their protest. It was held in *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402, that depositions proving matters not in the original bill cannot be read in support of an amended bill subsequently filed. While it may be said that the matters alleged in the amended bill in this cause were the same as those alleged in the original bill, the parties were not the same, the interests to be affected were different. In *Jones v. Williams & Tomlinson*, 1 Wash. (Va.) 230, it was held that if, after answer filed and depositions taken, the plaintiff makes new parties, and files a new bill, the depositions previously taken cannot be read against the new defendants. So in this case we are of opinion that the depositions taken cannot be read against the parties made defendants since the taking of the same.

(88 W. Va. 553)

MATHENY v. JACKSON. (No. 3595.)(Supreme Court of Appeals of West Virginia.
March 4, 1919.)*(Syllabus by the Court.)***1. TAXATION §=734(7) — TAX SALE — MISDESCRIPTION IN ADVERTISEMENTS—EFFECT.**

Misdescription in a sheriff's advertisement of a tax sale of a town lot, by reference to it by the wrong number, will not vitiate the tax sale and deed.

2. TAXATION §=798—CANCELLATION OF TAX DEED—FRAUD.

A false statement in relation to the land actually purchased, made by the purchaser at a delinquent tax sale, to the former owner, who applies to him for the purpose of redeeming within the time allowed by law, and on the truth of which the former owner relies and permits the time of redemption to expire, constitutes a fraud entitling the former owner to a cancellation of the tax deed.

Appeal from Circuit Court, Wyoming County.

Suit by M. F. Matheny against Silas Jackson. From a judgment dismissing the bill, plaintiff appeals. Reversed and remanded, with instructions to enter decree for plaintiff on condition.

F. B. Shannon, of Pineville, for appellant.
Toler & Moran, of Mufflens, for appellee.

WILLIAMS, J. This suit was brought by M. F. Matheny against Silas Jackson to cancel at tax deed made to defendant on the 10th of January, 1917, by Will P. Cook, clerk of the county court of Wyoming county, for an undivided one-half interest in lot No. 23 in the town of Sizemore in said county, pursuant to a sheriff's sale, made the 13th of December, 1915, for delinquent taxes, assessed for the year 1913 in the name of Elizabeth Sturgill, plaintiff's grantor. Defendant answered, and depositions were taken and filed, pro and con. Upon the hearing, on the 16th of February, 1918, the court held plaintiff was not entitled to relief and dismissed his bill, and he has appealed.

[1] Two issues are raised, one of law and the other of fact. The issue of law is that the misdescription of the lot in the sheriff's advertisement of sale is fatal to the validity of the tax deed, it being described in the advertisement as lot No. 13, when, in fact, the lot returned delinquent and sold is No. 23. This point is not well taken. Sections 6 and 25 of chapter 31, Barnes' Code (Code 1913, c. 31, §§ 6, 25 (secs. 1064, 1084)), expressly provide that such a misdescription shall not affect the sale and deed. The following decisions settle this point: *Hamill v. Glover*, 74 W. Va. 152, 81 S. E. 970, and *Fleming v. Charnock*, 66 W. Va. 50, 66 S. E. 8, 18 Ann. Cas. 711.

[2] The issue of fact is that plaintiff applied to defendant, within the time allowed for redemption, for the purpose of redeeming his lot, and was misled by his false and fraudulent statement, on the truth of which plaintiff relied. Plaintiff testifies that, some time in November, he thinks about the 10th, 1913, he was in Pineville, and was then informed by Floyd Lusk that defendant had bought in plaintiff's lot at a tax sale, that plaintiff immediately went to see defendant for the purpose of redeeming it, and told him he understood he had bid in lot No. 23 in the town of Sizemore, or an interest therein and, if it was true, he wanted to redeem it, and defendant replied that he had made no such purchase, that he and some friends of his had made several purchases at the delinquent sale, but that plaintiff had no property in the list. This was within the time to redeem. Defendant admits plaintiff came to see him, but denies he told plaintiff that none of his property was in the list of properties he had purchased, because, he says, he did not then know who owned the lot. He swears plaintiff said to him, "I understand you have bid in some of my property," and witness replied that, if he had, he did not know it, and then got his receipts and looked over them, and told plaintiff he had bought nothing that was sold in his name, and further says plaintiff only asked about lots sold in his name, and that he did not know at the time of sale, and did not learn, until after the year of redemption had expired, that plaintiff owned lot No. 23. But defendant is contradicted and plaintiff supported by witness Floyd Lusk, who gave plaintiff the information about the sale. Lusk was the owner of lot No. 13, and says John Riley Sizemore had told him that defendant had bid in his (witness') lot, and got a copy of the paper containing a notice of the sale and showed it to witness, and that it was lot No. 18 that was advertised. Lusk was therefore especially interested in ascertaining if lot No. 13 had been sold and bid in by defendant, and says he went to him and asked him if he had bought his lot and defendant replied he had not. Witness says further that he was not sure he had all the tax receipts, and went the second time to ask defendant about his purchase, and says he replied, "It wasn't my lot at all, that it was Mike Matheny's," and further said something about Matheny's causing him to pay out a lot of money, and that he would like to get some of it back, or wanted a show to get some of it back. After witness had told plaintiff that defendant had bought his lot, he says plaintiff went immediately, directly across the street and into defendant's store. Defendant admits witness Lusk came to see him twice about the matter, and fixes the time of the second conversation after the time to redeem had expired, but says he does not remember the month or day. The time of this

second visit is very material, and, in regard to that matter, defendant is evidently mistaken, because he does not deny that plaintiff had come to see him about the lot, at the time fixed by plaintiff, which was within the time of redemption. It was evidently after both visits to defendant by witness Lusk that Lusk told plaintiff of the tax sale, for defendant admits he told Lusk that he "had found out it was Mike Matheny's lot and as it was (he) didn't care to stick Mike a little, that he had caused (him) to pay out a little money unnecessarily, (he) thought." And this, in substance, is what plaintiff and Lusk both swear the latter told the former on the day, and immediately before, he went to see defendant. Plaintiff says he relied on defendant's statement to him as being true and was misled by it, and allowed the year of redemption to expire before he ascertained the fact to be that his lot had been sold in the name of his grantor, Elizabeth Sturgill, for delinquent taxes of 1913, and a one-half interest therein purchased by defendant. This was a fraud upon plaintiff, entitling him to a cancellation of the tax deed. *James v. Piggett*, 70 W. Va. 435, 74 S. E. 667.

Plaintiff, by his bill, tendered the amount of taxes, interest, and costs, and offers to pay the same. This, of course, he should do, it being admitted that the taxes, for which the lot was sold, were unpaid.

The decree will be reversed, and the cause remanded, with instructions to the lower court to enter a decree canceling the tax deed after payment has been made by plaintiff to defendant of the sum tendered, awarding costs to appellant both in this court and the court below.

(74 Va. 680)

TROTTER v. E. I. DU PONT DE NEMOURS & CO.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. PLEADING ⇨252(2)—AMENDED DECLARATION—EFFECT OF FORMER DECLARATION.

Where case was tried on the second amended declaration, which was intended as a substitute for the first two declarations, the case stood as though the first two declarations had not been filed, and allegations therein with reference to how accident happened did not bind plaintiff.

2. APPEAL AND ERROR ⇨806(2)—RULING ON DEMURRER TO EVIDENCE—REVIEW.

The trial court having sustained defendant's demurrer to plaintiff's evidence, the court on appeal will only consider whether a verdict for plaintiff, if found, would be set aside as without evidence to support it.

3. APPEAL AND ERROR ⇨927(5)—RULING ON DEMURRER TO EVIDENCE—REVIEW.

In determining whether demurrer to plaintiff's evidence was properly sustained, court on

appeal must admit the truth of plaintiff's evidence and all inferences therefrom, favorable to plaintiff, which the jury might have fairly drawn.

4. TRIAL ⇨139(1)—DEMURRER TO EVIDENCE.

If verdict for plaintiff would not have been set aside as without evidence to support it, demurrer to plaintiff's evidence should have been overruled.

5. MASTER AND SERVANT ⇨286(17)—NEGLIGENCE—QUESTION FOR JURY.

In action for injuries to plaintiff servant, due to falling of a scaffold which he was using in the course of his employment, and which had been erected by defendant master, question of defendant's negligence *held* for the jury.

6. MASTER AND SERVANT ⇨103(1)—NON-ASSIGNABLE DUTIES.

One of the nonassignable duties of the master is to use due care to furnish his servant with a reasonably safe place in which to work, and reasonably safe tools and utensils with which to work, and if he fails to do so he is liable to the servant for injuries proximately resulting from such failure.

7. MASTER AND SERVANT ⇨276(3)—PROXIMATE CAUSE OF INJURY—FAULTY CONSTRUCTION OF SCAFFOLD.

In action for injuries to plaintiff servant, due to falling of a scaffold which he was using in the course of his employment, and which had been erected by defendant master, *held*, under the evidence, that the faulty construction of the scaffold was the proximate cause of the injury.

8. MASTER AND SERVANT ⇨280—FAULTY CONSTRUCTION OF SCAFFOLD—ASSUMPTION OF RISK.

In action for injuries to plaintiff servant, due to falling of a scaffold which he was using in the course of his employment, and which had been erected by defendant master, *held*, under the evidence, that plaintiff did not assume the risk.

9. MASTER AND SERVANT ⇨217(7)—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

Plaintiff had the right to assume, when put to work on scaffold, that it was in a reasonably safe condition, and, if defect and danger therefrom was not so plain and clear that he must necessarily have been at fault in failing to observe it, he cannot be charged with knowledge of the defect on account of its obvious character.

Error to Circuit Court, Prince George County.

Action by Millard F. Trotter, Jr., against E. I. Du Pont de Nemours & Co. The trial court sustained a demurrer to plaintiff's evidence, and entered judgment for the defendant, and plaintiff brings error. Reversed.

Lassiter & Drewry, of Petersburg, for plaintiff in error.

Plummer & Bohannon, of Petersburg, for defendant in error.

BURKS, J. This action was brought by Trotter against the defendant to recover damages for injuries received by him by the fall of a scaffold, erected by the defendant, and which the plaintiff was using in the course of his employment as the servant of the defendant at the time the injury was inflicted. The defendant offered no evidence, but at the conclusion of the plaintiff's evidence demurred thereto. The trial court sustained the demurrer and entered judgment for the defendant, and to that judgment this writ of error was awarded.

On the oral argument in this court, counsel for the defendant abandoned the defense of the contributory negligence of the plaintiff, and relied upon the defenses (1) that the defendant was not guilty of any actionable negligence; (2) that, if it was negligent at all, its negligence was not the proximate cause of the injury complained of; and (3) that the plaintiff assumed the risk of the danger resulting in his injury.

[1] Before discussing these defenses, we will notice briefly the pleadings which have been made the subject of some discussion by counsel. The plaintiff filed a declaration containing three counts, to which the defendant demurred. Before the demurrer was passed upon, the plaintiff filed an amended declaration of three counts, to which the defendant also demurred. Before this demurrer was passed upon, the plaintiff filed a second amended declaration of three counts, to which the defendant also demurred. The trial court overruled the last-mentioned demurrer and the trial proceeded. The statement in the brief of counsel for the defendant in error is this:

"The second amended declaration, that upon which the case was tried, differs from the first two declarations, in that it omits certain allegations with reference to how the accident happened, which are found in the original and first amended declaration, and upon which allegations we submit the plaintiff in this case is bound. * * * These averments are omitted in the third declaration, but, as they are not stated differently, it is contended that the plaintiff is bound by the averments which he makes in the first and second declarations."

The contention cannot be sustained. The omission was doubtless made because counsel for the plaintiff foresaw that they could not be sustained by the evidence, and they did not wish to be hampered by their allegation. An examination and comparison of the declarations will show that the third declaration was intended as a substitute for the other two, and it is admitted by counsel for the defendant that the case was tried upon the third declaration. Under such circumstances, the case stood as though the first and second declarations had not been filed, so far as it related to the mere statement of facts, and did not affect the question of making a

new case or the statute of limitations. 31 Cyc. 465, and cases cited; *United States v. Gentry*, 119 Fed. 70, 55 C. C. A. 658. In *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450, it is said that, the original pleading being considered as abandoned, the adverse party cannot read it to the jury, or comment on it in his argument, unless he first offers it in evidence.

[2-4] As the defendant demurred to the plaintiff's evidence, no question about conflict of evidence arises; but we are only to consider whether or not we would set aside a verdict in favor of the plaintiff, as without evidence to support it, if one had been found by the jury, and, in so considering, we must admit the truth of the plaintiff's evidence and all inferences therefrom, favorable to the plaintiff, which the jury might have fairly drawn therefrom. If such a verdict would not have been set aside, the demurrer to the evidence should have been overruled.

Considering the case from this standpoint, the jury might have found that the plaintiff was employed by the defendant to do light electrical construction work in August, 1915; that prior to that time he had seven years' experience in that class of work; that from the time of his employment till the time of his injury he had done conduit work, similar to that in which he was engaged at the time of his injury; that he was familiar with the construction of scaffolds, and was not "scaffold scared"; that on April 18, 1916, the plaintiff was set to work by the defendant in erecting and placing conduits and conduitlets for the transmission of electric lights on one of the defendant's buildings then under construction; that these conduits and conduitlets were to be placed about 22 feet from the ground; that, in order to enable the plaintiff to do this work, the defendant had previously constructed a scaffold for the use of the plaintiff; that the scaffold at the point where the injury was inflicted was composed of an upright "ripping" about an inch thick and 3 or 4 inches wide, to which was nailed, with eight-penny nails, a piece of timber 2x4 inches thick, and about 3 feet long, the other end being fastened to a beam 6x8 inches running across the building, and upon this 2x4 piece of timber there was laid for a floor a single piece of timber 2 inches thick and about 10 or 12 inches wide; that the upright ripping extended 3 feet above the floor of the scaffold; that this scaffold was about 90 feet long and 12 feet above the concrete pavement below; that the place at which the plaintiff was injured was at the far end of the scaffold, near the end of the building; that at the other end of the scaffold the outside supports were timbers 2x4 inches, instead of plank 1x4 inches, and the floor of the scaffold consisted of two pieces of timber, instead of one, 2 inches thick and 10 or 12 inches wide; that this was a rush job, near

the completion of this class of work at defendant's plant, and the scaffold was built of old materials; that the plaintiff observed the scaffold when he went upon it; that he and another man had been on the scaffold at the same time, but not on the same section thereof at one time; that the scaffold was "absolutely an inadequately built scaffold," and "any ordinary man would have broken it under almost any circumstances"; that a 1x4 inch board, 12 feet long, would not withstand the vibration; that the plaintiff had been working on this job about two hours when he reached the far end of the scaffold described above, and, while attempting to insert a conduit in the conduit pipe, the conduit broke—an exceedingly unusual occurrence—and he staggered, or lost his balance, and reached out and took hold of the 1x4 plank above mentioned, and immediately the scaffold collapsed, in consequence of the breaking of said plank about 4 feet from the ground, and he was thrown down with the scaffold and received the injuries of which he complains.

It was earnestly insisted by the counsel for the defendant in error that the scaffold was strong enough to support two men as long as they were working on it, and that it only broke when the plaintiff caught it in falling. The plaintiff, while testifying on this subject, said that two men had been on the scaffold at the same time; but he distinctly states that they both were not on that section at the same time.

[5] If upon this evidence the jury had found that the defendant was negligent in the construction of the scaffold, we could not say that their finding was without evidence to support it.

[6, 7] It is one of the nonassignable duties of the master to use due care to furnish the servant a reasonably safe place in which to work, and reasonably safe tools and utensils with which to work, and if he fails to do so he is liable to the servant for injuries proximately resulting to such servant from such failure. It is insisted, however, that the defendant is not liable, even if the scaffold was negligently constructed, because such negligence, if any such there was, was not the proximate cause of the injury complained of. Many cases, from this and other jurisdictions, have been cited to show what is and what is not a proximate cause. It is always dangerous to attempt to give definitions, and this is especially true of the term "proximate cause"; and we shall not attempt it, nor shall we attempt any analysis of the cases on the subject in this and other jurisdictions, preferring that each case shall stand on its own circumstances and be decided on its own merits. There is not so much difficulty in declaring what is a proximate cause in the abstract as there is in applying the principle to the facts of particular cases. We concur in the observations of the Supreme Court of

Pennsylvania in *Yoders v. Amwell Township*, 172 Pa. 447, 33 Atl. 1017, 51 Am. St. Rep. 750, where it is said:

"Speculating on the doctrine of proximate and remote cause in supposed or hypothetical cases seems to have been a sort of intellectual recreation with text-writers on the subject, since the squib case in 2 W. Black. 893. With many, the rule laid down in *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653, would be criticized as lacking in scientific precision; but approximate certainty in the administration of justice, on evidence in an issue, is all we can hope to attain to. The same rule was, in substance, though in somewhat different language, adopted in many cases before *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653. In terse language, without leaving room for theorizing, where the evidence is conflicting and no fault is attributable to the plaintiff, it brings the jury at once to the ascertainment of the controlling fact: Was the consequence such as under the circumstances might and ought to have been foreseen and provided against? It eliminates all speculation as to the cause of the cause, which often is merely interesting, and aids not in determining just responsibility. As is said by Strong, J., in *Insurance Co. v. Boon*, 95 U. S. 130 [24 L. Ed. 395], the proximate cause is the dominant controlling one, and not those which are mere incidents."

In the case from which we have quoted, a horse was driven, in the nighttime, across a bridge upon which there was no handrail, and was stepped after he had safely crossed the bridge and gotten 14 feet beyond it. He then took fright and backed over the side of the bridge, causing the injury complained of. The court held that the lack of a proper handrail was the proximate cause of the injury. In arriving at this conclusion, the court announced several propositions which are stated in the headnote to 51 Am. St. Rep., supra, as follows:

"Township authorities are bound to know that a bridge may be crossed by a spirited horse in the nighttime, and that such horse may take fright; and if, by neglecting to place a guardrail upon such bridge, an injury results from the fright of such horse, their neglect is the proximate cause of the injury, and the township is liable therefor."

"Township authorities are bound to foresee, and reasonable provide against, common dangers to ordinary travel on the highway. The fright of a spirited horse, and that his conduct when in fright may be unreasoning, insane, and unlooked for, are common dangers, which should be expected. Such authorities cannot excuse their negligence in failing to erect a guardrail upon a bridge, or make it the remote cause of an injury, by asserting that they could not foresee a particular freak of conduct in a frightened horse."

"If township authorities neglect to place guardrails upon a bridge in the highway, and a horse drawing a vehicle passes safely over the bridge, and then, taking fright, backs the vehicle onto and off of the bridge over its side, thereby causing injury to its occupants,

such neglect is the proximate cause of the accident, and the township is liable therefor."

In *Standard Oil Co. v. Wakefield*, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792, it was held that—

"In order to excuse a party guilty of negligence on account of the intervening act of another, the intervening act must be the superseding or responsible cause of the injury. The liability is not averted if the act relied upon is one which might, in the natural or ordinary course, be anticipated, and defendant's negligence is an essential link in the chain of causation. In such cases defendant's negligence is the efficient and proximate cause of the injury."

There are many cases to the same effect. See monographic note, 36 Am. St. Rep. 807-852. The precise form of the injury need not have been foreseen. It is enough if, after the injury has been inflicted, it can be seen that it was a natural and probable result of the negligent act complained of.

"When the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind, the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act." 36 Am. St. Rep. 810, and cases cited.

We do not understand counsel for the defendant in error to controvert this proposition, but he insists that master cannot be held liable because its negligence, if any, was "merely a condition, as opposed to the efficient cause of the injury," to wit, the taking hold of the upright piece of timber by the plaintiff under the circumstances hereinbefore detailed. The weakness of the scaffold, as shown by the testimony of the expert, consisted in its inability to withstand vibration. His testimony on this subject was as follows:

"Then I would say, gentlemen, any responsible man that would erect a scaffold for a man to work on, that high from the ground—that it was absolutely an inadequately built scaffold. Now, if he had reversed his timbers and had a 2x4 upright with a 1x4 bracket—that 2x4, in the technical term of building is called a bracket—that would have held all of the weight, if it wasn't 3 feet long, that one man or two men would have put on it; but not with the vibration of 12 feet of 1x4 board; it is entirely inadequate; it don't make any difference how it was put up. I would say that any ordinary man would have broken it under almost any circumstances."

The scaffold was built for utility, not to walk on in the most careful and guarded manner; it may have been adequate for the latter purpose. The defendant knew that the work to be performed by the plaintiff was above his head, that he had to use a wrench to unscrew and tighten pipes for the purpose of inserting the conduitlet at the proper places, and that while doing so he had

to stand upon this scaffold. It also knew, or was chargeable with knowledge, of the character of work the plaintiff was called upon to perform. The plaintiff describes the work to be done as follows:

"You work conduits anywhere from 3-inch pipes down to half-inch, and, in doing this, you have to thread your own pipe, cut it, and handle it, and it requires quite a bit of strength to thread a 2½-inch pipe, or a 1½-inch pipe, or a 1-inch pipe; in fact, when you go to do it, you have to get up on your die and push down."

While the breaking of the conduitlet was a very unusual occurrence, and was not to be anticipated, still the work of the plaintiff, as described by him, would necessarily cause more or less vibration of the scaffold, and it should have been so constructed as to have withstood any amount of vibration to which it might reasonably have been expected it would have been subjected, and not so that "any ordinary man would have broken it under almost any circumstances." While the plaintiff was using a wrench to put in a conduitlet, the conduitlet broke, and an eyewitness testifies:

"I saw him lift his hands up, and he staggered a little bit, and he brought his hands down and caught hold of the board."

Again, he says he—

"just moved a little bit (indicating a few inches backwards), and put his hand back, and caught hold of the piece that was standing there, and it went over—broke."

Speaking of the situation of the plaintiff at the time of the accident, the same witness says:

"He was not staggering very much; he just staggered very little."

The plaintiff himself testifies:

"I lost my balance—rather, when the pipe broke, I was standing up like this; when the pipe broke, I just caught to that, and the pieces gave away, and I went down to the floor."

The upright piece, which the plaintiff caught hold of, did not break at or above the floor of the scaffold, but below the platform between 3 and 6 feet from the ground. The evidence does not show that the upright was grasped by the plaintiff with any degree of violence; on the contrary, both witnesses state that he "caught hold" of the piece, not that he grabbed hold of it. The taking hold of the piece of timber in this manner and under these circumstances did not supersede the negligence of the defendant in the manner of constructing the scaffold; for, as said in *Clinchfield Coal Corp. v. Ray*, 121 Va. 315, 93 S. E. 601:

"It is elementary that a cause, to be a superseding cause, must entirely supersede the operation of the negligence of the defendant, so that such cause alone, without the defendant's neg-

ligence contributing in the slightest degree thereto, in fact produced the injury."

Under these circumstances, we are of the opinion that the faulty construction of the scaffold was the proximate cause of the plaintiff's injury.

[8, 9] It is further claimed by the defendant that the plaintiff assumed the risk of the safe condition of the scaffold. This defense rests upon a rather slim foundation. The plaintiff was under no obligation to inspect the scaffold. He had the right to assume, when put to work on the scaffold, that it was in a reasonably safe condition; and if it is sought to charge him with knowledge of the defect on account of its obvious character, the defect and the danger therefrom must have been so unquestionably plain and clear that, if he did not see it, he must necessarily have been in fault. *Norfolk & W. R. Co. v. Cheatwood*, 103 Va. 358, 49 S. E. 489. This cannot be said of the plaintiff in this case. This scaffold was 90 feet long, and the plaintiff went upon it at the end farthest from where he was injured, and he noticed the construction of the scaffold when he went upon it. This was nearly 90 feet from the weak spot in the scaffold, which gave way and caused his injury. No complaint is made of the method of construction of the scaffold at the point where he entered upon it. Indeed, it seems to be conceded by the witnesses that, at that point, the scaffold was safely constructed; but, reading the evidence as a whole, it does not appear that the plaintiff either knew, or was chargeable with knowledge, of the weak construction at the point of the injury. We are of opinion that the risk was not assumed by the plaintiff.

Upon the whole case, we are of opinion that the trial court erred in sustaining the defendant's demurrer to the plaintiff's evidence, and for this error its judgment must be reversed; and this court, proceeding to enter such judgment as the trial court should have entered, will enter judgment in favor of the plaintiff against the defendant for the sum of \$10,000, with legal interest thereon from December 11, 1917, the date of the verdict, until payment, and for the costs.

Reversed.

(124 Va. 579)

GOODMAN v. GOODMAN.

Supreme Court of Appeals of Virginia. March 13, 1919.)

1. PARTITION §55(2)—ESTATES SUBJECT.

Code 1904, § 2582, authorizes a partition suit in equity between one claiming an undivided fourth by inheritance and another an undivided three-fourths, partly by inheritance and partly by purchase.

2. PARTITION §55(2)—PLEADING—TITLE.

It is not necessary in a bill for partition to make a formal disavowment of title, or any de-

raignment further than is necessary to show how parties became coparceners and entitled to partition.

3. PARTITION §55(2)—PLEADING.

The complainant in a partition suit must aver and prove that he occupies such a relation to defendant as entitles him to invoke equity jurisdiction.

4. PARTITION §56—EQUITY JURISDICTION—DISMISSAL.

If bill for partition shows that complainant occupies relation to defendant entitling him to invoke equity jurisdiction, and the answer denies it, then upon a hearing on bill and answer, either with or without a replication, bill will be dismissed.

5. PARTITION §56—JURISDICTION—COURTS OF EQUITY—PLEADING.

Although a suit for partition cannot be made a substitute for an action of ejectment, a defendant to a bill which states a good case for partition cannot defeat jurisdiction in equity merely by denying in toto and ab initio complainant's title and asserting in himself a title independent of and hostile to that under which complainant claims.

Appeal from Circuit Court, Hanover County.

Suit by Charles H. Goodman against John A. Goodman. Decree for defendant, and plaintiff appeals. Reversed and remanded.

Haw & Haw, of Richmond, for appellant.
W. Sydnor, of Richmond, for appellee.

KELLY, J. This suit in equity was brought by Charles H. Goodman against John A. Goodman, alleging that the complainant, as one of the heirs of Agnes Doyle, who married Benjamin Goodman, inherited an undivided fourth interest in the land described in the bill; that complainant's nephew, John A. Goodman, is the owner by inheritance and purchase of the other three-fourths undivided interest therein; and praying for a partition.

The defendant filed an answer to the bill, which, so far as material here, is as follows:

"The defendant states that he is the owner in fee, and is now in possession of, a tract of land lying in Henry magisterial district, Hanover county, Va., which is bounded on the north by the lands of W. Calvin Martin, east by the lands of L. J. Boze and Cornelius Mantlo, south by the lands of Peter A. Peace, and west by the lands of Robert L. Goodman and John Rosbach." (Same description as in the bill.) "And if this is the tract of land that the plaintiff claims 'an undivided one-fourth interest in,' this defendant positively denies that the plaintiff has any right, title, interest, or estate therein. And the defendant denies that the plaintiff is entitled to any portion of said land. And defendant denies each and every other allegation in said bill contained which has not been hereinbefore specially mentioned."

To this answer the complainant replied generally, and at a subsequent day the circuit court entered the decree from which this appeal was granted, and which, so far as it need be here set out, is as follows:

"This cause came on again this day to be heard upon the bill of the plaintiff, the answer thereto by the defendant, the replication thereto of the plaintiff, and on motion of the defendant to dismiss the plaintiff's bill for want of jurisdiction; and was argued by counsel. On consideration whereof, the court, being of opinion that upon the case as made out on the bill and answer, with general replication thereto, it is without jurisdiction to try this cause, doth so decide, and doth sustain said motion of the defendant; and doth adjudge, order, and decree that the bill of the plaintiff be dismissed."

The sole question presented for our decision is: Did the court err in dismissing the cause, merely upon the pleadings, for want of jurisdiction, instead of awaiting a further development of the facts as to the claims of title on the part of the complainant and defendant, respectively? We have no difficulty in answering this question in the affirmative.

[1] The allegations of the bill were quite meager; but no objection to its form or sufficiency was interposed, and in substance it was good as a bill for partition. Upon a natural and reasonable interpretation it makes out a case in which the complainant and defendant claim under a common ancestor, Agnes Doyle, the complainant claiming an undivided one-fourth of the land by inheritance, and the defendant an undivided three-fourths, partly by inheritance and partly by purchase. The complainant and defendant were thus coparceners as to a part and tenants in common as to the residue of the land, and therefore clearly within the express terms of the statute (Code, § 2562) authorizing a partition suit in equity.

[2] It is not necessary in a bill for partition to make a formal deraignment of title, or any deraignment, further than is necessary to show how the parties became coparceners and entitled to partition. *Ransom v. High*, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67; *Martin v. Martin*, 95 Va. 26, 27 S. E. 510.

[3, 4] We are not concerned here with the question of where the burden of proof would have rested if the case had been submitted and decided merely upon the bill, answer, and replication. Undoubtedly the complainant in a partition suit must aver and prove that he occupies such a relationship to the defendant as entitles him to invoke the equity jurisdiction. If his bill fails to show this, it is bad on demurrer. If it does show this, and the answer denies it, then upon a hearing on bill and answer, either with or without a replication, the bill will be dismissed. But the submission of this case by the parties, as well as the decision thereof by the court, was distinctly upon the defendant's motion to

dismiss the complainant's bill, not for failure to prove his allegations, but for want of equity jurisdiction. We must deal with the case practically, and it is clear, from the decree itself, taken with briefs and oral arguments and admissions of counsel in this court, that the defendant contends, and that the court decided, that, even though a bill in equity should state a perfectly good case for partition, the defendant could defeat the jurisdiction by a mere denial of the complainant's allegations, and a mere assertion of an independent hostile claim going to the whole of the property involved.

[5] It is settled and familiar law that a suit for partition cannot be made a substitute for an action of ejectment (*Pillow v. Southwest, etc., Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Litz v. Rowe*, 117 Va. 752, 86 S. E. 155, L. R. A. 1916B, 799; *Bailey v. Johnson*, 118 Va. 509, 88 S. E. 62); but a defendant to a bill which states a good case for partition cannot defeat the jurisdiction in equity merely by denying in toto and ab initio the complainant's title, and asserting in himself a title independent of and hostile to that under which the complainant claims. In *Pillow v. Southwest, etc., Co.*, supra, Judge Buchanan, speaking for this court, said:

"Of course, a partition suit cannot be made a substitute for an action of ejectment; and if the defendant in such suit does not claim under any one who was a joint owner, such as a coparcener, joint tenant, or tenant in common with the complainant, or those under whom he claims, then it is clear that such suit would not be proper; but if the defendant does claim under one who was a joint owner with the complainant, or those under whom he claims, the defendant cannot defeat the right of the complainants to have their legal rights settled in a suit for partition by merely alleging and proving that he denies the rights of the complainant, and holds adversely to him. If the jurisdiction of the circuit court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed."

The instant case, so far as it has proceeded, is not within the influence of the decision of this court in *Litz v. Rowe*, supra, and in *Bailey v. Johnson*, supra, cited and relied upon by counsel for defendant. The essence of the decision in those cases is summed up in the following language from the opinion in the *Bailey Case*:

"An independent, hostile claim, going to the whole property involved, and denying in toto and ab initio the title of the parties claiming the joint ownership of the land, cannot be set up and adjudicated in a partition suit brought by the latter," (that is to say, in a partition suit brought by the joint owners, or some of them).

In the *Litz Case* and in the *Bailey Case*, an outside party, who had never at any time had any community of interest with any of

the parties to a partition suit which had been properly brought, sought to intervene as actors in the partition suit under a claim of title distinct from and hostile to that under which the parties to the partition suits were claiming, and sought to have the court adjudicate therein the questions of title and boundary existing between such outside independent claimant and the parties claiming jointly under a different title. In other words, the adverse claimant in each of the cases cited was endeavoring to come into a partition suit in the attitude of a complainant for the purpose of trying a claim of title and boundary which both his pleadings and his proof showed could only be asserted in a court of law. In the present case, on the contrary, the defendant is seeking to defeat the jurisdiction in a partition suit, regularly brought, before the cause has proceeded far enough for the court to say whether the questions of title arising between the complainant and defendant are such "questions of law, affecting the legal title," as section 2562 of the Code expressly authorizes courts of equity in a partition suit to adjudicate and determine. It may be that when the case is fully developed upon the evidence the defendant can show that there has never been any community of interest at any time between him and the complainant; but, upon the record as it now stands, the case is clearly one for equity jurisdiction.

The decree complained of will be reversed, and the cause remanded for further proceedings to be had therein not in conflict with the views herein expressed.

Reversed.

TALIAFERRO et al. v. EMERY.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. CONTRACTS §99(3) — VALIDITY — INTOXICATION—RATIFICATION WHEN SOBER.

In an action for specific performance of a contract made, while defendant was intoxicated, evidence held insufficient to support the finding of the commissioner that the contract was agreed to or ratified by the defendant when sober.

2. CONTRACTS §92 — VALIDITY — INTOXICATION.

Where plaintiff furnished whisky to defendant, who was addicted to its use, and after he became drunk secured his signature to a contract more favorable to plaintiff than he had theretofore been able to secure, the contract was voidable, both at law and in equity.

Appeal from Circuit Court, Prince William County.

Bill in equity by C. H. Emery against C. D. Taliaferro and another. From a decree

for complainant, defendants appeal. Decree reversed, and bill dismissed.

C. E. Nicol, of Alexandria, and A. T. Embrey, of Fredericksburg, for appellants.

Thos. H. Lion and H. Thornton Davies, both of Manassas, and Jno. S. Barbour, of Fairfax, for appellee.

WHITTLE, P. This suit was brought by appellee, C. H. Emery, to enforce specific performance of a contract for exchange of properties between himself and appellant C. D. Taliaferro, and incidentally to set aside a deed to two lots in Quantico, subsequently conveyed by Taliaferro and wife to appellant G. W. Wallace, that were included in the deal. The contract bears date May 17, 1917, and by its terms Emery agreed to convey 92 acres of land in Prince William county, with a dwelling and storehouse thereon, to Taliaferro in exchange for 5 acres of land near Bell Fair Mills, in Stafford county, similarly improved, and the two vacant lots in Quantico above referred to. By prearrangement, on the morning of May 17th, Taliaferro rode on horseback from his home to Emery's a distance of about five miles, where the negotiation was carried on. Taliaferro in his answer denies the binding effect of the contract, a copy of which is exhibited with the bill and purports to have been signed by the parties and acknowledged before a justice. He avers that in the preliminary discussion of the stipulations of the proposed contract it developed that the parties could not agree, Emery demanding an even exchange of properties, while respondent insisted upon \$1,000 boot, and so the trade was declared off. But later on Emery plied Taliaferro with whisky, a supply of which he had on hand, to the point that he became intoxicated, and while he was in that condition, and unconscious of what he was doing, procured his signature and acknowledgment of the paper. The answer gives respondent's view of the disparity in values of the two properties, and points out certain alleged defects of title to the mineral rights in the Emery property, and the existence of a lien of \$300 thereon, the latter of which was subsequently discharged. Respondent insists that in the circumstances detailed a court of equity should not grant specific performance.

By consent of parties the cause was referred to a master commissioner to ascertain and report the facts, returning the depositions with his report. The commissioner's findings were adverse to Taliaferro, especially upon the controlling questions of his intoxication and insistence upon the provision that he should receive \$1,000 in money by way of owelty of exchange. Whereupon the circuit court passed the decree under re-

view, overruling the exceptions and confirming the commissioner's report, and setting aside the deed from Taliaferro and wife to Wallace, conveying the two lots in Quantico, and decreeing specific performance of the contract of exchange.

[1] We are not unmindful of the weight to which, ordinarily, a commissioner's report is entitled upon findings of fact, and in the conclusion we have reached will not transgress that rule, as correctly understood in the instant case. Yet we are of opinion that the commissioner and court have erroneously applied the law of the case to its facts. It is true that in some inconclusive particulars the evidence is conflicting; but the outstanding dominant facts and circumstances make out a case of imposition and unfairness which should not receive the sanction of a court of equity. That Taliaferro was an inebriate is not denied; nor is it controverted that Emery piled him with whisky pending negotiations for the exchange of properties. The divergence of opinion among witnesses is only in degree as to the extent of his intoxication. It appears that, while Emery's messenger had gone in quest of Merchant, the justice who redrafted the contract of exchange fled with the bill and took the acknowledgment of the parties, Taliaferro lay on the counter in the store asleep or in a stupor for three hours, and was aroused by Emery after Merchant's arrival to sign and acknowledge the paper. On the same occasion, but later, he signed a second paper of similar import, that Emery had had prepared by an attorney at Manassas, which was witnessed by Merchant. Let us accept Emery's version of what occurred on the arrival of Merchant, after he had awakened Taliaferro. He testifies that he said to him (Taliaferro):

"You know what we have done; don't do nothing unless you know what you are doing."

Again he says, on cross-examination:

"I just simply waked him up and said, 'Mr. Taliaferro, do you know you done some business here;' and he said, 'By G—, I never got too drunk to do business,' and we walked right into the dining room, and I handed Mr. Merchant the contract I had drawn up, and he said he would change it a little, and asked if it suited Mr. Taliaferro, and he said it did. When Mr. Merchant had drawn this contract, he asked if that was what we wanted, and he said it was all right."

On his way home that evening, Taliaferro attempted to ride into the front porch to a dwelling, which he had mistaken for a gate, and the owner took the horse by the bit and turned him into the road. Mrs. Taliaferro testified that "he was very much under the influence of liquor" when he reached home, so much so that he could not tell her anything about his trip. She says with respect to the deed that Emery subsequently brought

to their home for execution, when she learned that he could not give a clear title to the property, and had got her husband drunk and made him sign an agreement which left out the \$1,000 clause, she refused to execute the deed and burnt it up. With respect to this \$1,000, the commissioner reports:

"* * * In view of the fact that no mention is made of the sum of \$1,000 claimed by the said Taliaferro in his answer, and there is no evidence, other than the statement of the said Taliaferro, that any such sum had been agreed to, your commissioner is of opinion that the contract should prevail, and the said deeds should be passed free from any addition."

This finding fails to recognize the significance of a letter written May 31, 1917, to Taliaferro, by Emery's counsel, at his request. The writer, after rectifying the fact that Emery and wife had executed a deed conveying the 92 acres to Taliaferro, says:

"This deed is now ready for delivery, and Mr. Emery is in position to comply with the remainder of his consideration in the exchange of these properties, and requests that you make a deed conveying to him the property you agreed to convey him. * * * Kindly let me know the day and place where we can meet to exchange properties by delivery of deeds and payment of the money." (Italics supplied.)

In the absence of explanation, and the record affords none, this must be construed as an admission that, in addition to the 92-acre tract, there was a money consideration to be paid under the contract of exchange. That contention had been insisted on by Taliaferro throughout the case, and must not be ignored in considering his supposed ratification, when sober, of the contract of exchange signed by him while drunk.

[2] The law applicable to cases of this sort is concisely stated, by Mr. Minor in his Institutes. After giving the ancient rule, he says:

"But for more than a century this rigorous doctrine has been much relaxed, and it is agreed that drunkenness invalidates or renders voidable all contracts and transactions where (1) the drunkenness was brought about by the opposite party; (2) a fraudulent advantage was taken of it; (3) it deprived the party of his reason, and of an agreeing mind. * * * The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one or the other of the circumstances above stated; but, when a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits." 2 Minor's Inst. (4th Ed.) 644.

And the author further declares that, when the drunkenness is brought about by the

party obtaining the contract, the act is so flagrant a badge of fraud that it always renders the contract voidable, both at law and in equity, and that when a fraudulent advantage is taken of the drunkenness, this, too, is so direct a fraud as always to render the transaction voidable in all courts. This rule is well settled. 1 Elliott on Contracts, § 440, and cases cited in note; Miller v. Sterringer, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596.

For these reasons, we are of opinion to reverse the decree of the circuit court, and enter an order here dismissing the bill, with costs.

Reversed.

(124 Va. 842)

NEAL v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. INTOXICATING LIQUORS ⚡224—CRIMINAL PROSECUTION—CONSTRUCTION OF STATUTE—PRESUMPTION.

Prohibition Act, § 65, making evidence of possession of specified liquor in specified amount "prima facie evidence" of possession for the purpose of sale is simply a rule of evidence, and, like other presumptions, may be rebutted.

2. INTOXICATING LIQUORS ⚡224—CRIMINAL PROSECUTION—EVIDENCE TO REBUT PRESUMPTION.

In prosecution for violating the Prohibition Act, defendant's evidence held to rebut presumption, under section 65, that the liquor found in his possession was for purpose of sale.

3. INTOXICATING LIQUORS ⚡224—CRIMINAL PROSECUTION—BURDEN OF PROOF.

In prosecution for violation of Prohibition Act, where state merely established prima facie case by proof of liquor in defendant's possession, raising presumption of guilt, under section 65, defendant's evidence, tending to show that such liquor was not for purpose of sale, threw burden of proof upon state to establish defendant's guilt beyond reasonable doubt.

4. CRIMINAL LAW ⚡823(9)—INSTRUCTION—CORRECTION.

In prosecution for violation of Prohibition Act, where state's evidence merely established prima facie case, under section 65, raising presumption that specified liquor in specified amounts found in defendant's possession is for purpose of sale, instruction placing entire burden upon defendant to show his innocence, where the presumption under such statute was overcome by defendant's testimony, was not cured by a subsequent instruction to acquit defendant if state failed to prove him guilty beyond reasonable doubt.

5. WITNESSES ⚡382—IMPEACHMENT—EVIDENCE.

In prosecution for violation of prohibition act impeaching testimony of defendant's statement that he had given away some of the liquor

found on his premises, where such alleged statement was not shown to have been made by defendant when examined as a witness in his own behalf, was not admissible under Code 1904, § 3901.

Error to Circuit Court, Lunenburg County.

Charlie Neal was convicted of violating the Prohibition Act, and he brings error. Reversed and remanded.

Geo. E. Allen, of Victoria, for plaintiff in error.

Attorney General Jno. R. Saunders, for the Commonwealth.

WHITTLE, P. Neal was indicted under the Prohibition Act (Acts 1916, p. 215), and brings error to a judgment upon the verdict of a jury finding him guilty, and fixing his punishment at one month's confinement in jail and a fine of \$50.

The indictment followed the form prescribed by section 7 of the act, and charged the accused with being guilty of all the offenses enumerated therein. In point of fact he was prosecuted under section 65, the pertinent part of which is as follows:

"The possession by any person * * * in his home of more than one gallon of distilled liquor, one gallon of wine or three gallons of beer, or other malt liquor, at any one time, shall, in any proceeding * * * under this act, be prima facie evidence that such person possesses such distilled liquors, wine and malt liquor for the purpose of sale."

To sustain the prosecution, the commonwealth proved that about two gallons of wine and eight or ten gallons of liquid in a state of fermentation were found in the dwelling of accused, but whether the latter was intoxicating or not was not shown. There was also discovered in a corner near the dwelling a barrel containing about fifteen gallons of some kind of "beverage or liquid," which appeared to be made out of meal and cane juice, and an analysis of which showed that it contained 2.14 per cent. alcohol.

In the case of Pine & Scott v. Commonwealth, 121 Va. 812, 93 S. E. 652, this court decided that the Prohibition Act does not interdict the possession in a home for private use of distilled liquor, wine, beer, or other malt liquor, the possession of which was lawfully acquired, but merely declares that the possession of more than the specified quantity shall be prima facie evidence of a "purpose of sale."

[1] This presumption is simply a rule of evidence, and, like other presumptions, may be rebutted. No evidence was adduced to prove that the accused had ever sold or unlawfully disposed of any of the articles found on his premises, or that he made or

had them in possession for an unlawful purpose. The commonwealth proved the possession, and rested its case wholly upon the statutory provision that such possession constituted prima facie evidence of a "purpose of sale." In rebuttal the accused adduced evidence to the effect that the wine was made by his wife for his sick mother from canned berries, with California beer beans added to cause fermentation.

The other liquid found in the dwelling was not a beverage in any sense, but slop water left over from rinsing a molasses barrel. The liquid found in the crib was vinegar made from cane juice and intended for his own use.

[2] Certainly this evidence, if true, repels the prima facie presumption of guilt arising from the unexplained possession of the wine and vinegar.

In this condition of the evidence the court, over the objection of the accused, gave instructions 2, 3, and 5, as follows:

No. 2. "The court * * * instructs the jury that, where there is found in the possession of any person ardent spirits exceeding the amount allowed by law, the presumption is that such ardent spirits are being kept for unlawful purposes, as prescribed by the Prohibition Act, and throws upon the accused the burden of proving by a preponderance of the evidence that such ardent spirits were kept for legitimate purposes. * * *"

No. 3. "The court further instructs the jury that it is unlawful for any person to have in his possession or in his home more than one gallon of distilled liquor, one gallon of wine, or three gallons of beer or other malt liquors, and that, so far as this case is concerned, the possession of more than one gallon of the beverage charged in this indictment is a presumed violation of the law, and throws upon the accused the burden of proving by a preponderance of the evidence that such liquor or ardent spirits is not kept for the purpose of sale."

No. 5. "The court further instructs the jury that if they shall believe from the evidence that Charlie Neal had in his possession more than one gallon of the beverage which he had made or manufactured, which contained more than one-half of one per cent. of alcohol, that he is presumed guilty under this indictment."

In the case of *Pine & Scott v. Commonwealth*, supra, it was held, that the provision in the Prohibition Act that possession of more than the specified quantity of ardent spirits "shall be prima facie evidence of a purpose of sale, merely establishes a rule of evidence. * * * The presumption is merely prima facie and may be rebutted."

When the commonwealth has proved the possession of more than the specified quantity of ardent spirits, etc., and there is no rebuttal evidence of that fact, and none, that it was lawfully acquired, and was in the possession of the accused in his home for private use and not for sale, the prima facie presumption prescribed by the Prohibition

Act, that it was kept for the purpose of sale, would generally be sufficient to warrant a conviction. We say *generally*, because it is possible to conceive a situation in which the commonwealth's own evidence of possession might be such as to repel the presumption that it was unlawful. As in negligence cases, it sometimes happens that plaintiff's evidence develops such a case of contributory negligence as would bar a recovery.

[3] In the present case, as observed, the evidence on behalf of the accused tends to show the lawful acquisition and possession of the beverages in question; and the jury was confronted by a prima facie presumption that the decoction was in the possession of the accused for the purpose of sale, on the one hand, and by the presumption of innocence fortified by rebuttal evidence on the other. In such case, the burden of proof to establish the guilt of the accused beyond a reasonable doubt rested on the commonwealth, and constituted a continuing burden, which inheres in every stage of the prosecution.

It must follow from the foregoing postulate that any instruction which, in the final result, relieves the commonwealth of that burden and casts it upon the accused, is erroneous.

This principle is recognized and illustrated in *Litton's Case*, 101 Va. 833, 849, 44 S. E. 923, 927, where the court sustained the following instruction:

"The court instructs the jury that when the commonwealth has proven that the accused has committed a homicide, and it does not appear from the circumstances given in evidence by the commonwealth that the killing was of a lower degree than murder in the second degree or in self-defense, then it is a prima facie murder in the second degree, and the burden is cast upon the accused to prove that it was below murder in the second degree or in self-defense; and, if the commonwealth seeks to elevate the offense to murder in the first degree, the burden is upon it to do so. Yet when the evidence is all in, then, if the evidence both for the commonwealth and the accused leave a reasonable doubt as to the guilt of the accused, the jury must find the prisoner not guilty."

So, in *Potts' Case*, 113 Va. 732, 73 S. E. 470, it was held:

"A person charged with the commission of a crime is presumed to be innocent, and that presumption follows him throughout every stage of the prosecution. Moreover, the plea of not guilty denies every essential allegation of the indictment, and lays upon the prosecution the burden of proving the guilt of the defendant beyond a reasonable doubt. There is no shifting of this burden of proof. It remains upon the state throughout the trial. The evidence may shift from one side to the other, and the state may establish such a state of facts as must result in a conviction, unless the presumption they raise be met by evidence; but when the evidence is all in, if, upon a consideration of it

as a whole, the jury entertain a reasonable doubt as to the guilt of the accused, they must find him not guilty, as the state has not sustained the burden of establishing his guilt beyond a reasonable doubt. The accused is not required to prove his innocence. The rule that the burden of proof is upon the commonwealth is not affected by the modification that in cases of homicide, where the defense of self-defense is interposed, it is incumbent upon the defendant to set it up by affirmative proof, unless the fact appears from the commonwealth's own evidence."

In the case of *State v. Wilkerson*, 164 N. C. 431, at page 435, 79 S. E. 888, at page 890, in a similar prosecution under the Prohibition Act of that state (the language of which in the matter here involved is practically identical with that of our own statute), the court says:

"The jury were instructed that the fact of his [accused] having in his possession more than one gallon of the liquor made out a prima facie case against the defendant. If the court had stopped here, and not qualified this instruction, it would have been correct; but it did not do so, but went beyond the terms of the statute and the law when it further charged that it then was the duty of the defendant 'to go forward and satisfy the jury, by the greater weight of the evidence, that he did not have the liquor in his possession for the purpose of sale.' In this further instruction we think there was error."

The court then proceeds to show that it was the province of the jury to consider the case in the light of all the evidence, giving weight to the prima facie presumption on the one side, the presumption of innocence on the other, and all the evidence adduced. This case was approved and followed in *State v. Russell*, 164 N. C. 482, 80 S. E. 66, where it was held:

"Where the statute makes the possession by one person of a certain quantity of spirituous liquor prima facie evidence of an unlawful intent to sell, the burden of the issue remains on the state to show the guilt, as charged in the indictment, beyond a reasonable doubt; and when the prima facie case has been established, under the provision of the statute, it does not forestall the verdict, for it only means that as evidence it is sufficient to establish the ultimate fact of guilt, and the jury may convict if they find that it is not explained or rebutted. The presumption of innocence is still with the prisoner, and the burden continues to rest upon the state to show guilt beyond a reasonable doubt."

Upon request of the accused, the court instructed the jury—

"that although they may believe from the evidence in this case that there was found in the home of the defendant beverages analyzing a per cent. of alcohol in excess of that allowed by law in quantities in excess of those allowed by law, yet if they shall further believe from the evidence that such beverages were not made or

kept for purposes of sale they should find the defendant not guilty. The court further instructs the jury that if they have any reasonable doubt as to whether the said beverages were made or kept for sale, they should find the defendant not guilty."

[4] It is contended on behalf of the commonwealth that, in view of this instruction, the accused could not have been prejudiced by instructions 2, 3, and 5, granted on its behalf. An answer to that contention is found in *State v. Wilkerson*, supra, 164 N. C. at page 441, 79 S. E. at page 892, where it is said:

"It will be observed that in our case the court placed the entire burden upon the defendant to show his innocence, for the instruction to which exception was taken is that the statute requires him to satisfy the jury by the greater weight of the evidence that in fact he did not have the liquor in his possession for the purpose of sale, whereas, according to all the authorities, and especially in *Barrett's Case* [138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626], the burden is on the state throughout the trial.

"The defendant profited little or nothing by the subsequent charge that, if the jury had a reasonable doubt about the facts recited by the court, being those which the defendant must prove by the greater weight of the evidence, they should acquit. This, to say the least of it, was very confusing, if not contradictory. What advantage did he gain by the charge as to reasonable doubt, after the jury had been told that there was a presumption against him, and he must 'satisfy them by the greater weight of evidence' of his innocence. It deprived him of the presumption of innocence, and practically eliminated the benefit of the doctrine as to reasonable doubt by so weakening it that it amounted to nothing; and all this was done under a statute (act of 1913) which merely establishes a prima facie case for the state, sufficient, it is true, to carry the case to the jury, with the right to convict, but leaving in full force the doctrine of reasonable doubt, and also the presumption of innocence; for a man, even under our present laws, may have more than a gallon of liquor in his possession for a perfectly lawful and innocent purpose. It is not the possession that is unlawful, but the forbidden purpose for which it is held."

In *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, there is an instructive discussion of the effect and limitations upon the prima facie presumption rule in cases like the one in judgment. It is said:

"* * * The accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a rea-

sonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted. The case of *Commonwealth v. Williams*, 6 Gray [Mass.] 1, supports this view."

[5] With respect to the exception to the admissibility of the testimony of the witness H. T. Falson, attributing to the accused the statement that he had given away some of the beverages found on his premises: Accused denied having made such statement, and the purpose of the testimony was to impeach his credibility. The materiality of the evidence was not made to appear; but, however that may be, the statement was not shown to have been made by the accused "when examined as a witness in his own behalf," and therefore was not admissible. Code, § 3901.

For the error of the court in giving instructions 2, 3, and 5, and for the admission of the evidence excepted to, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

BYRD v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. DISORDERLY CONDUCT §1—ABUSING FEMALE RELATIONS—PRESENCE OF THIRD PERSON.

The offense denounced by Code Supp. 1910, § 3780a, is complete whenever insulting language is spoken to or about another, or about his female relations, in his presence and under circumstances reasonably calculated to provoke a breach of the peace, regardless of presence or absence of third person.

2. STATUTES §211—CONSTRUCTION—REFERENCE TO TITLE.

The title of an act properly may be referred to in determining its meaning.

3. CRIMINAL LAW §218(5)—SLANDER—SUFFICIENCY OF WARRANT.

Warrant charging, as amended, that defendant unlawfully slandered and abused another's wife by using vulgar and obscene language "to and about" her in the presence of her husband, etc., held sufficient to charge substantially that defendant had used abusive language about the wife in the presence of her husband under circumstances reasonably calculated to provoke a breach of the peace.

4. DISORDERLY CONDUCT §1—UNLAWFUL ABUSE OF WIFE OF ANOTHER—TRUTH AS DEFENSE.

Evidence that the offensive words spoken were true is not admissible in bar of a prosecution for a violation of Code Supp. 1910, § 3780a, for having unlawfully slandered and abused another's wife in the presence of her husband under circumstances reasonably calculated to produce a breach of the peace, but was admissible in mitigation of punishment.

5. CRIMINAL LAW §695(2)—GENERAL OBJECTION TO EVIDENCE—ADMISSIBILITY FOR SOME PURPOSES.

Where evidence was admissible for some, though not all, purposes, general objection to it should have been overruled.

6. CRIMINAL LAW §1170(5)—PREJUDICIAL ERROR—EXCLUSION OF EVIDENCE.

Where defendant was fined in a materially larger amount than the minimum fixed by Code Supp. 1910, § 3780a, for having unlawfully slandered and abused another's wife in her husband's presence, error in excluding in mitigation of punishment evidence of truth of defamatory words was not harmless.

7. CRIMINAL LAW §935(2)—NEW TRIAL—VENUE—FAILURE OF PROOF.

Commonwealth was bound to establish venue in prosecution for having unlawfully slandered and abused another's wife in presence of her husband, in view of Code Supp. 1910, § 3780a, and, regardless of instructions, if there was no proof at all as to where offense was committed, verdict of guilty should have been set aside, and new trial awarded, particularly where defendant raised point of venue, and relied on it before case went to jury.

8. CRIMINAL LAW §1144(6, 14)—APPEAL—PRESUMPTIONS—FAVORING COURT BELOW—INSTRUCTIONS—EVIDENCE.

In absence of bill of exceptions showing all instructions given or all evidence introduced, Supreme Court will presume that rejected instruction was covered by some other one given, and that there was evidence not certified as part of record which showed offense was committed within jurisdiction of trial court.

9. CRIMINAL LAW §1121(4), 1122(1)—BILL OF EXCEPTIONS—CONSTRUCTION.

Where trial court, to bill of exceptions, certified that following evidence was introduced by commonwealth to maintain issue, and then set out evidence, which, in light of other bills, could not have been intended as anything but a certificate of all evidence, and such matter was followed by statement that court instructed as follows, setting out a single instruction purporting to apply to evidence as whole, bill of exceptions must be taken as embracing all evidence and all instructions.

Error to Corporation Court of Hopewell.

R. J. Byrd was convicted of unlawfully slandering and abusing another's wife by using vulgar and obscene language to and about her in the presence of such other, and

he brings error. Judgment reversed, and cause remanded for new trial.

W. L. Devany, Jr., of Hopewell, for plaintiff in error.

Jno. R. Saunders, Atty. Gen., for the Commonwealth.

KELLY, J. This is a prosecution for an alleged violation of section 3780a of the Code, which is as follows:

"If any person shall, in the presence or hearing of another, curse or abuse such person, or use any violently abusive language to such person concerning himself or any of his female relations, under circumstances reasonably calculated to provoke a breach of the peace, he shall be deemed guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five hundred dollars, in the discretion of the justice trying the case." Acts 1910, p. 18.

[1, 2] It is necessary in the outset to construe this statute. The defendant contends that, in order to constitute an offense thereunder, the insulting words must be used in the presence of some third person, as well as in the presence of the person to or about whom they are spoken. The statute is possibly not entirely clear in this respect, and the construction contended for finds support in the obvious fact that as a rule the presence of third persons adds aggravation to direct personal insults. To adopt this view, however, it would be necessary to read into the statute some additional expression with which to connect the words "such person." Taking the language as a whole, and considering the subject-matter and reason of the enactment, we are of opinion that the contrary view, advocated by the commonwealth, is correct. In other words, the expression, "such person," refers to the person "in the presence or hearing of" whom the insult is offered; and the offense is complete whenever insulting language is spoken to or about another, or about his female relations, in his presence and under circumstances reasonably calculated to provoke a breach of the peace, regardless of the presence or absence of third persons. The title of the act, to which we may properly refer in determining its meaning (36 Cyc. 1133; C. & O. Ry. Co. v. Pew, 109 Va. 288, 293, 64 S. E. 35), declares its purpose to be "to punish a person for using abusive language to another" without any reference whatever to the presence of third persons. Similar statutes in other states plainly omit any requirement of the presence of others than the person insulted as an element of the offense. See, for example, Moore v. State, 50 Ark. 26, 6 S. W. 17; Watkins v. State (Tex. Cr. App.) 44 S. W. 507; Dyer v. State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228.

The defendant, R. J. Byrd, was tried by a

justice of the peace in the city of Hopewell, and fined \$25 upon a warrant charging that in said city he "did on various times in June, 1918, unlawfully slander and abuse Mrs. M. J. Connelly by using vulgar and obscene language to and about her." On appeal to the corporation court, the warrant was amended, on defendant's motion, by adding, after the words last quoted, the words, "in the presence of her husband, under circumstances reasonably calculated to produce a breach of the peace." In a jury trial which followed, he was again found guilty, and sentenced to pay a fine of \$25. It is this sentence which is now under review.

The only evidence offered to sustain the warrant showed that Byrd had made derogatory and insulting remarks about Mrs. Connelly to her husband, but not in her presence. Whether any person, except Byrd and Connelly, was present does not appear.

This evidence was objected to on the ground that it did not tend to prove the offense charged in the warrant, which, as contended by the defendant, was the use of insulting words to Mrs. Connelly in the presence of her husband. The action of the court in overruling this objection is the subject of the first assignment of error.

[3] The court was right. The only objection made to the form of the warrant was met by the amendment already indicated. As thus amended, while it was imperfectly phrased, the warrant was sufficient, in substance, to charge that the defendant had used abusive language about Mrs. Connelly in the presence of her husband under circumstances reasonably calculated to provoke a breach of the peace.

It was further urged, upon the hearing in this court, that the evidence was inadmissible, even if it did tend to prove the charge in the warrant as amended, because no third person was shown to have been present. This argument is disposed of by the construction which we have placed upon the statute.

During the course of the trial, the defendant offered to prove that the offensive words spoken by him to Connelly about the latter's wife were true. The court, upon the commonwealth's objection, refused to admit this evidence, and its action in that regard is assigned as error.

[4, 5] Counsel for defendant concedes, and it is clear upon reason and authority, that the evidence was not admissible in bar of the prosecution (Dyer v. State, supra; 8 R. C. L. p. 286, § 307); but the contention here is that the defendant ought to have been allowed to prove the truth of the defamatory words in mitigation of the punishment. For this latter purpose the evidence was proper, and should have been admitted. The objection seems to have been general in its form, and as the evidence was admis-

sible for some, even though not for all purposes, the objection ought to have been overruled. *Washington R. Co. v. Trimyer*, 110 Va. 856, 860, 67 S. E. 531.

[6] We do not understand that the commonwealth controverts the admissibility of the evidence in question for the purpose indicated. Its contention is that, as the fine was comparatively small, the error should not be regarded as prejudicial. The amount of the fine is materially larger than the minimum fixed by the statute, and we cannot say that the error was harmless. It is probably true that in many cases, as in this particular case, the insulting words spoken to or in the presence of another about his female relations may be of such a character as that their truth would not be accorded very much, if any, weight in mitigation of the offense; but, by analogy to the rule in civil actions for defamation (Code, § 3375, and cases cited), and in accordance with what we regard a safe and proper general practice, such evidence, when offered, should be received for what it is worth as an aid in fixing the punishment.

The only remaining assignments of error requiring any particular discussion may be dealt with jointly. They relate to: (1) The refusal of the court to instruct the jury that the commonwealth had to prove that the alleged offense was committed within the local jurisdiction of the court; and (2) the denial of the motion for a new trial because of a total failure of proof on that point.

[7] It will be conceded that the commonwealth was bound to establish the venue, and that, regardless of instructions, if there was no proof at all as to where the offense was committed, the verdict should have been set aside and a new trial awarded. *Fitch's Case*, 92 Va. 824, 827, 24 S. E. 272.

The failure clearly to prove venue is usually due to inadvertence, flowing naturally from the familiarity of court, counsel, witnesses, and jurors with the locality of the crime; and appellate courts will generally and properly lay hold of and accept as sufficient any evidence in the case, direct or otherwise, from which the fact may be reasonably inferred. In this case, however, there is nothing in the evidence before us upon which to base even a surmise as to where the insulting words were spoken. Nor is there any reason to regard the question as lacking in substantial merit. The record discloses that the defendant raised the point and seriously relied upon it before the case went to the jury.

[8] To meet this situation, it is contended on behalf of the commonwealth that there is no bill of exceptions showing all the instructions given or all of the evidence introduced, and that, therefore, this court must presume that the rejected instruction was covered by some other one given in the case, and, like-

wise, that there was evidence, not certified as a part of the record, which showed that the offense was committed within the jurisdiction of the court. If the assumption on which this argument is based were correct, the conclusion contended for would follow. *McArter v. Grigsby*, 84 Va. 159, 4 S. E. 369; 4 Min. Inst. (3d Ed.) 1080; *Burks' Pl. & Pr.*, p. 518, § 239a; *Teter v. Ins. Co.*, 74 W. Va. 344, 82 S. E. 40.

[9] But the defendant's seventh bill of exceptions manifestly contains the whole of the evidence, and also shows that the one and only instruction given did not relate to the venue. The court certifies therein that "the following evidence was introduced by the commonwealth to maintain the issue," and then sets out evidence which, when taken in the light of the other bills, could not have reasonably been intended by the court as anything but a certificate of all the evidence in the case. This is followed, in the same bill, by the statement that "the court instructed the jury as follows," setting out a single instruction which plainly purported to apply to the evidence as a whole. This bill of exceptions, the final one in the record, is purposeless and meaningless except in one embracing all the evidence and all the instructions.

In principle we have here the same situation, and must apply the same rule as this court applied in *Manchester Loan Association v. Porter*, 106 Va. 528, 533, 56 S. E. 337, 338, where Judge Buchanan said:

"It is quite true, as argued, that the bill should state, or it should appear by clear inference, that the evidence which is certified is all the evidence; otherwise the appellate court will not know upon what the lower court based its action, and its judgment on the evidence will be presumed to be right. *McArter v. Grigsby*, 84 Va. 159, 4 S. E. 369, and authorities cited. When a court certifies that the evidence introduced on the trial was as follows, and sets it forth without anything in the record to show, as in this case, that it was not all the evidence, it is not only a clear, but a necessary, inference that it was all the evidence introduced."

It follows that there was plain and vital error in denying the motion for a new trial.

There were two other assignments of error, but they were not sound, resting upon the fallacious theory that proof of insulting words spoken to Connelly about his wife, but not in her presence, or in the presence of a third party, did not constitute any offense either as charged in the warrant or as chargeable under the statute. The effect of the warrant and of the statute in this regard has already been sufficiently discussed.

For the errors above pointed out, the judgment will be reversed, and the cause remanded for a new trial, to be had not in conflict with the views herein expressed.

Reversed.

(124 Va. 628)

MOORE v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. VENUE ⇨32(1)—OBJECTION TO JURISDICTION—TIME OF MAKING.

Where defendant was served with process according to Code 1904, §§ 3225, 3227, and permitted the action to go to judgment by default, a subsequent objection to venue of the action came in the wrong form and too late, since section 3260 expressly provides that such objection must be taken by plea in abatement.

2. VENUE ⇨21, 32(1)—JURISDICTION—STATUTE—WAIVER.

Code 1904, §§ 3214, 3215, providing actions may be brought in any county or corporation wherein the cause of action arose, where defendants reside, or where defendant corporation's principal officer or officers reside, do not confer jurisdiction upon any courts, but confer upon defendant a privilege as to venue of trial which may be waived by failure to plead in abatement as provided by section 3260.

3. VENUE ⇨8—TRANSITORY PERSONAL ACTIONS.

Under Code 1904, § 3058, the circuit court had original and general jurisdiction of all civil cases at law, including a transitory action for personal injuries, regardless of where the cause of action arose, where the defendant company was served with process under sections 3225 and 3227, and jurisdiction of the cause does not depend upon sections 3214 and 3215.

4. ABATEMENT AND REVIVAL ⇨3—COURTS ⇨39—JURISDICTION—MODE OF OBJECTION.

Code 1904, § 3260, requiring objection to certain defects of venue affecting jurisdiction to be made by plea in abatement, has no application where the defendant is not before the court, nor where the subject-matter of the action or suit, although within its territorial jurisdiction, is not in fact before the court, and in such cases the defect may be pleaded in bar or by other defense, as by motion to quash process of summons or dismiss action. The court should dismiss upon its own motion where such facts appear.

5. PLEADING ⇨35—VENUE—SURPLUSAGE.

In an action for personal injuries, an allegation that the injuries were inflicted in the city of Lynchburg was a wholly unnecessary averment for the purpose of laying venue, and under Code 1904, § 3244, may be treated as an allegation of original venue or fact venue not affecting the place of trial, or as matter of description, or mere surplusage.

Error to Circuit Court, Campbell County.

Action by Thomas W. Moore against the Norfolk & Western Railway Company. Judgment for plaintiff by default, and defendant's motion to dismiss the case for lack of jurisdiction was allowed, and plaintiff's motion to be allowed to amend his declaration was

overruled, and plaintiff brings error. Reversed.

This is an action by the plaintiff in error against the defendant in error in seeking to recover damages for alleged personal injuries. The parties will be hereinafter referred to as plaintiff and company, respectively.

The cause of action arose in the city of Lynchburg, the alleged injuries having occurred there on the railroad of the company, and this appears on the face of the declaration.

The action was instituted in the circuit court of Campbell county against the company as sole defendant, and was commenced by process returnable at rules. There was service of the process in Campbell county in accordance with sections 3225 and 3227 of the Code, on a depot agent and telegraph operator of the company employed in such county on its railroad. The company failed to appear at the return day of the process, and failed then to demur, plead or answer, and, the plaintiff having filed his declaration, a conditional judgment was entered as to the defendant in accordance with the statute (section 3284 of the Code) in such case made and provided; and at the subsequent rules, the company continuing in default, judgment was entered against it at rules, with an order for damages to be inquired into, in pursuance of such statute. Thereafter, at term, the company appeared specially, and, after due notice thereof to the plaintiff, filed the following motion in writing, namely:

"And now comes the defendant, and, limiting its appearance to the point of questioning the jurisdiction of this court, says that this court has no jurisdiction over this suit, because it appears upon the face of the declaration filed herein that the entire cause of action arose without the jurisdiction of this court, to wit, within the limits of the city of Lynchburg, whose courts properly have jurisdiction of the subject-matter of this suit and of the parties, and that the circuit court of the county of Campbell ought not to retain jurisdiction of this cause, and hence the defendant moves the court to dismiss this suit and no longer retain jurisdiction thereof. * * *

"Said motion will also be based upon the fact that it appears by the sheriff's return that the summons in this case was served on J. N. Finch, a depot agent and telegraph operator of the defendant at Rustburg, Campbell county, on February 5, 1918, there not being in said county either the president, cashier, treasurer, general superintendent, or any one of the directors of said Norfolk and Western Railway Company on whom the same could be served."

The court below sustained such motion on the ground that it appeared of record that the court was without jurisdiction of the case, and dismissed the same, with costs against the plaintiff.

Thereupon the plaintiff moved the court to

allow him to amend his declaration by striking out the portion thereof from which it appeared that the cause of action arose in the city of Lynchburg, which motion the court overruled, and refused to allow such amendment.

And the plaintiff brings error.

A. H. Light, of Rustburg, for plaintiff in error.

F. S. Kirkpatrick, of Lynchburg, and W. H. Mann, of Petersburg, for defendant in error.

SIMS, J. (after stating the facts as above). The question raised by the assignments of error will be considered and passed upon in their order as stated below.

[1] 1. Did the trial court have jurisdiction of the action in the instant case?

This question must be answered in the affirmative.

The position of the plaintiff is that the trial court did have such jurisdiction, and that the motion of the company to dismiss the case was, in truth, an objection directed merely against the venue of the action, and came in the wrong form and too late under section 3260 of the Code (2 Pollard's Code 1904); that such an objection, as is expressly provided in such statute, cannot "be allowed, unless taken by plea in abatement," which, of course, could not be filed at the stage of the proceeding in which said motion was made.

We consider such position well taken.

Section 3260 aforesaid is as follows:

"Where the declaration or bill shows on its face proper matter for the jurisdiction of the court no exception for want of such jurisdiction shall be allowed unless it be taken by plea in abatement. No such plea or any other plea in abatement shall be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, nor after a decree nisi or a conditional judgment at rules." (The italics are supplied, except of the word "nisi.")

[2] The company, on the other hand, relies upon sections 3215 and 3214 of the Code (2 Pollard's Code 1904) as being the authority which must, and the sole authority which can, be looked to as conferring jurisdiction of the instant case on the trial court.

Section 3215, so far as material, is as follows:

*"An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose. * * **

Section 3214, so far as material, is as follows:

*"Any action at law * * * may be brought in any county or corporation.*

"First. Wherein any of the defendants reside.

"Second. If a corporation be a defendant, wherein its principal office is, or where its

mayor, rector, president, or other chief officer resides."

As to said section 3260 of the Code, the company contends that—

*"It appears upon the face of the declaration * * * that the entire cause of action arose without the jurisdiction of the court, to wit, within the corporate limits of the city of Lynchburg, whose courts properly have jurisdiction of the subject-matter of this suit and of the parties."*

Now, of course, it is true that under section 3215, the cause of action having arisen in the city of Lynchburg, its courts of general jurisdiction would have had jurisdiction of the instant case if it had been therein instituted and if process had been executed in accordance with the statute (section 3220 of the Code) in such case made and provided. It is also true that, if the action had been brought against the company in the county or corporation wherein its principal office is or its president or other chief officer resides, the court of general jurisdiction of such county or corporation would have had jurisdiction of the action, by virtue of said section 3214. But that is so because those sections of the Code so fix the venue of the action in such a case. Accurately speaking, such sections of the Code do not confer "jurisdiction" upon any courts. They concern only the procedure of the courts touching the place of trial, or the venue of actions at law or of suits in equity. They confer merely a privilege upon the defendant to have the action or suit against him in such a case heard and determined in the local courts therein specified. But it is a privilege which may be waived, and which, if about to be denied, must, in Virginia, be claimed by plea in abatement filed in pursuance of section 3260 of the Code aforesaid; otherwise it will be lost, if the court in which the action or suit is brought has general jurisdiction of such an action or suit and has the subject-matter and the proper parties, plaintiff and defendant, before it. *Burk's Pleading & Pr. pp. 273, 280, 284, 916, 917; 40 Cyc. 12-14, 16, 22, 23, 41-43, 103-106, 107, 111, and notes; Notes on Eq. Procedure, Washington & Lee University, § 21; Lille's Notes on Eq. Jur. p. 8; Lille's Notes on Eq. Pl. & Pr. §§ 8, 9, 25; Shaver v. White, 20 Va. (6 Munf.) 110, 112, 8 Am. Dec. 730; The Resolute, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. Ed. 533; Nelson v. C. & O. R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; Wells v. Hughes' Ex'r, 80 Va. 543, 16 S. E. 689; Buster v. Ruffner, 19 Va. (5 Munf.) 27; Hughes v. Hall, 19 Va. (5 Munf.) 431; Reed et al. v. Gold, 102 Va. 37, 40, 45 S. E. 868.*

[3] Sections 3214 and 3215 of the Code, therefore, are not the source of authority which should be looked to as conferring jurisdiction on the trial court of the instant case. Under section 3058 of the Code (2

Pollard's Code 1904) the trial court had " * * * original and general jurisdiction of all * * * civil cases at law." And, this being a transitory personal action at law, the trial court had jurisdiction of it, regardless of where the cause of action arose; the company having been so served with process (under sections 3225 and 3227 of the Code) as to bring it before the court as a party defendant. *Nelson v. C. & O. R. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; 40 Cyc. 17-19, 35-38, 103-105, 107.

The "proper matter" for the jurisdiction of the court mentioned in section 3260 aforesaid has reference to subject-matter over which the court has territorial jurisdiction, and the "jurisdiction" referred to is the territorial jurisdiction of the court over such subject-matter, which jurisdiction involves the venue of the suit or action.

That is to say, where the proper parties are before a circuit court, then, by virtue of the statute (section 3058 of the Code) and the common-law rule on the subject, its territorial jurisdiction over persons and property is co-extensive with the bounds of the whole state, except as limited by the venue statutes, sections 3214 and 3215; and but for such venue statutes, if a party defendant be once gotten before such court, in a litigation over a subject-matter of which the court has general jurisdiction, and which subject-matter is actually before the court by proper pleading and otherwise, such party would have no privilege of demanding that the trial should be had in any other court of the state, it matters not where the cause of action may have arisen or where else in the state the defendant may reside. And since the defendant owes to statute law the venue privileges given by sections 3214 and 3215 of limiting the said broad territorial jurisdiction of the court aforesaid, the statute law may attach a condition to the enjoyment of such privileges. And section 3260 aforesaid has attached a condition thereto, namely, that such a privilege must be claimed by plea in abatement.

Therefore, since the declaration in the case before us showed on its face that the trial court had general jurisdiction of the subject-matter of the action, since there is no question raised but that the pleadings put such subject-matter in issue before such court (*Linkous v. Stephens*, 116 Va. 898, 908, 83 S. E. 417; *Turner v. Barraud*, 102 Va. 324, 327, 46 S. E. 318), and since the process summoning the company to answer was duly served so as to give the court jurisdiction of its person as party defendant (so that both the subject-matter of the action and the proper parties thereto were before it), the trial court had jurisdiction of the case. And since the company did not object to the venue by plea in abatement, as the statute in such case requires if it intended to claim its venue privilege, such jurisdiction remained undisturbed by the motion of the company aforesaid.

The case of *Hilton v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899, the quotation therein from *Nye v. Liscombe*, 21 Pick. (Mass.) 263, *Burks' Pleading & Pr.* pp. 269 and 327, *Ratcliff v. Polly*, 12 Grat. (53 Va.) 528, and 14 Cyc. 434, 435, are cited and relied on by the company as being contrary to such a conclusion as that above reached. But an examination of those authorities discloses that all of them concern cases where there was no subject-matter before the court which was within its general jurisdiction, or where the party objecting to the jurisdiction was not before the court.

[4] Those of the character of cases just referred to which concern the subject-matter of the litigation do not involve a "want of jurisdiction of the court" in the sense in which the terms here quoted are used in section 3260 aforesaid, which, as we have seen, is a lack of territorial jurisdiction of the subject-matter. The court in those cases had such jurisdiction; but it did not have the subject-matter before it so as to give it actual jurisdiction thereof (or "active" jurisdiction thereof, to use a word adopted by Mr. Lile in his learned and valuable work on *Pleading and Practice* above cited), which is a wholly different thing from a want of territorial jurisdiction in the premises. The other of such cases disclose also a want of jurisdiction of the court because of another reason, not referred to in such statute, namely, because of the lack of actual (or "active") jurisdiction of the proper party or parties. Both classes of such cases present a situation, as to subject-matter or parties, in which no court in the state would have had actual (or "active") jurisdiction. Hence we find that section 3260 aforesaid has no application where the defendant is not before the court, nor where the subject-matter of the action or suit, although within its territorial jurisdiction, is not in fact before the court. In such cases the defense of lack of jurisdiction is a substantial defense, and is in its nature a bar to the action. It is not merely a dilatory defense. It does not go merely to the venue. Hence in such cases the defense need not be pleaded by a plea in abatement. It may be pleaded in bar, at rules or at term, or the defense may be otherwise made at term by motion to quash the process of summons or by motion to dismiss the action or suit, as may be most appropriate; and, indeed, the court should, ex officio, mero motu, dismiss the action or suit upon the facts disclosing the lack of jurisdiction appearing or being made to appear of record by any method which is in accordance with the prevailing practice. *Warren v. Saunders*, 68 Va. (27 Grat.) 259; *Deatrick's Adm'r v. State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489; *Hilton v. Consumers' Can Co.*, supra, 103 Va. 255, 48 S. E. 899; *Raub v. Otterback*, 89 Va. 645, 16 S. E. 933; *Noell v. Noell*, 93 Va. 433, 25 S. E. 242; *Lane v. Bau-*

serman, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; Green v. Massie, 62 Va. (21 Grat.) 356, 362; Jones v. Bradshaw, 57 Va. (16 Grat.) 355, 361.

But, as aforesaid, such a case is not now before us.

[5] 2. Was there error in the action of the trial court in its refusal to allow the plaintiff to amend the declaration so as to eliminate therefrom the portion thereof which alleges that the injuries complained of were inflicted in the city of Lynchburg?

That, under section 3244 of the Code, was an unnecessary averment for the purpose of laying the venue. *N. & W. Ry. Co. v. Ampey*, 93 Va. 108, 128, 25 S. E. 226. It may therefore be treated as surplusage. Or it may be treated as an allegation of "original venue," or "fact venue," which "raise no question as to the proper place of trial for the action," i. e., raised no question as to the "action venue" (40 Cyc. 11-15); or it may be treated as matter of description (*Burks' Pleading & Pr.* pp. 917, 918; 40 Cyc. 24). But

In any view of the allegation, however, as we have seen above, the fact that the cause of action arose beyond the bounds of the county in which the action was instituted did not affect the jurisdiction of the trial court in the case in judgment, because the latter had actual jurisdiction both of the subject-matter of and of the proper parties to the action. Hence the amendment of the declaration sought was an immaterial amendment.

The question under consideration must therefore be answered in the negative.

However, for the reasons above given, the order of the trial court dismissing the action must be reversed.

PRENTIS, J., absent.

(124 Va. 711)

VIRGINIAN RY. CO. et al. v. AVIS.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. RAILROADS ¶73(4) — CONSTRUCTION — USE FOR DEPOT PURPOSES.

Under deed conveying land to railway company "to be used for depot purposes and facilities connected therewith," held, company was to use such part of land as it needed for a depot and residue exclusively for facilities connected therewith, so that company could not lease the residue to a third person for other uses.

2. CONTRACTS ¶152 — LANGUAGE — ORDINARY SIGNIFICATION.

In determining the meaning of what the parties have said in a written contract or convey-

ance, the language used is to be taken in its ordinary signification, unless it has acquired a peculiar meaning or unless the context plainly shows that it is used in some peculiar sense, and, if when so read the meaning is plain, the instrument must be given effect accordingly.

3. CONTRACTS ¶169 — CONSTRUCTION — AMBIGUITY—SITUATION OF PARTIES.

If the meaning is ambiguous, then unless the parties have, by their subsequent unequivocal conduct, placed a practical construction upon their language, the rule to be first applied is for the court to place itself as nearly as possible in the situation of the parties at the time of the execution of the instrument, and consider the facts and circumstances attending the same.

4. DEEDS ¶90 — CONSTRUCTION AGAINST GRANTOR.

The rule that the language in a deed poll must be construed most strongly against the grantor is not a favorite and is generally said to be one of last resort when all other rules of construction have failed.

5. COVENANTS ¶21—CONSTRUCTION IN FAVOR OF FREE ALIENATION.

The rule that restrictive covenants are not favored simply means that all doubts are to be resolved in favor of the free alienation of realty.

6. COVENANTS ¶21 — CONSTRUCTION — INTENTION OF PARTIES.

Neither the rule that the language in a deed poll must be construed most strongly against the grantor, nor the rule that restrictive covenants are not favored, can operate when there is no room for doubt as to the intention of the parties.

7. INJUNCTION ¶62(1) — ENFORCEMENT OF COVENANTS—USE OF PROPERTY.

Where a grantor has clearly restricted the use of land granted and the restriction itself is not illegal, the covenant creates a trust which, in a proper case, courts of equity will enforce by means of an injunction against an inconsistent use.

8. CONTRACTS ¶143 — DEEDS ¶90 — CONSTRUCTION.

Courts cannot read into contracts and conveyances language which will add to or take from the meaning of the words already contained therein.

Appeal from Circuit Court, Isle of Wight County.

Suit by James E. Avis against the Virginian Railway Company and others. From the decree rendered, defendants appeal. Affirmed.

Loyall, Taylor & White and G. A. Wingfield, all of Norfolk, and Hugh L. Holland, of Suffolk, for appellants.

Jno. N. Sebrell, Jr., of Norfolk, for appellee.

KELLY, J. James E. Avis, being the owner of all the land on both sides of the right of way of the Virginian Railway Company

at what is now Colosse station, conveyed to that company two small parcels of land on opposite sides of the railroad tracks at that point, containing, respectively, .65 of an acre and .92 of an acre. The deed expressed a consideration of \$1, and there was incorporated therein, after the granting clause, this sentence:

"The above-granted land is to be used for depot purposes and facilities connected therewith."

The deed was prepared by the railway company, and, as originally drafted, did not contain the last-mentioned provision. Avis refused to sign it in that form, and the sentence quoted above was either inserted by him or by the company at his direction. This fact does not appear in the record, but is admitted by counsel for the company.

Avis conducts a mercantile business in a storehouse owned by him and located on his own land at Colosse.

On the larger of the two parcels conveyed to it, the company has erected and maintained a passenger and freight depot of the class used by it at other similar stations on its line, ample for the present needs of itself and the public, and intends to provide more commodious freight and passenger facilities there if they should hereafter be necessary.

The company leased to Henry Darden, under a contract which can be canceled at any time, a portion of the smaller parcel, and he has erected thereon a warehouse, a storehouse, a shed, and cotton gin, and is using the same for his personal benefit and profit. In the storehouse he conducts a general merchandise business similar to that in which Avis is engaged.

This suit in equity was brought by Avis against the company and Henry Darden, alleging, in substance, the facts stated above, claiming that "it was made a condition of the said grant that the said property should be used for depot purposes and facilities connected therewith," and "was the true intent and meaning of said conveyance that the property should be used for depot purposes only, and that when it should cease to be used for such purposes, or was not used for such purpose, it should revert to the grantor," and praying that the company and Darden be enjoined from the use of the property otherwise than for depot purposes and facilities connected therewith, that the land be declared to have reverted to Avis, and that the defendants be required to pay him proper damages for their unauthorized use of the premises.

The cause was heard upon the bill, the deed filed therewith as an exhibit, the separate demurrers and answers of the defendants, and an agreed statement of facts (from which the facts above recited appear); and thereupon the circuit court rendered a decree which in its material parts, was as follows:

"And the court, overruling the demurrer and being of opinion that it was the intention and agreement of the grantors and grantee in the deed * * * that the land therein conveyed should be used only for (depot) purposes and facilities connected therewith, and that particularly it was not the intention and agreement of the parties, as contained in the deed, that the said property should be used by the said railroad for the purpose of erecting thereon storehouses, warehouses, cotton gins, etc., to be rented out to private individuals, to be operated in competition with the grantor in said deed, the court doth adjudge, order, and decree that the Virginian Railway Company and Henry Darden, their agents, officers, and employes, and all other persons, be forever restrained and enjoined from using, for purposes other than depot purposes and facilities connected therewith," the two parcels of land conveyed by Avis to the company.

Error is assigned to the action of the court: (1) In overruling the demurrers; and (2) in decreeing upon the merits in the manner above set out.

[1] Both assignments present practically the same question. Although the bill charges that the language of the deed referring to the use of the land constituted a condition subsequent, for breach of which the land would revert to the grantor, the circuit court did not so decide, and no such contention is made before us. All the parties now agree that the provision is a covenant and not a condition, and the controversy here is as to the construction and effect of the covenant. The appellee contends that it is restrictive in its nature, and limits the use of the land exclusively to depot purposes and facilities connected therewith. The position of the appellant, on the other hand, is that the stipulation merely requires that as much of the land as may be necessary therefor shall be used for depot purposes and facilities connected therewith, and that unless and until all of the land shall be required for that purpose the company has the right to use the residue for any legitimate purpose, so that such purpose be not inconsistent with the future use of the property for depot and railroad purposes when and as necessary.

[2, 3] The purpose of all written contracts and conveyances is to say what the parties mean, and the only legitimate or permissible object of interpreting them is to determine the meaning of what the parties have said therein. In doing this, the language used is to be taken in its ordinary signification, unless it has acquired a peculiar meaning with reference to the subject-matter, or unless the context plainly shows that such language is used in some other peculiar sense. If, when so read, the meaning is plain, the instrument must be given effect accordingly. These propositions are familiar and elementary, and they embody the fundamental rule of construction to which all others are subordinate and subservient. If the contract is so drawn

and expressed as to render the meaning of the whole, or any part of the instrument, ambiguous, then unless the parties themselves have, by their subsequent unequivocal conduct, placed a practical construction upon their language, the auxiliary or subordinate rule to be first applied, and the one of most usefulness and importance, is for the court to place itself as nearly as possible in the situation of the parties at the time of the execution of the instrument, and to consider the facts and circumstances attending the same, including, in particular, the relations of the parties, the nature and situation of the subject-matter, the negotiations leading up to, and the apparent purpose of, the transaction. 17 A. & E. Enc. L. (2d Ed.) 21, 22; 13 Cyc. 607; *Bank v. McVeigh*, 32 Grat. (73 Va.) 530, 538; *Starke v. Berry*, 118 Va. 706, 711, 88 S. E. 68; *Walker v. Gateway Milling Co.*, 121 Va. 217, 226, 92 S. E. 826; *Atlanta, etc., Ry. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436, 110 Am. St. Rep. 215.

A conveyance of land to a railway company, "to be used for depot purposes and facilities connected therewith," if taken upon its face and given its primary and most apt and natural meaning, immediately conveys the thought that the company will be expected to use at least a part of the land for a depot, and the residue for facilities connected therewith; and to say that it means that the company will only use such part as it needs for a depot and incidental facilities, and may lease the residue to outsiders for business purposes wholly apart from its passenger and freight operations, is to say something which the parties did not say, and to ascribe a meaning to their words which comes as a second thought, and finds its support, not in the words used, but in a refinement of construction based upon secondary and inapplicable rules of interpretation. The secondary rules will be presently mentioned; but we say they are inapplicable, because, if it be conceded that the covenant is not clear on its face, we must next look to the circumstances surrounding its execution, and they certainly remove all doubt as to its meaning.

Avis owned all the adjacent land at that point. He wanted a depot there, and the company likewise desired to establish one. The conveyance was for more land than was needed then, and more, perhaps, than would ever be needed merely for a depot site. When the deed was presented to Avis for his signature, it contained a correct description of the land, but stated a nominal consideration of \$1,000, omitting any reference to the use for which the property was to be employed. He refused to execute the deed in this form and required the covenant to be inserted. This was the consideration upon which he parted with the property. It did not stipulate merely for the establishment of a depot, but fixed a use coextensive with the property conveyed, and one which would enhance rather than de-

preciate the value of the rest of his land. It seems to us that both parties must have understood that the company would use such part of the land as it needed for a depot, and would use the residue for facilities connected therewith. They knew that the whole of the land would not be occupied by the depot building, and they definitely specified the use which should be made of the residue.

[4-7] Much reliance is placed by counsel for the railway company upon the general rule that the language in a deed poll must be construed most strongly against the grantor, and upon the further general rule that restrictive covenants, like all other impediments to the free alienation of real estate, are not favored. The first rule here mentioned is itself not a favorite, and is generally said to be the one of last resort when all other rules of construction have failed. It certainly is never to be resorted to unless the language involved can be said to be ambiguous. The second rule, which declares that restrictive covenants are not favored, simply means that all doubts are to be resolved in favor of the free alienation of real estate. Neither rule can operate when there is no room for doubt as to the intention of the parties. It is well settled that where the grantor has clearly restricted the use of the land granted, and the restriction itself is not illegal, the covenant creates a trust which, in a proper case, courts of equity will enforce by means of an injunction against an inconsistent use. *Graves' Notes on Real Property*, § 240, and citations; *Wells v. Chapman* (N. Y.) 4 Sand. Ch. 312; *Whitney v. Union Ry. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715; *Haskell v. Wright*, 23 N. J. Eq. 389; *Winulpesaukee, etc., v. Gordon*, 63 N. H. 505, 3 Atl. 426.

[8] It is argued that the construction adopted by the lower court and approved by us cannot be reached without making the covenant read, "only for depot purposes and facilities," thereby supplying a word which the parties did not use. The argument is plausible but not sound. We might, with equal plausibility, say that the covenant cannot be construed in accordance with the contention of the railway company without adding thereto the words, "but if not needed for depot purposes and facilities, the land hereby conveyed may be used for any other lawful purpose." It is, of course, true that courts cannot read into contracts and conveyances language which will add to or take from the meaning of the words already contained therein; but, if this rule could be applied as appellants attempt to apply it here, the result would be that courts could never undertake to construe an instrument without being confined to the exact language employed therein. There are more ways than one of expressing an idea clearly, and the language of the decree of the circuit court, declaring that "it was the intention and

agreement of the grantors and grantee in the deed that the land therein conveyed should be used only for depot purposes and facilities connected therewith," was simply another and more emphatic way of stating the already clear import of the provision in question.

The case of *Bolling v. Petersburg*, 8 Leigh (35 Va.) 224, is strongly relied upon as sustaining the contention of the appellants. An examination of that case will show a substantial and vital distinction between it and the instant case. As unmistakably shown by the several opinions delivered in the case, the sole intention of the grantors in the deed there involved was to require the maintenance of a courthouse on the land conveyed, and not to further restrict its use. In the brief of counsel for the appellee, it is said:

"The distinction is plain. In the *Bolling* Case, the intention of the parties was to require the use which should be made, while in this case the intention of the parties was to specify the use which might be made."

This, we think, is the true distinction between the two cases. If the deed from *Avis* had said that the land was conveyed on condition that a depot should be erected and maintained thereon, then it would be simple and easy enough to say that there was no restriction upon the use of any part of the land not needed for the depot; but the language of the covenant which actually was embodied in the deed seems to us to plainly limit the use of the additional land to facilities connected with the depot.

We find no error in the decree, and it is affirmed.

Affirmed.

(124 Va. 484)

ATLANTIC COAST LINE R. CO. v. TYLER.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. APPEAL AND ERROR §1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE—ERRORS OF LAW.

Verdict of jury on conflicting evidence is conclusive on Supreme Court, and will not be disturbed unless some harmful error of law was committed by the trial court.

2. EVIDENCE §73—PRESUMPTION—COMPLIANCE WITH STATUTE.

In action against railroad for injuries at crossing, there is a presumption, from the fact that the railroad erected gates, that they were erected in obedience to a city ordinance.

3. APPEAL AND ERROR §231(5)—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO ORDINANCE.

In action for injuries at railroad crossing, where defendant objected to introduction of city ordinance requiring vertical arm gates at crossing, without specifying any ground therefor, it cannot complain on appeal that ordinance

was inadmissible because relating only to gates to be erected when deemed necessary and required by committee on streets.

4. RAILROADS §307(4)—INJURIES AT CROSSING—DUTY TO ERECT GATES—NEGLIGENCE.

It was absolute duty of railroad to erect vertical arm gates at city crossing as required by city's ordinance, not merely its duty to use ordinary care to obey the ordinance, and any failure to erect such gates, if the sole proximate cause of injury to plaintiff, was negligence sustaining recovery.

5. RAILROADS §317—INJURY AT CROSSING—INSTRUCTION.

In action against railroad for injuries to plaintiff at city crossing, trial court properly instructed that if train which struck plaintiff's buggy was operated at more than four miles an hour, speed fixed by ordinance, railroad was negligent, and if jury believed such negligence was proximate cause of accident, and plaintiff was not negligent, they must find for plaintiff.

6. RAILROADS §351(22)—INJURIES AT CROSSING—INSTRUCTION ON LAST CLEAR CHANCE—EVIDENCE.

In action against railroad for injuries to plaintiff whose buggy was struck at city crossing, where it was held on the track by a lowered gate, evidence held sufficient to justify giving of an instruction on last clear chance.

7. RAILROADS §346(5)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In action against railroad for injuries at crossing, burden to prove plaintiff's contributory negligence is on the railroad, unless it appears from plaintiff's evidence.

8. TRIAL §229—INSTRUCTIONS—REPETITION—EMPHASIZING PROPOSITIONS.

It would be improper to repeat and emphasize propositions of fact and law which already had been clearly stated.

9. TRIAL §252(9)—ABSTRACT INSTRUCTION.

In action for injuries at railroad crossing, when plaintiff in her buggy was caught on tracks by lowered gates, and struck by freight train, instruction based partly on supposition that gates on one side were being let down at time buggy was driven on tracks on other side held properly refused as without support in evidence.

10. TRIAL §260(1)—INSTRUCTIONS—REPETITION.

An instruction, based on a theory, supported by evidence, on which the jury had already been sufficiently instructed, was properly refused.

Error to *Hustings* Court of Richmond.

Action by *Mattie Tyler* against the Atlantic Coast Line Railroad Company. From judgment for plaintiff, defendant brings error. Affirmed.

Bernard Mann, of Petersburg, *E. P. Cox*, of Richmond, and *Wm. B. McIlwaine*, of Petersburg, for plaintiff in error.

Nunnally & Miller, of Richmond, for defendant in error.

PRENTIS, J. The Atlantic Coast Line Railroad Company complains of a verdict and judgment in favor of Mattie Tyler, in an action to recover damages for personal injuries alleged to have been sustained by her.

The substantial facts, as shown by the plaintiff's evidence, are that she was being driven in a buggy from Manchester to her home in the country shortly after midnight; that, when she reached the three tracks of the company crossing Hull street, the gates were up; and that, just as the horse crossed the third of the railroad tracks going towards Swansboro, the gate was lowered in front of the horse which prevented him from going further; and that while thus stopped on the track a freight train, coming from the south, which consisted of 18 cars and an engine, being pushed backwards, collided with the buggy and caused her injuries. The evidence submitted in her behalf also tended to show that, although the crossing was fairly lighted, she could not at night see far down the track in the direction from which the train was coming, and that no warning signals of any kind were given.

The company's evidence tends to prove that the gates on the Swansboro side of the track were already lowered and that at the time the buggy was driven between the gates on the Manchester side of the track they were being lowered; that the gateman endeavored to prevent the driver of the buggy from going upon the tracks; and that the train was stopped as quickly as it possibly could have been stopped, after the plaintiff's position of peril was discovered.

[1] These conflicting theories were submitted to the jury. Upon well-settled principles their verdict is conclusive on this court, and will not be disturbed unless some harmful error of law was committed by the trial court. *Atlantic Coast Line R. Co. v. Church*, 120 Va. 733, 92 S. E. 905, and cases there cited.

The errors of law alleged are:

[2, 3] 1. That the court gave instruction No. 1 for the plaintiff, reading thus:

"The court instructs the jury that under the ordinance of the city of Richmond it was the duty of the defendant to provide and erect vertical arm gates at this crossing of its track over Hull street, and it was the further duty of the said defendant to erect and maintain the said gates, and to provide for the closing of them at the approach of engines or trains so as to prevent accident and the failure to perform the duty set forth above is negligence; and if you believe from the evidence that the defendant failed to perform the said duty and the said failure was the proximate cause of the accident to the plaintiff, without negligence on her part, then you must find for the plaintiff."

Two points are made against this instruction. One is that the ordinance which was

introduced relates to gates which are to be erected when deemed necessary and required by the committee on streets, and that there is no evidence in the record to show that the committee on streets ever required these gates to be erected and maintained. A sufficient answer to this objection is that this point was not made at the time the ordinance was introduced. The defendant at the trial simply made a general objection to the introduction of the ordinance, without specifying any ground therefor. There is a presumption, growing out of the fact that the gates were erected, that they were erected in obedience to this ordinance, and, if the question had been raised in the trial court which is raised here, the court would doubtless have excluded the evidence until the facts with reference thereto had been ascertained. Such a point cannot be raised for the first time in this court.

[4] The other objection to the instruction is that, instead of telling the jury that it was the company's absolute duty to obey the ordinance, they should have been instructed that the company was bound to exercise ordinary care to obey it. The suggestion is without merit. It is the absolute duty of all to obey valid statutes and ordinances enacted for the protection of human life, and the failure to do so, if this be the sole proximate cause of an accident, is negligence which will sustain a recovery. The instruction followed the ordinance and is correct. *Atlantic & Danville R. Co. v. Reiger*, 95 Va. 427, 28 S. E. 595; *A. C. L. Co. v. Church*, supra.

[5] 2. The second instruction complained of was one given for the plaintiff, and related to the speed of the train, and told the jury that, if the train was operated at a rate of speed greater than four miles an hour, the rate fixed by an ordinance of the city, then that this was negligence, and that, if they believed that this negligence was the proximate cause of the accident and that the plaintiff was free from negligence, then they must find for the plaintiff. No authority is relied upon to support this objection, and we find no error in the instruction.

[6] 3. The third instruction relates to the last clear chance doctrine, and the jury were told that if by the exercise of ordinary care the servants of the defendant in charge of the train, or the gatekeeper in charge of the gates, could, after the peril of the plaintiff had been discovered, by the use of ordinary care have prevented the accident, then it was their duty to do so. There is sufficient evidence in the record to sustain this instruction.

[7] 4. The other instruction complained of relates to the defense of contributory negligence, and shows that the burden of proving the plaintiff's contributory negligence is upon the defendant, unless it appears from

the plaintiff's evidence. This instruction, in substantially this form, has been many times approved by this court.

[8] 5. The defendant complains of the refusal of the court to give instruction No. 7, offered in its behalf. It is sufficient to say as to this that the court had already given at the instance of the defendant six instructions which fully and sufficiently instructed the jury as to the defendant's theory, and it was unnecessary and improper to repeat and emphasize propositions of fact and law which had already been clearly and sufficiently stated to the jury.

[9, 10] 6. Instruction No. 8, which was offered by the defendant and refused, seems to be based in part upon the supposition that the gates on the Swansboro side were being let down at the time the buggy was driven upon the tracks on the Manchester side. There is no evidence submitted by the defendant tending to prove this. The company undertook to prove by several witnesses that the gates on the Swansboro side were already down, and that the gates on the Manchester side were being let down at the time referred to and upon this evidence rested its defense. The instruction was properly refused because there was no evidence to support the fact thereby suggested. Another part of the same instruction is based upon the theory that the evidence does support, namely, that the gates on the west or Swansboro side were already down at that time; but, as the jury had already been sufficiently instructed on this point in instruction No. 5 which the court did give, such repetition was unnecessary. In that instruction, No. 5, they were clearly and distinctly told that, if the gates on the west or Swansboro side were down and the gates on the east or Manchester side were being lowered (and the evidence of the defendant tended to prove that state of facts), then the plaintiff could not recover.

Upon the whole case, it seems to us that the jury were sufficiently instructed, and that no harmful error is shown.

Affirmed.

(124 Va. 522)

**CITY OF RICHMOND v. MERCHANTS'
NAT. BANK OF RICHMOND.**

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. TAXATION — 499 — BANK STOCK — CORRECTION OF ASSESSMENT — MOTION — PARTIES.

Error in bringing action to correct assessment of capital stock, surplus, and undivided profits of bank, in name of corporation instead of stockholders, was cured by consent order nunc pro tunc, whereby the amount of taxes ascertained to be due from stockholders was assessed against them; the court having power,

by virtue of consent order, to admit stockholders as parties.

2. TAXATION — 12 — BANK STOCK — DISCRIMINATION — UNITED STATES STATUTE.

General purpose of U. S. Rev. St. § 5219 (U. S. Comp. St. § 9784), prohibiting taxation of national bank stock "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state," was to prevent discrimination by the states in favor of state banking associations against national banking associations.

3. TAXATION — 12 — DISCRIMINATION — NATIONAL BANK STOCK.

Ordinance founded upon Acts 1915, c. 85, imposing tax of \$1.40 on \$100 on national bank capital, instead of 30 cents, the rate imposed on other moneyed capital in the hands of individuals, is not a discrimination against the bank capital in favor of the other moneyed capital, in violation of Rev. St. U. S. § 5219 (U. S. Comp. St. § 9784), prohibiting taxation of national bank stock at a greater rate than other "moneyed capital in the hands of individual citizens."

Error to Hustings Court of Richmond.

Petition by the Merchants' National Bank of Richmond against the city of Richmond, to correct an assessment. Order granting plaintiff relief prayed for, and defendant brings error. Reversed.

H. R. Pollard, of Richmond, for plaintiff in error.

Coke & Pickrell and Legh R. Page, all of Richmond, for defendant in error.

WHITTLE, P. This case originated in the hustings court with a petition by the Merchants' National Bank of Richmond against the city of Richmond, to correct an alleged erroneous assessment for the year 1915, directly against the bank upon its capital stock, surplus, and undivided profits, less the assessed value of its real estate and other deductions allowed by law, instead of being levied and assessed against the shareholders of the stock of the bank upon the value of their shares ascertained as the law prescribes. Moreover, complaint was made that the assessment, instead of being limited to the alleged maximum rate of 30 cents on each \$100 of the ascertained value of the shares of stock, was fixed, levied, and collected at \$1.40 on each \$100 of such value. To an order of the hustings court granting the relief prayed for, this writ of error was allowed.

Two assignments of error were pressed: (1) That the court erred in overruling the motion of the city to dismiss the proceeding for want of jurisdiction. (2) In establishing 30 cents on the \$100 of value as the maximum rate that could be levied by the city on the shares of bank stock in place of \$1.40.

The first assignment rests upon the contention that the assessment, in essence, is

against the stockholders, and therefore the proceeding should have been in their name, and could not be maintained by the bank. *Main St. Bank, Inc., v. City of Richmond*, 122 Va. 574, 95 S. E. 386.

[1] Whatever merit there may have been in this assignment in the first instance, the error in procedure was cured by the consent order, *nunc pro tunc*, whereby the amount of taxes ascertained to be due from the shareholders was assessed against them. The court, by virtue of the consent order, was within its powers thus to admit the shareholders (the real persons in interest) as parties, and to make a correct assessment against them. *Commonwealth v. Schmelz*, 114 Va. 364, 76 S. E. 905.

2. The remaining controverted question for our determination is, What was the maximum rate which the city of Richmond could lawfully levy on the shares of bank stock for the year 1915?

By way of premise to the consideration of this feature of the case, we may observe that the city of Richmond, under its charter, possesses plenary power of taxation, subject only to such limitations as may be placed upon the exercise of that power by the Constitution and Legislature.

The ordinance approved April 9, 1915, is founded upon the city charter and the segregation act passed by the General Assembly at its extra session of 1915, and approved March 15, 1915 (an emergency was declared to exist with respect to it, so that the act was in force from its passage). Acts 1915, c. 85, p. 119. The gravamen of the bank's complaint is that its capital is taxed at the rate of \$1.40 on the \$100, instead of 30 cents, the rate imposed on other moneyed capital in the hands of individuals. Its contentions are based on an alleged conflict between the ordinance and section 1040a of the Code; section 168 of the state Constitution; the fact that at the date of the assessment the rate of taxation on all intangible property taxed that was also taxed by the state was at the rate of 30 cents on the \$100; and that a higher rate than 30 cents contravened section 5219, Rev. Stat. U. S. (U. S. Comp. St. § 9784). All of these objections except the last were practically disposed of by the construction placed upon the segregation act by the decision of this court in the case of *City of Richmond v. Drewry-Hughes Co.*, 122 Va. 178, 94 S. E. 989.

The history of the litigation of which that case is the sequel was this: By authority of the ordinance (one of the features of which is here drawn in question) the city assessed the capital employed by *Drewry-Hughes Company* (and other merchants residing and doing business in the city) in their business as merchants at \$1.40 on the \$100. From an order of the hustings court declaring the correct rate of taxation in that case to be 30 cents on the \$100, the city

appealed, and at the November term, 1916, of this court that judgment was affirmed. The case again came before us on rehearing, and was ably argued by the original counsel, and also by others, whose localities were affected by the decision, on briefs; and in an exhaustive opinion, written by Judge Kelly and concurred in by all the other judges, the judgment of the hustings court was reversed. The last opinion covers the contentions stressed in this case, save the insistence that the exception in the segregation act as therein construed would, if applied to national banks, be violative of section 5219, *supra*.

Since, therefore, we have no purpose to recede from the conclusions reached in the merchants' tax case, further elaborate discussion of the questions settled by that decision is unnecessary. This statement is predicated upon the view that the exceptions in the act of 1915, in respect to the capital of merchants and the shares of stock of banks in the particular here involved, are so concatenated as necessarily to demand the same construction.

The act after segregating the several kinds and classes of property, so as to specify upon what subjects state taxes and upon what subjects local taxes may be levied, respectively, and limiting the maximum local rate of taxation on segregated intangible personal property at 30 cents on the \$100 of assessed value thereof, contains the following exception:

"Except that the capital of merchants shall not be subject to the state taxation, but may be taxed locally as prescribed by law; and the shares of stock of banks, banking associations, and other institutions enumerated in section seventeen in Schedule D of the act aforesaid, which shares of stock shall be taxed as provided by law."

Judge Kelly, in his opinion, justly observes:

"If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named in that particular act, undoubtedly he would have used the words 'as prescribed by this act,' or their equivalent, instead of 'as prescribed by law.' If this be not true, then it would follow that 'shares of stock of banks' could only be taxed locally at the 30-cent rate, for, as we think, it cannot be plausibly contended that the words, 'as prescribed by law,' when applied in the act to merchants' capital, have any other or different meaning than the words 'as provided by law,' when applied therein to bank stock. The necessary result of the decision of this court in *Tresnon v. Board of Supervisors* [120 Va. 203] 90 S. E. 615, is that the local taxation of bank stock is not controlled by the terms of the segregation act."

Judge Kelly also points out that section 168 of the Constitution does not conflict with the right of the taxing power to tax different classes of intangible personal property at dif-

ferent rates, citing Judson on Taxation, § 441; 37 Cyc. 746; Bradley v. City of Richmond, 110 Va. 521, 524, 66 S. E. 872.

[2] Advertising briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States, in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other "moneyed capital in the hands of individual citizens of the state," obviously the general purpose of the federal statute is to prevent discrimination by the states in favor of state banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

In 9 U. S. Comp. Stat. (1916) title "National Banks," at page 11993, note 29, it is said:

"*Moneyed Capital*."—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase 'moneyed capital' used therein means capital engaged in the operations of banking, which is used as a source of profit, so that Act N. Y., July 1, 1882, § 312, declaring that the stockholders in banks organized under the authority of the state or United States shall be assessed for the value of their stock, was not void under this section because the assessment roll showed that the securities of life insurance companies, the stock of state corporations, the deposits of savings banks, the stock of trust companies, and companies created outside of the state and owned in the state, virtually escaped taxation, since such property, excepting that of savings banks and trust companies, was not 'moneyed capital in the hands of individuals,' as contemplated by this section." *Mercantile Nat. Bank v. New York* (1887) 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *National Bank, etc., v. Boston* (1888) 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689; *Palmer v. McMahon* (1890) 133 U. S. 660, 10 Sup. Ct. 824, 33 L. Ed. 772; *Talbot v. Board of Commissioners, etc.* (1891) 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210; *First Nat. Bank v. County of Chehalis* (1897) 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *New York ex rel. Amoskeag Sav. Bank v. Purdy* (1913) 231 U. S. 373, 34 Sup. Ct. 114, 58 L. Ed. 274.

[3] These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of defendant in error, that the rate of tax imposed under the segregation act and the ordinance of the city upon the shareholders of bank stock constitutes "a gross and illegal discrimination against that species of property as compared with all other moneyed capital," is groundless.

In conclusion, it is only fair to the learned judge of the hustings court to state that on August 3, 1917, when he delivered his judgment in this case fixing the maximum amount of tax against shareholders of bank stock at 30 cents on the \$100, the first decision

of this court in *City of Richmond v. Drewry-Hughes Co.* was still in force, and he naturally regarded it as strongly persuasive, if not controlling, authority in the instant case.

For the reasons given, the order complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with the views expressed in this opinion.

Reversed.

(124 Va. 730)

WESTERN UNION TELEGRAPH CO. v. BOWLES.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. COMMERCE ⇐28—NATURE OF—TRANSMISSION OF MESSAGES.

Transmission of intelligence by wire is commerce.

2. COMMERCE ⇐8(7)—INTERSTATE COMMERCE—REGULATION—TELEGRAPH COMPANIES.

Congress by Act Feb. 4, 1887, to regulate commerce, as amended by Act June 18, 1910, has occupied the whole field of regulation with respect to interstate telegrams, and has thus ousted the state of its jurisdiction over the subject.

3. COMMERCE ⇐28—INTERSTATE COMMERCE—TRANSMISSION OF MESSAGES.

The transmission of a message between two points in a state which in the course of its transmission passed out of the state is interstate commerce, though the message in the first instance passed through point of destination, and could have been sent there direct, where the route by which it was sent afforded the quickest service and was the one in regular use.

4. COMMERCE ⇐8(7)—INTERSTATE COMMERCE—REGULATION OF TELEGRAPH COMPANIES.

Where message passes out of state during transmission and becomes an interstate message, the state, in view of Act of June 18, 1910, loses its jurisdiction, and has no right to say that the message should have been sent by a different route.

5. COMMERCE ⇐59—INTERSTATE COMMERCE—TELEGRAPH COMPANIES.

In view of Act Cong. Feb. 4, 1887, to regulate commerce, as amended by Act June 18, 1910, depriving the state of its jurisdiction over regulation of interstate messages, Act approved March 21, 1916 (Acts 1916, c. 439), defining interstate messages, is invalid, being an attempt to legislate upon the subject over which the state has no jurisdiction.

6. COURTS ⇐97(5)—DECISIONS—INTERSTATE COMMERCE.

Upon the question of what constitutes interstate commerce, the state laws must give way to federal law as laid down by federal judicial decisions.

7. COMMERCE ⇐8(1)—INTERSTATE COMMERCE—LAWS APPLICABLE.

On the question of interstate commerce, state laws must give way to federal laws, wheth-

er such laws take the form of judicial decisions or legislative enactments.

8. COURTS — 366(1)—DECISIONS—CONSTRUCTION OF STATE LAWS.

Upon all questions arising under state Constitutions and laws, where nothing is involved of national authority or national right, the federal courts are bound to accept the construction placed by the courts of the state upon its Constitution and statutes whenever the former courts are called upon to decide similar questions.

Error to Circuit Court, Henry County.

Action by I. S. Bowles against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

Whittle & Whittle, of Martinsville, and Hughes, Little & Seawell, of Norfolk, for plaintiff in error.

Wm. M. Peyton and I. M. Clingenpeel, both of Martinsville, for defendant in error.

KELLY, J. I. S. Bowles delivered to the agent of the Western Union Telegraph Company at Bassett a prepaid message to be transmitted to Dr. M. E. Hundley, at Martinsville. The points of origin and destination are both within this state.

Following the method then, and for some years theretofore, in regular use by the company, this message was forwarded from Bassett to Richmond over a direct wire which passes through two telegraph offices in North Carolina before it reaches Richmond, the relay point for messages coming into the territory in which Martinsville is situated. This wire passes through the Martinsville office, but is not designed for direct use there. From Richmond the message, like all others of its class, was sent over another direct wire which runs through two other North Carolina offices before reaching Martinsville. The agent at Bassett testified that the message could have been sent direct to Martinsville, but that the route by which he did send it was the one which afforded the quickest service to patrons, and was the one in regular use under the practice and requirements of the company. This testimony is not in any way disputed or contradicted.

No complaint was made of any delay in transmission or delivery, but the message as given to Dr. Hundley was signed "O. S. Bowles," the first initial of the sender's name having been changed from "I" to "O"; and the present action was brought by Bowles, based upon this error, to recover the statutory penalty of \$100, prescribed in section 1294h, cl. 5, of the Code of 1904. There was a verdict and judgment below in his favor.

The decisive question in the case is whether the message, as handled by the company, constituted interstate commerce, and thus lay

beyond the realm of state control and regulation. As a matter of established law, we think it did.

[1-3] In *Western Union Telegraph Co. v. Bolling*, 120 Va. 413, 91 S. E. 154, Ann. Cas. 1918C, 1036, the following propositions are shown to be conclusively settled by authority, and are accordingly adopted as law in this jurisdiction: (1) Transmission of intelligence by wire is commerce. (2) The transmission of a telegraph message between two points in the state which in the course of its transmission passes out of the state is interstate commerce. (3) Congress, by the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended June 18, 1910 (36 Stat. 539, c. 309), has occupied the whole field of regulation with respect to interstate telegrams, and has thus ousted the state of its jurisdiction over the subject.

The fact that the message here involved went in the first instance through Martinsville, and might, if the company's rules had so required, have been received there without passing out of the state, does not, as contended by the defendant in error, differentiate the case in principle from the *Bolling* Case. It is true that in the latter case there appeared to be no means of transmitting the message except through a relay point outside of the state; but in the companion case of *Western Union Telegraph Co. v. Mahone*, 120 Va. 422, 91 S. E. 157, decided the same day, the message involved might have been sent from the point of origin to the point of destination without leaving the state; and this court there said:

"There is no substantial difference between the law applicable to this [*Mahone*] Case and that applicable to the case of *Western Union Telegraph Company v. Bolling*, * * * this day decided."

It was contended in the *Mahone* Case, as here, that, inasmuch as the message could have been sent over an intrastate route, the company could not impress upon it an interstate character by a different routing. But this court held, upon authority, that the interstate character of the message must be tested by the actual facts as to its transmission, and not by the motives of the company; and, further, as a necessary corollary from the decision in the *Bolling* Case, that the adoption by the company of an interstate route of transmission relegated the transaction to the domain of federal control.

[4] Whether the power of regulation rests with the state or with the United States, the really important question is one of public service. If only the patrons of the company at Bassett and Martinsville were concerned, there would seem to be little doubt, certainly to a mind unfamiliar with the art of telegraphy and untrained in its practical use, that the best and quickest way to serve these two

points would be by the use of a direct instead of a circuitous line. But the company serves a vast territory and a multitude of patrons, and in doing so maintains a large organization and a complex system, which it is by law required to so direct and control as to best and most efficiently serve the general public. If it is failing in its duty in this respect as to messages of the kind here involved, the question is one with which (whether unfortunately or not) the state cannot deal, for the reasons already set out. We can no more say that the message from Bassett to Martinsville should have been sent direct than we could have said that the message in the Mahone Case should have been so sent.

[5] It follows from what has been said that the act of the General Assembly, approved March 21, 1916 (Acts 1916, p. 757), entitled "An act to define intrastate messages and what is held not to be such a message," strongly relied upon by the defendant in error, is of no force, being an attempt to legislate upon a subject over which the state has no jurisdiction or power of control. The act is as follows:

"Be it enacted by the General Assembly of Virginia, that any message accepted by any telegraph company doing business in this state to be sent to another point in this state, shall be deemed to be an intrastate message. Any telegraph company that would give such message as aforesaid the character, or fix upon such message an interstate character by virtue of the fact that in the course of transit of said message it is relayed or carried out of the state in sending it, shall introduce evidence * * * that the route used in sending said message was the only practicable or feasible and the most expeditious manner of sending said message, and shall introduce as a part of said evidence, charts and maps showing lines of wires and relay stations to prove such route as the most desirable and proper route to have been used, upon request of any complainant."

[6-8] This statute undertakes to define interstate commerce, as to telegraphic communications, and to confer upon the courts of the state the right and power to inquire into and pass upon the reasonableness and expediency of the rules and methods by which such commerce is carried on. That messages between two points within, but transmitted over lines passing without the state, constitute interstate commerce, and, as such, are subject to federal control, is a proposition based upon federal decisions and federal statutes, as fully appears from the Bolling and Mahone Cases and the authorities therein cited. This being true, state laws upon the subject must give way, whether such laws take the form of judicial decisions or legislative enactments. Upon all questions arising under state Constitutions and laws, where nothing is involved of national author-

ity or national right, the federal courts are bound to accept the construction placed by the courts of a state upon its Constitution and statutes whenever the former courts are called upon to decide similar questions. Cooley's Const. Lim. (7th Ed.) p. 31, and citations; 5 R. C. L. p. 705, § 17, and citations in note 10. But the decision of all questions arising under the laws of the United States, including, in particular, the definition and meaning of the commerce clause of the Constitution, rests finally and conclusively with the federal courts. Cooley's Const. Lim. (7th Ed.) p. 25, and notes; 5 R. C. L. p. 705, § 17, and citations in note 9; United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. —.

For the foregoing reasons, and upon the authorities cited in support thereof, the judgment must be reversed.

Reversed.

PRENTIS, J., absent.

(124 Va. 478)

ADAMS v. TRI-CITY AMUSEMENT CO.,
Inc.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. CONTRACTS ⇨302—BUILDING—DEFECT IN WALLS—LIABILITY.

A building contractor cannot be held responsible for defect in not having walls of a building heavy enough to stand in wet ground, where he followed the plans and specifications furnished by the architect as the agent of the owner.

2. CONTRACTS ⇨232(2) — BUILDING CONTRACTS — UNFORESEEN ACCIDENT — AGREEMENT FOR RECONSTRUCTION.

Where the wall of a building in construction fell, not by contractor's fault, but because of defective plans, its re-erection by the architect's directions, contractor and owner each to bear half of the expenses, cannot, upon owner's complaint, be said to be inequitable, particularly where the owner's president, general manager, and corporate directors were informed of and agreed to such re-erection.

3. CORPORATIONS ⇨432(12)—CONTRACT—EVIDENCE.

Evidence held to show that a letter from the defendant corporation's general manager to contractor authorizing the re-construction of a wall at cost plus 10 per cent., of which the treasurer had notice, had come to the general knowledge of the corporation, and that the corporation agreed to it by acquiescence.

4. ARBITRATION AND AWARD ⇨85(3)—PARTIALITY OR MISCONDUCT OF ARBITRATORS—EVIDENCE.

In a suit involving an award made under provisions of a building contract fixing the value of work, evidence held insufficient to show that

the arbitrators were dishonest, prejudiced, or unfair.

5. CONTRACTS ⇨232(2)—IMPLIED CONTRACT—RATIFICATION.

Where, owing to a defect in plans, and not from contractor's fault, walls collapsed, requiring additional work to be done, and the corporate owner accepted and utilized the work done, even without an express contract, the contractor is fairly entitled to recover the value of the work performed.

6. MECHANICS' LIENS ⇨254(2)—FORECLOSURE—COUNTERCLAIM—DEFECTS.

In the foreclosure of a mechanic's lien by contractor, who failed to waterproof basement walls because of the caving in of the earth, and where there were leaks and other defects in the roof, although the building was accepted by the corporate owner, allowance should be made for such defects.

7. COURTS ⇨475(10)—JURISDICTION—ENFORCEMENT OF MECHANIC'S LIEN.

If a suit in a city corporation court against the corporate owner of a building in which receiver was appointed was instituted before a contractor's mechanic's lien foreclosure suit was instituted in the circuit court, the contractor should be required to intervene in the corporation court; but, if the mechanic's lien suit was first instituted, the receiver should appear and defend.

Appeal from Circuit Court of City of Hopewell.

Suit by C. E. Adams against the Tri-City Amusement Company, Incorporated, to enforce a mechanic's lien. From a decree for plaintiff reducing the amount of his claim, plaintiff appeals. Amended and remanded.

Don P. Halsey, of Lynchburg, and A. B. Dickinson, of Richmond, for appellant.

J. O. Heflin, of Colonial Beach, and A. L. Jones, for appellee.

PRENTIS, J. C. E. Adams (hereinafter called the contractor) erected a theater building in the city of Hopewell for the Tri-City Amusement Company, Incorporated (hereinafter called the company). After the completion of the structure, the defendant filed his mechanic's lien, claiming that there was a balance due him of \$5,893, and thereafter instituted this suit to enforce such lien.

The history of the transaction appears to be: That the original contract in writing was entered into on February 2, 1916, and provided for the erection of a building at the price of \$7,335; thereafter the company authorized the contractor to build a basement as an addition to the building for \$4,407, and certain extra work was directed. The decree of the court which is complained of reduced the claim of the contractor to the sum of \$1,977.60, and of this reduction the contractor is here complaining.

[1] The controversy grows out of the fact

that the basement walls of the building twice fell and had to be re-erected. The balance claimed by the contractor is for the extra work imposed upon him in the re-erection of these walls. When the walls fell the first time, they were reconstructed in accordance with the original plans and specifications of the architect, except that by the architect's instructions they were braced with iron columns. It is claimed for the company that the contractor rebuilt these walls without complaint, and at his own expense, and that his claim now for compensation for one-half of the cost of such re-erection is an afterthought. Upon this, as upon most of the controverted questions, there is a hopeless conflict in the testimony. It appears, however, from the evidence of the architect, who must, under the plain terms of the written contract, be held to be the agent of the company, to direct the work in its details, that he, although at first of the opinion that the falling of the walls was due to the fault of the contractor, upon learning the facts (the principal fact in this connection being that the company had failed to furnish the timbers which were necessary for the superstructure and for bracing the work), changed his opinion, and in accordance with the agreement of the parties directed the re-erection of the walls at the joint expense of the company and the contractor. It is perfectly manifest that the design of this wall was inadequate. Whether sufficient or not, under ordinary conditions, it appears that by reason of the low, wet character of the ground and the consequent drainage through it, such a wall as the architect designed was not sufficient to stand the strain of the water and the earth which was washed against it. For such a defect a building contractor cannot be held responsible, for it is his duty to follow the plans and specifications furnished as his guide by the architect as the agent of the owner.

[2] The theory of the company, that, because of the contract for the erection of a complete building, the loss arising from such an accident should fall upon the contractor, is unsound, in cases like this where the loss was caused, not by any fault of the contractor, but because of the defective plans of the architect. So that the walls having been re-erected by the direction of the architect, the settlement and agreement made under these circumstances of imposing half the cost upon the contractor and half upon the company cannot be said to be inequitable, and this adjustment of an unanticipated difficulty, in which the interest of the company required some prompt adjustment, is supported by the testimony of the architect and the contractor to the effect that the president, general manager, and directors of the company were informed of and agreed to this division of the expense of such re-erection.

[3] The walls, however, fell a second time, after the frame superstructure had been erected, and the larger part of the amount here in controversy grows out of the claim of the contractor for the additional cost of erecting these walls the third time. For the contractor it is shown that he had strictly followed the plans and instructions of the architect; that after the accident there was a meeting of the directors; and that at that meeting he told them that he could build a wall which would stand in that place, but that it would be necessary to make it 3 feet wide at the bottom, instead of 18 inches, as the architect had planned, and that it should be gradually narrowed to the width of 18 inches at the top; that he estimated the cost of the additional labor and material which would be required to make this change at from \$1,200 to \$1,600, and that he would undertake to do the work, which involved the removal of a large quantity of earth and the cleaning off of bricks of the old wall, as well as the additional material and labor, at its actual cost plus 10 per cent. thereon; and that this was agreed to. In a short while he asked for some written memorandum of this agreement, and said that he was otherwise unwilling to do the work. Thereupon Mr. Xippas, who was named as general manager in the charter of the company and had never been removed from office, gave him this letter:

"Hopewell, Va., August 21, 1916.

"Mr. C. E. Adams, Hopewell, Va.—Dear Sir: You are hereby authorized to proceed with the following work as extra work at the Marcelle Building in Hopewell, Va.

"Re-erect the walls that caved in and take down walls that are not safe, at actual cost and 10 per cent. commission.

"Order frames for the theater as per sketch furnished you same not cost more than \$75.00 (5 frames in all).

"Order electric fixtures for theater as selected by me, same not to cost over \$300.00 (10 brackets, 5 auditorium ceiling lights & 5 lobby lights, 4 exit lights).

"Wire building for six intercommunicating phones.

"Wire sidewalk for two street lights.

"The above electric fixtures are to be bought for us at cost price and same is being done for us by you as an accommodation.

"Yours truly, Tri-City Amusement Co., Inc.,
"S. A. Xippas, Genl. Mgr."

He thereupon proceeded with the work, relying upon the assurance of that letter that he would receive the actual cost of such re-erection with 10 per cent. commission thereon added. This letter was promptly shown to Saunders, the treasurer of the company, and according to Xippas it was in substance authorized and directed by all of the other directors. There is no conflict about the fact that it was shown to Saunders, but all of the other directors testified that they knew nothing whatever about the letter and denied

that there was any agreement for the erection of the walls at cost plus 10 per cent. Their version of the transaction is that the contractor agreed to re-erect these walls for a sum not exceeding \$1,600; but there is striking confirmation of the contractor's understanding in the fact that each one of the witnesses says that the estimate of \$1,600 was stated to be for the additional material and work made necessary by the change in design and the widening of the walls.

In considering such testimony, the equities of the situation naturally influence the impartial mind. In this case the contractor would have been justified in refusing to re-erect the walls which had fallen because of defects in design (for which the company and its agent, the architect, were responsible) and not for defects in construction (for which he would have been responsible). There was no reason for expecting the contractor to incur the expense of such re-erection. Then, in considering the weight of the testimony, we find that Xippas was the original promoter of the company; that the plans and contract for the building were originally made in his name, he having originally secured the architect to make such plans, and the written contract was altered just before it was executed by the insertion of the name of the company; that Xippas was the general manager; that he ordered many extras during the construction of the work, some of which appear in the letter above quoted; that he countersigned the checks which were drawn by the treasurer in favor of the contractor as the work progressed; and that he did all these things with the knowledge of the president and directors from which their acquiescence must be inferred; and that they have accepted the benefit of his labors and attention to the business of the company, during the construction.

Upon the whole case, we are clear that the weight of the testimony sustains the contractor's claim, and that, notwithstanding the denials of the other directors (whose veracity may be conceded), the corporation must be charged with notice of the letter referred to, written by Xippas, the general manager, and communicated to Saunders, its treasurer, and this whether the other directors knew of it or not; for it appears that Xippas was in the habit of giving orders, that the affairs of the company were conducted in a loose and unbusinesslike way, and that no record of either stockholders' or directors' meetings, or of any formal action taken by the company at any time, appears to have been kept by anybody.

[4] Then, again, there is another phase of the controversy, which, though merely persuasive, tends to sustain the contractor's claim. In the original agreement it was provided that—

"Should any dispute arise respecting the true value of any such works added or omitted by

the contractor, the same shall be arbitrated by appealing to three men who have been mutually selected, and whose decision shall be final and binding on all parties."

Pursuant to this agreement, three building experts were chosen as arbitrators. They met for the purpose of arbitrating the controversy on the 18th of January, 1917. At the request of the company, through its president, Mr. Temple, who said that an important witness was absent, they adjourned to a date apparently agreeable to all, January 23d: the order of adjournment being signed by all three of the arbitrators. When they met pursuant to such adjournment, the arbitrator chosen by the company, by its direction, withdrew; whereupon, the other two arbitrators proceeded with their investigation and awarded the contractor the full amount of his claim. This award was based entirely upon the evidence of the contractor himself. No sufficient justification or excuse for this refusal by the company to observe their agreement to submit to arbitration is shown by the record. The president, Mr. Temple, says:

"I got information which I did not like, showing which way things were going, and as I afterwards found out was correct from the witnesses herein. All those that attempted to arbitrate were on Mr. Adams' side, just as I had been told they were; therefore, I declined to arbitrate."

And later he says, in explaining why he refused to submit the evidence to the arbitrators, "After I found out how things were, we quit, and I did not propose to arbitrate," and that he did not feel bound by the arbitration and "did not pay any attention to it at all." In response to a question as to whether he meant to say that any of the arbitrators would have acted unfairly, he replied:

"No, sir; I mean to say that they were lined up for the arbitration just as they are lined up here in these depositions, as witnesses for the plaintiff."

Now, the two arbitrators who made the award were examined as witnesses in the case, and a close scrutiny of their testimony fails to indicate the slightest bias or prejudice against the company or against its claim. They were experts especially well fitted to determine such a controversy, and there is not the slightest suggestion in the record above quoted that they are not honest men of high character, who wished to do the work which they were requested to do with the determination to do justice. So that, so far as this record discloses, the with-

drawal by the company from the arbitration was without justification or excuse.

[5] There is still another view which may be taken of the case. It sufficiently appearing that the cause of the trouble was the defect in the plans at that particular place, because of the character of the soil and drainage, and that there was no defect in the construction for which the contractor was responsible, and the additional work having been done for the benefit and advantage of the company, and having been accepted and utilized, even without an express contract the contractor is fairly entitled to recover the value of the work so performed. The losses of the stockholders of the company have been serious, but the contractor cannot be held responsible therefor.

[6] From every aspect of the case, then, we are convinced that the trial court erred in failing to sustain the claim of the contractor, substantially for the amount claimed.

It appears, however, that under one of the contracts the basement walls were to be waterproofed, and that because of the sudden caving in of the earth against the wall this was not done. There is also testimony tending to show that there are leaks in the roof and some other defects, though the building has been accepted and is in use by the company. For these defects there should be an allowance in favor of the company, and in our opinion this allowance should be \$500.

The decree will therefore be amended, and the amount adjudged to be due the contractor increased from \$1,977.60 to the sum of \$5,393, with interest thereon from the 13th day of January, 1917, and costs.

[7] It appears that the trial court, after determining the amount due, decreed that, instead of enforcing the lien by further proceedings in the cause, the complainant should intervene by petition in a suit then pending in the corporation court of the city of Hopewell, in which a receiver had been appointed who at that time held the property of the company. If the suit in the corporation court of the city of Hopewell was instituted before this suit, then there is no error in requiring the contractor to intervene by petition in that suit; but, if this suit was first instituted, the circuit court of the city of Hopewell should proceed with this case and give the contractor complete relief by the enforcement of his lien against the property of the company; or for greater convenience one of the causes should be removed to the other court and both thereafter heard together.

The cause will be remanded for such further proceedings as may be necessary to effectuate the views herein expressed.

Amended and remanded.

(124 Va. 548)

COMPTON et al. v. RIXEY'S EX'RS et al.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. WILLS §794—RELINQUISHMENT OF PROVISIONS—TIME.

Where a widow entered into enjoyment of property under a will and after seven years relinquished its provisions, it was too late for her to claim the provision made for her by statute.

2. WILLS §440 — CONSTRUCTION — INTENTION.

The testator's intention is that spoken by the words of the will, and not the intention deduced from speculation as to what he would have done had he anticipated a change in the circumstances surrounding him at its execution.

3. WILLS §802(2) — REMAINDERS — ACCELERATION.

Where testator designates remaindermen to take upon the death or remarriage of his wife as "my children then living and the descendants per stirpes of such as may be then dead without issue surviving," no one can tell, until the happening of the event which is to terminate wife's life estate, which of the children answer the description of being "then living," and the wife living and not remarrying cannot by renunciation of rights under a will accelerate the taking by the remaindermen.

4. WILLS §802(2) — CONSTRUCTION — INTENTION — ACCELERATION OF VESTED REMAINDER.

Where the remainder is vested, it does not follow that the time of enjoyment will be accelerated by the renunciation of the life holder, since the testator's intention, as shown by the will read as a whole, may not permit it under the existing circumstances.

5. WILLS §834(8) — REMAINDERS — SUBSTITUTIONARY REMAINDER—ACCELERATION.

A remainder to a person after a life estate to another, or if such person be dead then to his heirs, is not contingent but substitutionary, and the mention of his heirs is intended to prevent a lapse in event of the death of the remainderman in the lifetime of the life tenant, and, if the particular estate ceases in such tenant's lifetime, the remainder may be accelerated as a vested remainder.

6. WILLS §853—CONTINGENT REMAINDERS —ACCELERATION OF ENJOYMENT.

Although there can be no acceleration of a contingent remainder, yet, where the contingency is the death of a life tenant, whatever terminates the life estate or prevents it from taking effect is equivalent to the death of a life tenant.

7. WILLS §853 — CONSTRUCTION — ACCELERATION OF REMAINDER.

When it appears that the life tenant and remainderman are sufficiently designated and testator intended that they together should take the whole estate, acceleration will be accorded the remainderman when the life estate is eliminated in any manner, for such must have been testator's intention.

8. WILLS §554 — CONSTRUCTION — ACCELERATION OF REMAINDER.

A gift to testator's "descendants per stirpes of such as may be then dead without issue surviving" is not substitutionary, but creates contingent remainders in the persons mentioned, and they take as purchasers, and only those living at "the death or remarriage" of the wife, life tenant, answer the description of donees under the provisions of the clause.

Appeal from Circuit Court, Fairfax County.

Suit by Mary B. Compton and others against John S. Barbour and another, as executors of the estate of John F. Rixey, deceased, and others. From a decree dismissing the bill, the complainants appeal. Decree affirmed.

Jos. F. Moore, of Berryville, for appellants.

R. E. Thornton and John S. Barbour, both of Fairfax, and H. Thornton Davies, of Manassas, for appellees.

BURKS, J. This case involves the construction of the will of Jno. F. Rixey. The fourth and fifth clauses of the will are as follows:

"Fourth. Upon the majority of my youngest child, my wife being alive and unmarried, I direct one-third of the net annual income from my entire estate, comprising that mentioned in the third as well as in the second clause hereof, to be paid over to my wife, as long as she lives, and remains my widow, and the remaining two-thirds to be divided equally between my surviving children and the descendants per stirpes of such as may be dead leaving descendants.

"Fifth. Upon the death of my wife, or her marriage, my youngest child living being of age, I direct my entire estate to go to and be divided equally between my children then living and the descendants per stirpes of such as may be then dead with issue surviving."

After accepting the provision of the will and enjoying the benefit thereof for a period of seven years, the widow executed, acknowledged, and caused to be recorded the following paper:

"Know all men by these presents, that I, Ellen B. Rixey, widow of the late John F. Rixey, deceased, for reason satisfactory to myself and which are known to my children, do hereby forever renounce and disclaim all my life estate in the estate of the said John F. Rixey, deceased, and all right, title and interest of whatsoever nature therein given to me by the provisions of the will of my late husband, the said John F. Rixey, which is of probate in the clerk's office of the circuit court of Culpeper, Virginia. And I do renounce and disclaim all right, title and interest of whatsoever nature to which I am now entitled in said estate, whether under the said will or by way of dower or widow's portion. I do hereby bind myself and declare that I will not accept, either at present or in the future, from the executors, their successors or assigns, any portion of the

income of said estate or any interest therein which may be sought to be paid to me in accordance with any right, title or interest which I had at any time before the execution of this instrument, it being my intention in executing this instrument to terminate my life estate in the estate of the said John F. Rixey as effectively as would my death.

"In witness whereof I hereunto set my hand and seal this ninth day of June, 1916.

"Ellen B. Rixey. [Seal.]"

At the time of the death of the said John F. Rixey, he had four living children, all of whom were still living and had attained the age of 21 years at the date of the renunciation by his widow. After the renunciation, these children called upon the executors of the estate of said Rixey for a settlement of their executorial accounts, and a delivery to them of the testator's estate, which delivery the executors declined to make, and thereupon they instituted this suit to compel such delivery. The circuit court dismissed their bill, upon demurrer, on the ground that the complainants had contingent and not vested remainders, and that nothing they had done, or could do, could operate to accelerate the time fixed by the testator for the distribution of his estate. We are of opinion that the decree of the circuit court is right.

[1] The widow relinquished the provision made for her by her husband's will, and it was too late for her to claim the provision made for her by the statute. Her children claimed that her renunciation was equivalent to her death, and that by such renunciation the remainders to them became vested and their enjoyment thereof accelerated.

[2, 3] "Acceleration" is the hastening of the enjoyment of an estate which was otherwise postponed to a later period, and the doctrine is only applied in furtherance, or in execution, of the presumed intention of the testator. It is never applied to defeat the testator's intention. The intention of the testator which is to be considered in the interpretation of his will is the intention spoken by the words of the will, where he has so spoken as to disclose his intention, and not the intention to be deduced from speculation as to what he would have done had he anticipated a change in the circumstances surrounding him at time of the execution of his will. The latter would amount to making a will for him, and not to be the interpretation of a will he has made. When he says, "I wish A. to take my estate at a designated time," we have no right to say that he meant that B. should take it at a different time. If we could call upon him to say what he meant, he might, and probably would, say, "I meant what I said." In the case in judgment, the testator designates the remaindermen who are to take upon the death or remarriage of his wife as "my children then living and the descendants per stirpes of such as may be then dead

with issue surviving." The wife is still living and has not remarried, and no one can tell until the happening of the event which is to terminate the particular estate, which of his children will answer the description of being "then living." As said in *Blatchford v. Newberry*, 99 Ill. 11, 46:

"Surviving at the time of distribution is a part of the description given by the will of the donees, and there is no gift to any one who does not answer the description in this element of time—who is not at that time living."

The children of the testator took, under the will, contingent, not vested, remainders. *Howbert v. Cauthorn*, 100 Va. 649, 42 S. E. 683; *Smoot v. Bibb*, 97 S. E. 355; *Purdy v. Hayt*, 92 N. Y. 446.

[4] There are many cases holding that where the remainder is vested, and it is apparent that the only object of postponing the remainderman is that the property may be enjoyed by the tenant for life, as where an estate is given to A. for life and after his death to B., so that it is manifest that A. and B. are to take the whole estate, on the termination of the estate of the life tenant in any way, or his incapacity or refusal to take, the estate of the remainderman will be accelerated. Here the testator's intention is inferred from the language of the will. In *re Rawling's Estate*, 81 Iowa, 701, 47 N. W. 992; *Clark v. Tannison*, 33 Md. 85; *Hinkley v. House of Refuge*, 40 Md. 461, 17 Am. Rep. 617; *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Jull v. Jacobs*, L. R. 3 Chay. D. 711. But even where the remainder is vested, it does not necessarily follow that the time of enjoyment will be accelerated. We are still to seek to ascertain the intention of the testator from his will read as a whole, and acceleration may not comport with that intent. There may be vested remaindermen for different parts of the estate, or vested remaindermen and residuary legatees, and perhaps other situations, where acceleration would not accord with the testator's intention, and will not be accorded. In *Jones v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293, the widow renounced the provisions of her husband's will and took what the law gave her, and thereby destroyed the whole scheme of distribution of her husband's estate, and, although certain legacies were vested, their payment was not permitted to be accelerated because it would be detrimental to the interests of the residuary legatees and for that reason did not accord with the presumed intention of the testator. See, also, *Wood v. Wood*, 1 Metc. (Ky.) 512; *Dean v. Hart*, 62 Ala. 308. In *Gallagher's Appeal*, 87 Pa. 200, it was held:

"Where a widow elects not to take under a will, her substituted devise and bequests are a trust in her, for the benefit of the disappointed claimants, to the amount of their interest there-

in. * * * A court of equity will sequester the benefit intended for the wife to secure compensation to those whom her election disappoints."

In *McReynolds v. Counts*, 9 Gratt. 242, the testator gave a tract of land to his wife for life with remainder in fee to his son, Isaac. He directed his personal estate to be divided into eight equal shares, one of which he gave to each of his seven living children, and the other to a child of a deceased son. The widow renounced the provisions made for her by the will and thereby destroyed the whole scheme of testamentary disposition. One-third of the tract of land was assigned to her as dower. The widow by her renunciation of the will disappointed the legatees in respect to one-third of their respective legacies, and by her waiver she gave up a life estate in two-thirds of the real estate, and it was said that familiar principles of equity authorize and require courts of chancery jurisdiction to sequester the property thus given up, and apply its profits to indemnify the disappointed legatees, and that, after these legatees had been indemnified for their disappointment, the two-thirds of the land should pass into the hands of Isaac Reynolds, the remainderman. To this extent, but to this extent only, the vested remainder of Isaac was accelerated.

[5] A remainder to a person after a life estate to a third person, or if such person be then dead to his heirs, is not contingent, but substitutionary, and the mention of his heirs is intended to prevent a lapse in the event of the death of the remainder in the lifetime of the life tenant, and, if the particular estate ceases to exist in the lifetime of the tenant for life, the remainder of such person may be accelerated under like conditions as a vested remainder. In *re Disston's Estate*, 257 Pa. 537, 101 Atl. 804, L. R. A. 1918B, 62; *Small v. Marburg*, 77 Md. 11, 25 Atl. 920; *Schulz's Estate*, 113 Mich. 592, 71 N. W. 1079; In *re Woodburn's Estate*, 151 Pa. 587, 25 Atl. 145.

[6] There can be no acceleration of a contingent remainder, for until happening of the contingency it is uncertain who is to take the estate. 16 Cyc. 651. But where the contingency is the death of a life tenant, the courts have been very liberal in declaring that whatever terminates the life estate, or prevents it from taking effect, is equivalent to the death of the life tenant. But this holding is based upon the presumed intention of the testator, and if such presumption is not warranted by the language of the will, construed in the light of the circumstances surrounding the testator, it will not be made. It has arisen most frequently in the construction of wills where a wife is given a life estate, followed by a remainder to take effect at her death, and the wife renounces the provision made for her, and

takes what the law accords her, and thereby defeats the testator's scheme for the distribution of his estate. Generally, the remainder has been either vested, defeasible, or an estate to one person followed by a substitutionary gift, and the courts have found a presumed intention on the part of the testators that the renunciation of wife was equivalent to her death, and have applied the doctrine of acceleration.

Quite a number of such cases have come before the Supreme Court of Pennsylvania, some of which have been hereinbefore cited in another connection; but they all recognize the rule that the application of the doctrine must be in furtherance of the intention of the testator, and never in contravention thereof. Many of these cases were brought under review by that court in 1917 in the case of *In re Disston's Estate*, 257 Pa. 537, 101 Atl. 804, L. R. A. 1918B, 62. In that case there was a life estate to the wife, with remainder after her death to the testator's children, or, if any of the children were dead leaving issue, the parent's share was to go to such issue; if no issue, to certain nephews and nieces or their issue. The court regarded the gift over to the issue of the children or to the nephews and nieces as substitutionary. Referring to other cases, it said, among other things, that the fact that alternate remainders may be provided for in the event of the decease of such children in the lifetime of the widow, will not take a case out of the general rule, if, on a view of the whole will or the particular part in question, such alternate remainders appear to be merely secondary or substitutionary in character. It was conceded all through the opinion, however, that if the intention of the testator can be gathered from the will, it must prevail, and, considering the facts of the particular case before it, it was said that the literal provisions of a will may be departed from so as to carry out what appears to be a superior or preferred intent; but, when this is done, the object in view must always be "to approximate as closely as possible to the scheme of the testator, which has failed by reason of intervening rights or circumstances." It was further said that the effort must be to find and carry out the testator's chief intention with the minimum disturbance of the general plan of the will, and that, after the provisions for the wife, the testator's children were the natural and primary objects of his bounty, and not their issue, still less nephews and nieces or their issue, and that the alternate provisions for others, after the testator's children, were undoubtedly intended as substitutionary, in case the latter died during the life of the mother, should she take under the will; but that a testator is presumed to know that a widow's statutory rights are paramount, and that she may take against his will, and that a testator is presumed to know also, the general

rule that the election of a widow to take under the intestate laws is equivalent to her death, and that, unless his will plainly indicates a contrary intent, remainders are accelerated accordingly.

It was said, however, in the course of the opinion, "of course, an intent that there shall be no acceleration may be shown by inevitable implication," and among other instances given is "where the contingency upon which the remaindermen are to take is such that, in the nature of things, the person entitled can be ascertained only by the physical death of the widow."

The same view was taken in *Schulz's Estate*, 113 Mich. 592, 71 N. W. 1079, where there was a substitutionary provision. The holding is based on *Woodburn's Estate*, 151 Pa. 537, 25 Atl. 145; *Coover's Appeal*, 74 Pa. 143; and *Small v. Marbury*, 77 Md. 11, 25 Atl. 920.

There have been similar holdings in Maryland (*Small v. Marburg*, supra; *Randall v. Randall*, 85 Md. 430, 37 Atl. 209); but there, as elsewhere, the holdings have been based upon the presumed intention of the testator, and always in subordination to that intention when it could be discovered. In *Rogers' Trust Estate*, 97 Md. 674, 677, 55 Atl. 679, 680, it is said:

"The doctrine of the acceleration of estates is founded upon the desire of courts of equity to give effect to the manifest intention of the testator; and, when such intention would be frustrated by allowing it, it will be denied. The cases are too numerous to do more than refer to some of the leading cases in this state."

Then follows a citation of seven Maryland cases.

[7] The principle underlying this class of cases seems to be that wherever it appears that the life tenant and the remainderman are sufficiently designated, and it was intended they together should take the whole estate, acceleration will be accorded the remainderman whenever the life estate is eliminated in any manner whatever, for such must have been the intention of the testator.

The case of *Blatchford v. Newberry*, 99 Ill. 11, involved a large estate and was most elaborately argued and carefully considered. The testator gave his wife an estate for her life, and provided that, immediately after the decease of his wife, the trustees mentioned in the will should divide his estate into two equal shares, and at once proceed to distribute one of such shares among "the lawful surviving descendants of my own brothers and sisters, such descendants taking per stirpes, and not per capita," and the other to a public library. The widow renounced the will and took the provision made for her by the statute. During the lifetime of the widow, the then living descendants of the brothers and sisters, claim-

ing that the renunciation of the widow was equivalent to her death, insisted that there should be acceleration of the enjoyment of their estates. The court said:

"The question for determination is: Can there be now, during the lifetime of Mrs. Newberry, a legal division of the estate by the trustees, one half to the descendants of the testator's brothers and sisters, and the other half to the public library?"

This question the court answered in the negative. In the course of the opinion of the court, it is said:

"Under the form of gift here, there is no gift to any one except such as are surviving and capable of taking at the time of distributing. Surviving at the time of distribution is a part of the description given by the will of the donees, and there is no gift to any one who does not answer the description in this element of time—who is not at that time living. The donees then, here, are the descendants living at the time of distribution, whenever that time may be. * * * Until the time of distribution it is uncertain who will be alive to take then, and until that time arrives it cannot be ascertained and much less certain who the donees are."

Further:

"This doctrine of acceleration, however, is not an arbitrary one, but it is founded on the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may be still alive, and is applied in promotion of the presumed intention of the testator, and not in the defeat of his intention. And, when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated."

Three of the eight judges sitting in this case dissented, but the conclusion of the majority of the court seems to be approved in *Slocum v. Hagaman*, 176 Ill. 533, 539, 52 N. E. 332. In the latter case, there was a substitutionary gift, and the renunciation of the wife was held, under the circumstances, to be equivalent to her death, and acceleration was accorded in favor of those designated to take after the death of the wife.

In *Augustus v. Seabolt*, 3 Metc. (Ky.) 155, there was a gift of property to a wife for life, with remainder to the children of the testator's brother, "or such of them as may be living at the time of her death." The will also provided that as to certain designated land the estate given the wife should cease upon the remarriage of the wife, and she did remarry. The wife claimed no further interest in this land, but the heirs of the testator and the brother's children aforesaid each claimed that they were entitled to it from the date of the remarriage till the death of the widow. The court said:

"But it is said that the remainder interest in the devise was a vested one, and took effect as

completely upon the marriage of the widow as though she had died. This view is clearly erroneous. The remainder is manifestly contingent in one respect, and cannot therefore be properly denominated a vested remainder. * * *

"Here the estate in remainder is limited to take effect upon the happening of a certain event—that is, the death of the widow—but it is limited to such of the children, of the brothers designated, as shall be living at her death. Whether any of such class will be then alive, or, if so, how many, is of course uncertain, and cannot be known until the event occurs."

The court refused to accelerate the enjoyment of the estate by the brother's children, because it regarded their estates as contingent until the death of the widow.

In *Bradenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575, there was a gift to the wife for life, and upon her death "one share to each of my following nieces and nephew, then surviving" (naming them), and "one share to the issue of each of said nieces and nephew then deceased leaving issue then surviving, according to their right of representation." The widow renounced the will and the nieces and nephew sought acceleration; but the court said:

"We must construe the bequest in favor of the nieces and nephew in the same manner as if the widow had accepted the provisions of the will. Recurring to this bequest, it is clear that it cannot now be determined who will take under it. It is a bequest to the nieces and nephew 'then surviving,' and to the issue of each niece and nephew 'then deceased leaving issue then surviving.' It cannot be known that any of the nieces and nephew now living will take anything under this bequest."

To the same effect is *Lovell v. Charlestown*, 68 N. H. 584, 32 Atl. 160.

We have examined many more cases from other states, but those cited are sufficient to show the trend of the decisions in other jurisdictions.

In *Poythress v. Harrison*, 1 Pat. & H. 197, a testator devised to his wife for life all his property, and at her death to certain devisees upon the condition that said devisees should raise the sum of \$1,000 to be paid at the death of said testator's wife, to Thos. P. Harrison, and, in the event of his death before the said life tenant, the said sum was to be paid to his sister. Soon after the said will was probated, the widow renounced the provisions made for her in the said will.

Thereafter the said Thos. P. Harrison instituted suit to recover the said \$1,000, claiming the same by reason of the renunciation of the widow, who was still living.

The court denied Harrison the right to recover the said legacy of \$1,000 for two reasons:

"First, because the said legacy was not payable to him until after the death of Mrs. Poythress, the testator's widow, although she had renounced the provisions made for her in her husband's will; and, secondly, because the legacy, until after the death of Mrs. Poythress, was contingent, and, if the appellee had died in her lifetime, it would have been payable to his sister."

[8] Under the will of Mr. Rixey, if any one of his children should die in the lifetime of the widow, the descendants of such child would take as purchasers directly under his will; but, if the renunciation of Mrs. Rixey is given the effect claimed for it, the child would take the estate now, and, if he should die in the lifetime of the widow, his descendants would take nothing under the will of Mr. Rixey, although the will gives them the whole of it. The effect would be to make a will for Mr. Rixey. He has made his own will, and no relinquishment by Mrs. Rixey of what was given her can change the direction given by Mr. Rixey of the residue of his estate. In the case at bar, we conclude that the gift in the fifth clause of the testator's will to the "descendants per stirpes of such as may be then dead with issue surviving" is not substitutionary, but that said fifth clause creates contingent remainders in the persons mentioned therein; that they take as purchasers under the will; that only those children who are living at the death or remarriage of the wife answer the description of donees under said clause; that the renunciation of the wife in this case is not the equivalent of her death; that it does not in any way affect or disturb the scheme of the testator in the distribution of his estate, but is simply a relinquishment to the estate of the testator of all interest of the wife therein, without receiving anything in lieu thereof; and that there can be no acceleration of the enjoyment of the remainders created by said clause.

The decree of the circuit court will therefore be affirmed.

Affirmed.

(124 Va. 616)

LEACHMAN, County Treasurer, v. BOARD OF SUPRS OF PRINCE WILLIAM COUNTY.(Supreme Court of Appeals of Virginia.
March 13, 1919.)**1. APPEAL AND ERROR ⇨56—JUDGMENTS APPEALABLE—AMOUNT IN CONTROVERSY.**

Where court, on exception to disallowance of claims to an amount upward of \$900, paid by county treasurer, affirmed the disallowance and gave judgment for costs against him, the judgment was appealable, under Code 1904, § 3454, as in effect a final judgment for money to amount of claims disallowed.

2. TRIAL ⇨370(3)—SUBMISSION OF ISSUES TO JURY—BILLS ALLOWED BY TREASURER.

A cause in the circuit court on exceptions to the commissioner's report refusing to allow certain items paid by the county treasurer raises an issue presenting a question of law, which should have been decided by the court, and not submitted to the jury.

3. TRIAL ⇨370(2)—EX PARTE MATTERS—TREASURER'S SETTLEMENTS—RIGHT TO JURY.

Upon a county treasurer's exceptions to the report of the commissioner of accounts refusing to allow items paid, authority is not conferred upon the court by Acts 1914, c. 330, or by analogy under Code 1887, § 2698, as amended by Acts 1904, c. 154 (Code 1904, § 2698), for the calling of a jury.

4. APPEAL AND ERROR ⇨1062(1)—HARMLESS ERROR—SUBMISSION TO JURY.

While it was error, in an ex parte settlement of a county treasurer, taken to the circuit court upon exceptions to the commissioner's report, to submit the issues to a jury, such error was harmless, where the court itself properly passed upon such exceptions.

5. OFFICERS ⇨111—LIABILITY—PUBLIC POLICY.

For reasons of public policy fiscal officers are held to a very strict liability for public funds intrusted to their care, and are required to assume all risk of loss and account for all funds going into their hands.

6. COUNTIES ⇨165—OFFICERS—BOARD OF SUPERVISORS—ALLOWANCE OF CLAIMS—"LEGAL."

Code 1904, § 851, provides that every warrant to the county treasurer shall be signed by the clerk and countersigned by the acting chairman of the board of supervisors, that no warrant shall be issued except upon recorded vote or resolution of the board, and to be legal a warrant must conform thereto; and the word "legal," as used in reference thereto by sections 859, 860, 863, is equivalent of "lawful."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legal.]

7. COUNTIES ⇨168(5)—OFFICERS—SUPERVISORS—ALLOWANCE OF CLAIMS—WARRANTS.

The chairman of the board of supervisors is a public officer, and not the agent of the board upon whom the county treasurer could rely

as to the validity of warrants he signs, or as to their having been approved by the board.

8. COUNTIES ⇨168(5)—OFFICERS—TREASURER—POWER TO PASS ON CLAIMS.

Although a county treasurer is a mere disbursing officer, without power to question the action of the board of supervisors in ordering warrants drawn on him, yet he is not authorized to pay warrants not passed upon by the board.

9. COUNTIES ⇨168(5)—TREASURER—LIABILITY—ILLEGAL WARRANTS.

A county treasurer was not authorized, by the fact that warrants were signed by the chairman of the county board of supervisors, in indulging the presumption that they were authorized by the board, and where he did so, and the warrants were illegal, he was liable for the loss sustained.

Error to Circuit Court, Prince William County.

Proceeding by J. P. Leachman, as treasurer of Prince William County, to secure allowance of his accounts. On exceptions heard by court and jury, judgment was entered against him for certain claims, and he brings error. Affirmed.

C. M. Nicol, of Alexandria, and Allen L. Oliver, of Cape Girardeau, Mo., for plaintiff in error.

H. Thornton Davies, of Manassas, for defendant in error.

BURKS, J. The commissioner of accounts of Prince William county audited the accounts of the treasurer of said county, pursuant to Acts 1914, p. 640, c. 330, and filed his report October 4, 1915. The report was excepted to by the board of supervisors of the county, and the circuit court of the county recommitted it to the commissioner, with directions to restate it in conformity with oral instructions given the commissioner in open court. The commissioner accordingly restated the account in accordance with his instructions, and filed his report July 26, 1916. To this report the treasurer filed several exceptions. The chief question involved was whether the treasurer should have credit for sundry warrants paid by him for which the board of supervisors denied the liability of the county. Before passing upon the exceptions, the court summoned a jury and had tried at its bar the following issue:

"Whether or not the items represent a legal and valid claim against the county, so as to justify the treasurer in being entitled to credit therefor, which items are as follows:

"County fund, the sum of.....	\$617.91
Special road fund.....	140.19
Occoquan district.....	100.19
Brentsville district road fund...	35.49

Total \$893.78"

The commissioner refused to allow the treasurer credit for these items. The jury, by their verdict, also refused to allow credit for these items, and thereupon the exceptions of the treasurer to the report of the commissioner were overruled, and a judgment for costs was entered against the treasurer. From this order of the circuit court, which also refused to set aside the verdict of the jury as contrary to the law and the evidence, this appeal was taken.

[1] The appellee moves to dismiss the appeal as improvidently awarded, on the ground that no appeal lies to this court from an order of an inferior court merely overruling exceptions to and confirming a commissioner's report, and he cites in support of his motion *Owen v. Owen*, 109 Va. 432, 63 S. E. 990. That case arose upon the settlement of an administration account under section 2699 of the Code, providing that—

"The report, to the extent to which it may be so confirmed, shall be taken to be correct, except so far as the same may, in a suit, in proper time, be surcharged or falsified."

There the party appealing had the right to file a bill surcharging and falsifying the account. The case in judgment arises under an entirely different statute, where no right to file such a bill is given the treasurer. The judgment of the circuit court is, in effect, a judgment against the treasurer for upwards of \$900, and is a final judgment. Under the provisions of section 3454 of the Code, he has the right of appeal to this court, and the motion to dismiss should therefore be overruled.

[2-4] It is stated in the record that, on the calling of this case for hearing on the exceptions to the commissioner's report, "the defendant demanded a trial by jury," and the court directed a jury to be summoned "to try the issue in this cause." The jury was summoned, and they heard and decided the issue hereinbefore set forth, finding a verdict adverse to the defendant. The issue, as framed, presented a question of law, which should have been decided by the court, and not submitted to a jury. Moreover, there was no authority for summoning a jury on the hearing of the exceptions to the report of the commissioner. No such authority is conferred by the act under consideration, nor is it to be inferred by analogy to the proceedings under section 2698 of the Code (1904). Not only does that section not apply to ex parte settlements by treasurers, but the power to impanel a jury to inquire into matters of fact under section 2698 of the Code of 1887, which had been in force since the Code of 1849, was taken away by Acts 1904, p. 268 (Code 1904, § 2698). It was error, therefore, to have summoned the jury; but the error was harmless, as the court itself properly passed upon the exception to

the commissioner's report, and it is the correctness of the court's ruling on the exception which is the matter in controversy here.

[5] The controversy in this case is over the refusal of the board of supervisors to allow the treasurer of Prince William county credit for certain warrants paid by him and upon which the board denied liability. The appellant does not state in his petition the origin of said warrants, nor is the record full and clear on the subject; but the brief for the appellee gives a statement of the facts relating to this matter, which was not controverted by the appellant in the oral argument, but in fact accepted and made the basis of his argument here, and which is no doubt correct. That statement is as follows:

"Blank county warrants, in book form similar to check books, were filed in the clerk's office of Prince William county. Without authority from the board of supervisors, or from any other source, the chairman of the said board signed his name to a number of said blank warrants, as chairman, and not at or during any meeting of said board, but when said board was not in session. The clerk or deputy clerk thereafter, likewise without authority from said board or any source, and not at or during any session of said board, signed the clerk's name to said warrants. In a number of said warrants so signed was inserted, in the blank spaces left, the date, payee's name, such amount as he desired, and the fund on which drawn. This was done without authority from or knowledge of said board. On a number of these warrants the payee's indorsement was genuine, but a number contained the forged indorsement of the payee. These warrants were made payable to persons who had no claims against said board, and in whose favor no warrants had been ordered issued.

"When the report which was reviewed by the circuit court was made, the commissioner allowed him credit for all of the said forged warrants, except those upon which the payee's name was forged. He denied him credit for those, and those only, which bore the forged indorsement of the payee. To this report the treasurer filed exceptions.

"The court held that said treasurer was not entitled to credit for the said warrants upon which the payee's name had been forged, sustaining the report of the commissioner."

For reasons of public policy, fiscal officers are held to a very strict liability for public funds intrusted to their care. They have been held liable for losses resulting from fire, theft, robbery, burglary, failure of banks in which money was deposited, and, in fact, losses sustained by almost every cause, except the act of God or a public enemy. See cases collected in notes 22 R. C. L. § 140, p. 470. In *Mecklenburg v. Beales*, 111 Va. 691, 69 S. E. 1032, 36 L. R. A. (N. S.) 285, it was said that the court favored the rule of strict liability, which requires a public official to assume all risk of loss,

and imposes upon him the duty to account for the public funds which go into his hands.

[6] The statutes of this state give in detail the method by which boards of supervisors may allow and pay claims within their jurisdiction. No provision is made for paying such claims, except by a warrant on the treasurer, and Code 1904, § 851, provides that—

"Every warrant shall be signed by the clerk and countersigned by the acting chairman of the board, and the name of the person to whom it is issued shall be entered in a book to be kept by him in his office for the purpose; but no warrant shall be issued except upon a recorded vote or resolution of the board."

A warrant, therefore, to be legal, must be made in conformity with this section. This idea of a "legal warrant" runs through the chapter on the subject of county treasurers. Section 859 speaks of "warrants legally drawn upon him by the board," section 860 of a "warrant legally drawn upon him," and section 863 of a "legal warrant." The word "legal," in this connection, is the equivalent of "lawful." It is said in Black's Law Dictionary, under the word "Lawful":

"But there are some connections in which the two words are used as exact equivalents. Thus a 'lawful' right, warrant or process is the same as a 'legal' right, warrant or process."

[7] It is not claimed by counsel for the appellant that the warrants in this case were legal warrants, but only that they were apparently legal, and because of the apparent legality the county should pay them.

It was insisted by counsel for the appellant that, where one of two innocent persons must suffer a loss resulting from the negligence, fraud, or deceit of a third person, or of his agent, he should suffer the loss who reposed confidence in such person, and not the other party, and a number of cases are cited to support the proposition. But that doctrine has no bearing upon the question in controversy. The chairman of the board was in no sense the agent of the board, and the doctrine of agency does not apply. He was not held out by the board as a person upon whose acts or statements the treasurer could rely. He was a public officer, charged with certain duties, for the discharge of which he alone was responsible. The statute imposed upon the chairman, and not upon the board of supervisors, the duty of countersigning the warrants, and nothing that the board did, or omitted to do, could, in any proper sense, be said to have affected his conduct in signing the warrants. He acted as a public officer under the mandate of the law, and all persons were charged with knowledge of his powers and duties. These were prescribed by the statute, and not by any resolution of the board of supervisors. But, even if the relation of principal and agent had existed be-

tween the board of supervisors and the chairman, the latter was not acting for the benefit of the former in signing warrants for which no claims had been allowed, and there is very high authority for the statement that in such case the principal is not liable. *British Mutual Banking Co. v. Charnwood Forest Ry.*, L. R. 18 Q. B. 714, 717; *Friedlander v. Texas, etc., Ry.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991. It must be conceded, however, that the doctrine of these cases is seriously controverted. *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185; *Amer. Wire & Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10; *Appeal of Kisterbock*, 127 Pa. 601, 18 Atl. 381, 14 Am. St. Rep. 868.

[8] Quite a number of cases have also been cited to sustain the proposition that the treasurer is a mere disbursing officer, and has no right or power to question the action of the board of supervisors, or to go behind it, but is bound to pay warrants drawn upon him by the board. Undoubtedly the treasurer has no supervisory power over the board, to determine the validity of accounts allowed by the board. He cannot refuse to pay claims for which warrants have been legally issued, simply because he thinks they are not just or lawful, nor for any other reason which has been passed upon by the board where it had power to act. If the matter is within the jurisdiction of the board, and the board has acted upon the claim and issued a legal warrant therefor, it is plainly the duty of the treasurer to pay it. It will be unnecessary to examine these cases, as the legal proposition involved is not in controversy, but only its application. In the case in judgment, the claims had not been passed upon by the board, and no legal warrants therefor had been issued, so that no such question is involved as that determined by the cases referred to.

[9] It is earnestly insisted that a ministerial officer will be protected in the service of process which is fair on its face and emanates from proper authority. A number of cases from the United States Supreme Court are relied on to support the doctrine. The rule in that class of cases is well stated by Mr. Justice Field in *Erskine v. Hohnbach*, 14 Wall. 613, 616 (20 L. Ed. 745), where he says that it is well settled that—

"If the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any

prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal by reaching the conclusion or judgment upon which the order or process issued."

It was this principle only which was enforced in *Bryan v. Ker*, 222 U. S. 107, 32 Sup. Ct. 26, 56 L. Ed. 114, so earnestly relied on by the appellant. But the case in judgment is not a case of the service of process, or the execution by a ministerial officer of a process emanating from a tribunal having jurisdiction over the subject-matter, and it is not controlled by the same principles. The cases referred to on this subject belong to the class where the acts of the officer executing the process presuppose the validity of another act by the tribunal from which the process emanated; but, as held in *Langford v. Few*, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 608, there is a difference between indulging a presumption in favor of an officer having done a duty which the law cast upon him, and indulging a presumption that a fact exists which the statute requires to exist in order to give the officer power to act. See, also, *Reed v. Lowe*, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578.

In *French v. Edwards*, 13 Wall. 506, 511 (20 L. Ed. 702), it was held that where the provisions of a statute are intended for the protection of a citizen, "and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid." If this be true of statutes affecting private rights, it must, of necessity, be true of statutes affecting the public revenue, around which every safeguard is thrown for its protection. An officer disbursing the public revenue must comply substantially with every provision of the statute enacted for its protection, and if he fails to do so, and loss ensues in consequence thereof, he must bear it. The right of the chairman of the board to sign warrants for claims which had to be audited by the board was dependent upon the allowance of the claims by the board. The previous action of the board was, in a sense, jurisdictional. Without it, the warrant was a nullity, into whosoever hands it passed, and creates no liability upon the county. The treasurer had no right to presume that the claims had been audited by the board of supervisors and a recorded vote taken allowing the claim, and that in pursuance thereof the chairman and clerk had issued the warrants in controversy. The chairman of the board and the clerk had no right or power to issue the warrants until the claims had been passed upon by the board. It is very rare that warrants are ever issued, except after compliance with section 851 of the Code, and

there was comparatively little risk in the treasurer paying warrants bearing the signature of the chairman of the board and the clerk; but this risk, whether large or small, was the risk of the treasurer, and not of the board of supervisors, and the loss which ensued therefrom must fall upon the treasurer. The clerk was required to keep a list of all the warrants, and the treasurer was required to attend all regular meetings of the board. He had but to consult the clerk's list to ascertain whether or not warrants had been authorized. It was his failure to do this that occasioned the loss in controversy, and, while it is conceded that the treasurer was guilty of no fraud in the transaction, but acted in the utmost good faith, yet the loss is the result of a failure on his part to exercise proper care for his own protection. He had the means readily at his command to have protected himself against loss, but failed to use them, and he cannot now call upon the county to bear a loss which he could so easily have prevented.

We have not deemed it necessary to consider what was the effect of forging the indorsements of the payee on said warrants, as the illegality of the warrants themselves is an insuperable obstacle to their payment. Other questions were raised in the case, but they were only incidental to the main question hereinbefore considered, and need not be noticed.

For the reasons hereinbefore stated, the judgment of the circuit court must be affirmed.

Affirmed.

(124 Va. 692)

VIRGINIA IRON, COAL & COKE CO. v. GRAHAM et al.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. CONTRACTS \Leftrightarrow 309(1, 2)—IMPOSSIBILITY OF PERFORMANCE—DESTRUCTION OF SUBJECT-MATTER.

If one makes contract which is in itself possible, he will be liable for a breach, notwithstanding it is beyond his power to perform, but where it is apparent that parties contracted on basis of continued existence of substance to which contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will excuse performance.

2. MINES AND MINERALS \Leftrightarrow 70(3)—ROYALTIES UNDER LEASE—EXHAUSTION OF ORE.

A 40-year mining lease, providing compensation to lessor "for each ton of good merchantable ore mined and shipped * * * not less than 20,000 tons to be shipped each year," held not to contemplate that lessee should be bound when ore was exhausted.

3. CANCELLATION OF INSTRUMENTS — 4 — GROUNDS—MISTAKE OF FACT.

Relief may be had in equity for the cancellation or rescission of a contract if mistake of fact affects its very substance and is not a mere incident or inducement for entering into it.

4. CONTRACTS — 93(5)—VALIDITY—MISTAKE OF FACT.

If certain facts are assumed by both parties as basis of a contract, and it subsequently appears that such facts did not exist, the contract is inoperative.

5. CANCELLATION OF INSTRUMENTS — 13 — GROUNDS—DEFENSE AT LAW.

Although a lessee of a mine could have set up in action for royalties or rent failure of consideration due to mistake of fact as to amount of ore, it was under no obligation to wait institution of such an action, but could resort to equity for cancellation of lease, where existence of lease and possibility of having to assume liabilities thereby imposed constituted a contingent liability, tendency of which would be to impair its credit, especially where rights of trustees and bondholders were involved.

6. CANCELLATION OF INSTRUMENTS — 4 — GROUNDS—FAILURE OF CONSIDERATION.

Failure of consideration is a ground of equity jurisdiction.

7. EQUITY — 46—JURISDICTION—ADEQUACY OF REMEDY AT LAW.

In order to justify court of equity in refusing to take jurisdiction, remedy at law must be adequate, and must attain the full end and justice of case, reaching whole mischief and securing whole right of party in a perfect manner at present time and in future.

Appeal from Corporation Court of Roanoke.

Suit by the Virginia Iron, Coal & Coke Company against Nannie M. Graham and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

W. B. Kegley, of Wytheville, and Jackson & Henson and D. D. Hull, Jr., all of Roanoke, for appellant.

Stuart, B. Campbell and Robert Sayers, both of Wytheville, and Waller R. Staples, of Roanoke, for appellees.

PRENTIS, J. The briefs herein filed are unique in that (either purposely or inadvertently) counsel have observed rule 2 (120 Va. v. 94 S. E. vi). This rule requires the briefs to contain a concise abstract or statement of the facts admitted and controverted, which are disclosed by the record. When fairly observed, the precise questions involved are manifest, and much subsequent labor for the court and counsel will be thereby avoided.

The facts here to be considered are: That by indenture of December 31, 1897, David P. Graham and wife demised unto Carter Coal & Iron Company for 40 years from Janu-

ary 1, 1898, that certain iron ore property in Wythe county, Va., known as "Cedar Run," theretofore granted to Graham by Franklin Carter and wife, said to contain about 3,600 acres, with the right during the term to mine and remove all the iron ore which the lessee might or could mine on these lands, with certain easements and privileges fully set forth in the instrument. By deed of January 27, 1899, Carter Coal & Iron Company conveyed unto Virginia Iron, Coal & Coke Company (appellant, hereinafter called the lessee), together with other property, the rights and privileges granted by the said lease. Theretofore, on October 1, 1898, the Carter Coal & Iron Company executed a deed of trust to the Continental Trust Company of the city of New York, conveying the leased property and privileges to secure a bond issue of \$2,000,000. The New York Trust Company has succeeded the Continental Trust Company as trustee in that conveyance. On February 23, 1899, the lessee (Virginia Iron, Coal & Coke Company) conveyed the leased estate, together with much other property, to the Manhattan Trust Company, trustee, to secure a bond issue of \$10,000,000. David P. Graham, the original lessor, having died, his successors in title, Nannie M. Graham, his widow, and others (hereinafter called the lessors), on May 13, 1903, modified the lease so as to reduce the minimum quantity of ore required to be shipped from 20,000 tons to 12,000 tons per annum. A partial partition of the real estate of the original lessor has been made, whereby the rights of his widow and heirs to participate in royalties under the lease are fully set forth and established by conveyance of August 20, 1904.

The original lease fixed a royalty of 50 cents per long ton (N. & W. Ry. Co. or its successor's weight) for each ton of good merchantable ore mined and shipped from the leased premises, to be paid to the lessor on or about the 25th days of April, July, October and January of each year for the ore shipped the preceding three months, with the following provisions as to minimum:

"Not less than twenty thousand tons to be shipped each year. If less is shipped, royalty is to be paid on twenty thousand tons, and if more than twenty thousand tons are shipped in one year, and less than that quantity in the next preceding or succeeding year, the surplus of the one year, and the royalty paid thereon, may be carried to the credit of the other year, either preceding or succeeding, to make the required minimum. If the minimum quantity is not shipped in any year or paid for in sixty days after the expiration of the year, or if the ore shipped is not paid for in sixty days after the rent therefor is due, the said David P. Graham, his heirs, representatives, or assigns, may terminate this lease on ten days' notice of intention so to do."

And the following clause:

"The said David P. Graham, his representatives, heirs or assigns, or their agent, may enter the property at any time for the purpose of inspecting the mining operations, and of requiring the same to be carried on in a proper way, and with due regard to the rights of each party."

The lessee is given the right to remove, at the end of the term, all tramways, machinery and appliances, all pipes, sluices and troughs, and everything used in connection with the mining and washing operations, except the houses and the timber used as supports in the mines, and except pipe lines, tramways and washing plant which were there prior to October 1, 1897. Provided, however, that nothing put on the property by the lessee for use in mining and washing operations shall be removed until the rents are paid; and the privileges and easements granted are to be enjoyed in the operation of the mines leased. The mine had been in operation prior to the date of the lease, and was operated at that time.

The Carter Coal & Iron Company took possession and continued to operate the mine until it conveyed its rights to the Virginia Iron, Coal & Coke Company, and thereafter the last-named company continued to operate it until July 25, 1916, upon which date it gave written notice to Nannie M. Graham and others, the lessors, of the cancellation or surrender of the original lease of December 31, 1897, to become effective as of September 1, 1916. The reason therefor stated in the notice was that iron ores could no longer be found on the leased premises, either of the quality or in the quantity that could be profitably mined; the cost of such tonnage as could be gotten out being altogether prohibitive. The lessors replied to this notice August 29, 1916, advising that they intended to hold the lessee strictly to the terms of the contract, and conceded no authority to cancel it.

The lessee, in accordance with such notice, ceased operations upon the leased premises, has abandoned possession thereof for all the purposes of the lease, though it has not removed its property therefrom, has paid all royalties accrued up to the date designated for the cancellation and surrender to become effective, and has not since that time occupied the property or exercised any of the privileges granted by the lease. After the attempted cancellation and surrender, the lessee undertook to remove from the leased premises the machinery, rails, and equipment placed thereon by its predecessor, which under the terms of the lease it had the right to remove upon its termination, but, under threat of proceedings by the lessors to secure an injunction, has for the present abandoned its claim of right to remove such property. It seems that this allegation of threatened injunction proceedings

is made in an amendment to the bill, and that this threat was made after the institution of this suit. The cancellation and surrender of the lease has been ratified by the board of directors of the lessee, and the deed of release tendered to the lessors with the bill and amended bill.

The lessee, on January 30, 1917, filed its original bill, and thereafter filed an amended bill against Nannie M. Graham and others, successors in title to the original lessor, and the trustees in the deeds of trust referred to, setting forth these facts, and praying for a decree cancelling the lease, permitting it to remove its personal property from the premises, enjoining the lessors from prosecuting any actions for the recovery of royalties under the lease, and for general relief. The lessors, defendants, filed their demurrer and answer, and the trial court sustained the demurrer and dismissed the bill. Of this action the lessee is here complaining.

Fairly stated, the demurrer is based upon two grounds:

(1) That the bill and exhibits filed show that the contract between the parties is a contract of hazard, that the risk as to the quantity and quality of ore was assumed by the lessee, and that this appears from the lease itself; that it also appears therefrom that it is a definite contract, under seal, for the rental of the property for 40 years, including the right to the lessee to mine ore and do certain other things on the land; that the consideration of the lease is a sum certain as rent reserved; and that there is no warranty on the part of the lessors that the ore will be found of any particular quantity or quality, and hence that the existence or nonexistence of such ore in any quantity or of any quality is immaterial.

(2) That even if the lessee is entitled to be relieved from paying the royalty on account of exhaustion of the ore in the premises, a court of equity has no jurisdiction to grant such relief, upon the ground that the complainant has a complete and adequate remedy at law.

The trial court sustained the demurrer upon the ground last stated.

(a) Taking up these grounds in the order in which we have just stated them, we come to consider whether the bill is demurrable upon the ground that the contract was one of hazard as to the lessee.

The question is quite an interesting one, and we have been greatly enlightened by the exhaustive briefs of the learned counsel on both sides. While no precisely similar question has ever been decided in Virginia, we have been referred to many cases in other jurisdictions, and the principles involved seem to be fairly well established.

As to contracts in general, this is said in 13 Corpus Juris, p. 376:

"Where certain fact, assumed by both parties are the basis of a contract, and it subsequently appears that such facts did not exist, there is no agreement."

And many cases are cited in support of that general statement.

Applying this to mining leases, this is said in 27 Cyc. p. 718:

"Mining leases frequently contain a provision for the release of the lessee from payment of rents or royalties in case the mineral becomes exhausted or is found not to exist in paying quantities, and in such case the happening of such contingencies releases the lessee. Even in the absence of such a provision, it is usually held that a lessee on a royalty basis is released from payments if the mineral becomes exhausted, or is found not to exist in paying quantities, although the lease provides that he shall take out and pay royalties on a certain amount each year, or that the royalties shall not be less than a fixed amount per year, for by such an undertaking the lessee contracts merely for promptitude and thoroughness in taking out existing mineral. But where the lessee retains possession he is not relieved of liability for the fixed rental, or royalty based on minimum production. Where the lease provides for the payment of rent irrespective of product and whether the mine is worked or not, which is termed a dead or sleeping rent, the lessee cannot be relieved from payment of the rent because the mineral proves not to be worth the expense of working, because mineral is not found in paying quantities, or even because the mine supposed to exist develops no mineral at all, and such rent is payable even after the mine is exhausted"—citing many authorities.

A most interesting and instructive note upon the subject of the intervening impossibility of performance of a contract as a defense is found in L. R. A. 1916F, at page 10. Ancient and modern cases involving both mining leases and other contracts are there gathered and analyzed.

In a comparatively recent English case, *Krell v. Henry*, [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246, this language, which seems to be particularly pertinent to the case in judgment, is used:

"But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case, the contracting parties will not be held bound by the general words, which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law, as introduced into the English law, is limited to cases in which

the event causing the impossibility of performance is the destruction or nonexistence of some thing which is the subject-matter of the contract, or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the nonexistence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. * * * Each case must be judged by its own circumstances. In each case one must ask oneself: First, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative. * * * I think both parties are discharged from further performance of the contract."

[1] If one makes a contract to do a thing which is in itself possible, he will be liable for a breach of the contract, notwithstanding it is beyond his power to perform it. But where, from the nature of the contract itself it is apparent that the parties contracted on the basis of the continued existence of the substance to which the contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will and should excuse such performance. *Walker v. Tucker*, 70 Ill. 527.

The case of *Muhlenberg v. Henning*, 116 Pa. 188, 9 Atl. 144, is strikingly like this case. There was a 5-year lease in which the lessees covenanted to pay 35 cents a ton for every ton of merchantable ore mined, and to mine at least 1,500 tons annually during the term, or, in default thereof, to pay a royalty of \$525 annually; and that the lease should be forfeited at the option of the lessors, if at the end of each year at least \$525 as rent or royalty had not been paid. In an action to recover unpaid royalty for two years, an affidavit of defense was filed, averring that, though the defendants had operated the mines in a workmanlike and skillful manner for about nine months, yet, on account of the nonexistence of sufficient ore and its inferior and unmerchantable quality, they were unable to continue. It was held that the affidavit exhibited a good defense to the action, and the court there distinguished such a lease from those involved in the cases which were there and are here relied upon to support a contrary view, notably *Jervis*

v. Thompson, 1 Exch. (H. & N.) 195, and Marquis of Bute v. Thompson, 13 M. & W. 486, in both of which cases the contracts were construed to import an absolute covenant to pay the rent whether the mines could be made to produce the mineral or not.

In Williston on Sales, § 661, it is said:

"It is probable that the tendency of the law is towards an enlargement of the defense of impossibility, and in any case where it may fairly be said that both parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition of affairs will be an excuse."

And this, in Bishop on Contracts (2d Ed.) § 588:

"Where by the intent of the parties the continued existence of a specific subject-matter is essential to the performance of the contract, its destruction will operate as a discharge, where neither of the parties have assumed such risk."

In Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1, it is said that:

"Where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent"—citing Beach, Contr. § 217; 9 Cyc. 631.

This is said in Boyer v. Fulmer, 176 Pa. 282, 35 Atl. 235:

"It is perfectly manifest that the parties contracted entirely with reference to iron ore which was supposed to exist, and did exist, on the land demised. The lessee was * * * to use all proper efforts * * * to find ore, and, if found, to mine and take it away, and to take out at least enough in each year to yield \$400 annually, and if he did not take out that much he was bound to pay the \$400 annually in any event; but, of course, this obligation proceeded upon the assumption that the ore was there, and continued to be there, in sufficient quantity to enable the lessee to perform his contract in this respect. If the ore was not there at all, * * * so that it could no longer be taken out in such quantity, the lessee was not bound to pay for it. He could not do an impossible thing, and therefore could not be held liable for not doing it. * * * Neither the lease nor the contract is a sale of the ore in place for a definite * * * minimum sum, as was the case in Timlin v. Brown [158 Pa. 606, 28 Atl. 236]."

Ridgley v. Conewago Iron Co. (C. C.) 53 Fed. 988, construes a mining lease which required the lessee to mine at least 4,000 tons annually, and to pay therefor a fixed sum per ton, or, in case he fails to take out such quantity, to pay therefor. It was held that the lease imposed no obligation to pay the minimum royalty after the ore in the premises had become exhausted. There Dallas, Circuit Judge, said:

"Mining leases commonly include, in addition to the usual undertaking to pay for what may be actually mined, a covenant that some fixed or ascertainable sum, at least, shall be annually paid. These covenants are not all the same, or to the same effect. They may be divided into two classes: First, those which require the payment of rent irrespective of product; second, those which require that, upon failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid. Where the covenant is of the first class the tenant is liable for the rent, even if nothing could be gotten by mining. * * * Where the covenant is of the second class his obligation is to pay for the stipulated quantity, whether mined or not; not whether it exists or not. He contracts for promptitude and thoroughness in mining; not for the productiveness of the mine. Lord Clifford v. Watts, L. R. 5 C. P. 577; Muhlenberg v. Henning, 116 Pa. St. 138, 9 Atl. 144. This covenant is of the second class."

The general rule, substantially as stated by Judge Dallas, is recognized in the following cases: Diamond Iron Mining Co. v. Buckeye Iron Mining Co., 70 Minn. 500, 73 N. W. 507, 19 Mor. Min. Rep. 197; Brooks v. Cook, 135 Ala. 219, 34 South. 960, 22 Mor. Min. Rep. 456; Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. 427, 18 Mor. Min. Rep. 462; Hewitt Iron Mining Co. v. Dessau Co., 129 Mich. 590, 89 N. W. 365, 22 Mor. Min. Rep. 111; Gribben v. Atkinson, 64 Mich. 651, 31 N. W. 570, 15 Mor. Min. Rep. 428; Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144, 15 Mor. Min. Rep. 423; McCahan v. Wharton, 121 Pa. 424, 15 Atl. 615, 16 Mor. Min. Rep. 239; Bannan v. Graeff, 186 Pa. 648, 40 Atl. 805; Scioto Fire Brick Co. v. Pond, 38 Ohio St. 65; Adams v. Washington Brick Lime & Mfg. Co., 38 Wash. 243, 80 Pac. 446; Hiller v. Walter Ray & Co., 59 Fla. 285, 52 South. 623, 20 Ann. Cas. 1162; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61; Bloomfield Coal & Min. Co. v. Tidrick, 99 Iowa, 83, 68 N. W. 570; Edwards v. Trinity B. V. Ry. Co., 54 Tex. Civ. App. 334, 118 S. W. 572; St. Louis S. W. Ry. Co. of Texas v. Johnston, 58 Tex. Civ. App. 639, 125 S. W. 61; Williams v. Miller, 68 Cal. 291, 9 Pac. 166; Min. Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1; Carr v. Whitebreast Fuel Co., 88 Iowa, 136, 55 N. W. 205.

There are other cases which cannot be reconciled with this view, though some of them may be distinguished. There is a line of cases in which the lessee has been required to pay the minimum royalty, notwithstanding the exhaustion of the mine, if he continues in possession of the leased premises claiming under the lease. Vandalia Coal Co. v. Underwood, 55 Ind. App. 99, 101 N. E. 1047; Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387, 35 Atl. 919; N. Y. Coal Co. v. New Pittsburgh Coal Co., 86 Ohio St. 140, 99 N. E. 198; McDowell v. Hendrix, 67 Ind. 513.

Then in Lehigh Zinc Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215, it is

held that where the right to mine ore in the premises was not the substantial inducement for the lease, and the covenant to pay a fixed royalty as rent per year is not qualified, the lessor is not released even if the mineral is exhausted. Then there are cases where it is said that the amount of mineral was known to the parties at the time the lease was entered into, and the contract was for the sale and purchase of such mineral. *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Bute v. Thompson*, 13 M. & W. 487, 153 Eng. Rep. 202; *Jervis v. Tompkins*, 4 Week. Rep. 683.

[2] Applying these principles to the bill and lease here involved, it appears clear that the main purpose of the contract was to mine iron ore, the existence of which in quantities great enough to justify the continuance of mining operations for 40 years was assumed as a fact by both parties, and by its express language the lessor was to receive 50 cents per long ton as compensation, "for each ton of good merchantable ore mined and shipped." The subject and substance of the contract is merchantable iron ore, to be mined and shipped, and the obligation is to pay therefor, or to pay such royalty on the minimum quantity which both parties assumed could be so produced. This language in the lease confirms this view:

"Not less than twenty thousand tons to be shipped each year. If less is shipped, royalty is to be paid on twenty thousand tons, and if more than twenty thousand tons are shipped in one year, and less than that quantity in the next preceding or succeeding year, the surplus of the one year and the royalty paid thereon may be carried to the credit of the other year, either preceding or succeeding to make the required minimum."

How is it possible for the lessee to receive the benefit of these credits unless the ore exists? The contingency provided against was the failure to mine and not the exhaustion of the ore which both parties assumed to exist. It is manifest then that if the facts alleged in the bill can be proved, and the ore does not exist, the lessee should be relieved of its obligation to pay the royalty provided for in the lease, because the paramount consideration of the contract has failed, and performance thereof by the lessee has become impossible. Cases relating to the general subject could be added, but those referred to which construe the contracts involved as we have construed the contract under review are so convincing, so securely rest upon right reason and justice, that additional citations are unnecessary. This, as we understand, is the view which the trial judge entertained, but he sustained the demurrer because of opinion that the defense could and should be made at law.

(b) This brings us to the second ground of demurrer.

[3] Equity jurisdiction to decree cancella-

tion of an instrument, because at the time of its execution either one or both of the parties labored under a mistake of fact, is well recognized. 4 R. C. L. 506.

In *Briggs v. Watkins*, 112 Va. 26, 70 S. E. 555, this is quoted from *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508:

"An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which * * * does not exist."

In *Lee v. Laprade*, 106 Va. 597, 56 S. E. 720, 117 Am. St. Rep. 1021, 10 Ann. Cas. 303, in which it was held that a court of equity had jurisdiction to rescind a deed for a plain mistake which was material in its character and of the very substance of the transaction—that is, that the lot conveyed was a part of a public street—this is quoted from 4 Min. Inst. (4th Ed.) 697:

"In cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, equity will rescind the conveyance, if the error goes essentially to the substance of the contract, so that the purchaser does not get what he bargained for, or the vendor sells that which he did not design to sell."

It is clearly settled that relief may be had in equity for the cancellation or rescission of a contract, if the mistake affects its very substance, and is not a mere incident or inducement for entering into it. The subject is discussed in a comprehensive note to *Steinmeyer v. Schroepel* (228 Ill. 9, 80 N. E. 564, 10 L. R. A. [N. S.] 114) 117 Am. St. Rep. 228.

In the note to *Miles v. Stevens*, 3 Pa. 21, in 45 Am. Dec. 632, this is stated:

"No principle of equity is more firmly settled than that relief will be granted from the consequences of a mistake of fact, provided that such mistake is in reference to a fact material to the transaction, and was not occasioned by the parties' own neglect of a legal duty. There is no doubt of this general rule. The great difficulty arises in applying it to the multiform circumstances attending various kinds of transactions. A mistake of fact may arise in two ways, either in reference to the subject-matter of the contract, such as its situation, value, extent, boundaries, amount, and so forth, or in reference to its terms, as where the mistake consists in reducing a verbal agreement to writing. It may be either a mistake as to a fact past or present, arising from unconscious ignorance or forgetfulness, or a mistake occasioned by a belief in the past or present existence of a fact. Under all circumstances, in order to obtain equitable relief, the mistake must have been unintentional"—citing a number of cases.

[4] If certain facts are assumed by both parties as the basis of the contract, and it subsequently appears that such facts did not exist, the contract is inoperative. *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; note, *Du Bois Borough v. Du Bois City, etc., Co.*, 176 Pa. 430, 35 Atl. 248, 34 L.

R. A. 92, 53 Am. St. Rep. 682; *Bluestone Coal Co. v. Bell*, 38 W. Va. 307, 18 S. E. 493; *Laing v. Price*, 75 W. Va. 192, 83 S. E. 499; *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488, 67 N. E. 1069; *Long v. Inhabitants of Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A. (N. S.) 96.

[5] The question at issue is whether this contract comes within this doctrine. As to this we have no doubt whatever. Both parties assumed that iron was upon the land in sufficient quantity to justify its operation for at least 40 years. The production of iron ore and the payment to the lessor of the royalty on such ore was the very substance of the contract. Assuming the allegations of the bill to be true, as we must upon this demurrer, it is clear that the parties were grossly mistaken as to the quantity of the ore. This mistake was mutual, and as a consequence thereof there is a substantial failure of the consideration. While the lessee was not bound to go into court of equity and could have made its defense at law, if sued by the lessor, it was under no obligation to await the institution of such an action. The existence of the lease and the possibility of having to assume the very large liability thereby imposed constituted a contingent liability, the tendency of which would be to impair its credit. If that action had been postponed, the lessee would have been left with a contract of vast importance outstanding, with impending litigation, and the the consequent uncertainty as to whether the claim would be adjudged valid or invalid. The court of law could not either require a cancellation of the lease, or in that action adjudicate questions which may arise affecting the rights of the parties as to the property upon the leased premises. The bill and exhibits also show that there are two outstanding deeds of trust upon the property, securing large bond issues and only a court of equity could conclude and determine the rights of those claiming thereunder, for a common-law court would be powerless to do so. It is not inconceivable that these trustees and the bond-holders they represent may differ with the lessee as to the value of the privileges granted by the lease; and, before any action affecting the property upon which they have a lien is taken they have the right to be heard.

[6, 7] If the facts alleged are true, the lessee is entitled to relief in equity upon the ground of failure of consideration arising out of mutual mistake, and both failure of consideration and mutual mistake are grounds of equity jurisdiction. In order to justify the court in refusing to take such jurisdiction, the remedy at law "must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and

secure the whole right of the party in a perfect manner, at the present time and in future; otherwise equity will interfere and give such relief and aid as the exigencies of the particular case may require." 1 Story's Eq. Jur. § 33; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509; *Southern Ry. Co. v. Franklin*, etc., R. Co., 96 Va. 704, 32 S. E. 485, 44 L. R. A. 297. Even if sued at law, the lessee would not be bound to make its equitable defense, which is allowed under Code, § 3299, for it is expressly provided by section 3300 that failure to make such defense in the common-law action does not preclude a subsequent proceeding in equity for such relief, and the statute is thus construed in *Selden v. Williams*, 108 Va. 551, 62 S. E. 380.

The discussion could be prolonged, and many other authorities are cited in the briefs, but those to which we have referred are sufficient. We are convinced that the trial court erred in sustaining the demurrer. A decree will therefore be entered here overruling it, and the cause will be remanded for trial upon the issues of fact tendered by the answer.

Reversed and remanded.

KELLY and BURKS, JJ., absent.

(124 Va. 563)

GLIDEWELL v. MURRAY-LACY & CO.
et al.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. PROCESS ¶168—"ABUSE OF PROCESS"—CAUSE OF ACTION.

"Abuse of process," as distinguished from malicious prosecution and from false imprisonment, constitutes an independent cause of action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abuse of Process.]

2. PROCESS ¶168—"ABUSE OF PROCESS."

The distinctive nature of an action for "abuse of process," as compared with actions for malicious prosecution and false imprisonment, is that it lies for the improper use of a regularly issued process, not for maliciously causing process to issue, or for an unlawful detention of the person.

3. PROCESS ¶171—ABUSE—ALLEGING AND PROVING MALICE.

In action for abuse of process, it is not necessary to allege or prove that process was maliciously sued out, as in malicious prosecution, but it is necessary to allege and prove that process, after being properly sued out, was maliciously misused or abused; law implying malice from intentional and willful perversion, facts of which must be alleged.

4. PROCESS —168 — ABUSE — REDRESSING PRIVATE WRONG.

It is illegal to use the criminal processes of the state merely to redress a private wrong.

5. PROCESS —168—ABUSE OF PROCESS—ENFORCING COLLECTION OF DEBT—SETTLEMENT OF PROSECUTION.

Under Code 1904, § 3973, authorizing private adjustments between parties immediately concerned in misdemeanors for which there is a remedy by civil action, despite section 3760, against compounding offenses, tobacco warehousemen who procured plaintiff's arrest for misdemeanor denounced by Acts 1912, c. 130, plaintiff having failed to repay money borrowed on pledge to sell tobacco through such person, held not guilty of abuse of process, having released him on settlement, despite any intention to use process to enforce collection of debt.

6. CRIMINAL LAW —40—STATUTES—SETTLEMENT OF PROSECUTION—EJUSDEM GENERIS.

The general words, "or other misdemeanor," in Code 1904, § 3973, authorizing private adjustments between parties immediately concerned in misdemeanors for which there is remedy by civil action, following the specific words, "assault and battery," are not to be limited, under the principle of ejusdem generis, to other misdemeanors of the same kind.

7. MALICIOUS PROSECUTION —35(2)—VOLUNTARY COMPROMISE—BAR TO ACTION.

Voluntary compromise of a criminal prosecution by the procurement, or with the consent of accused, in itself defeats a recovery in a subsequent action for malicious prosecution based on the proceeding.

8. PROCESS —168—ABUSE—WANT OF PROBABLE CAUSE.

The element of want of probable cause is immaterial in an action for abuse of process.

9. PROCESS —168—ABUSE—CRIMINAL PROCESS TO COLLECT DEBT.

Criminal process cannot be wrongfully used to collect a debt, if by "wrongful" is meant a perversion or oppressive use of process, as distinguished from secret motive party may have had in procuring issuance.

10. PROCESS —168 — ABUSE — PRECLUSION TO ATTACK VALIDITY.

In action for abuse of process, presupposing an originally valid and regular process duly and properly issued, plaintiff cannot contend warrant on which he was arrested was barred by limitation, and that act under which warrant issued was unconstitutional.

11. APPEAL AND ERROR —1068(3)—HARMLESS ERROR—INSTRUCTIONS.

Where, on evidence, verdict for defendants was only one which jury properly could have rendered, if there was any error in regard to instructions, it was harmless to plaintiff.

12. APPEAL AND ERROR —1060(1)—HARMLESS ERROR—EVIDENCE.

Where evidence admitted over plaintiff's objection was of such a character that its exclu-

sion could not properly have produced a different result, its admission was harmless to him.

Error to Circuit Court, Lunenburg County.

Notice of motion by J. Y. Glidewell against Murray-Lacy & Co. and others. To review judgment for respondents, movant brings error. Affirmed.

Geo. E. Allen, of Victoria, for plaintiff in error.

Booker, McKinney & Settle, of South Boston, for defendants in error.

KELLY, J. Section 1 of an act of the General Assembly, approved March 11, 1912 (Acts 1912, p. 232), declares:

"That it shall be unlawful for any person to borrow money from any person, firm or corporation conducting a business as sales tobacco warehousemen upon a written promise or pledge to sell with or through said person, firm or corporation, any tobacco, and thereafter fail or refuse to comply with the conditions of said written promise or pledge."

And section 2 thereof provides that any person who shall fail to comply with such written pledge, or to repay the amount borrowed, with legal interest, shall be guilty of a misdemeanor, and punished by fine, or imprisonment, or both.

A warrant, issued by a justice in Halifax county, at the instance of Murray-Lacy & Co., tobacco warehousemen, charging J. Y. Glidewell with having obtained from and failed to repay to them the sum of \$93 under circumstances constituting a violation of this statute, was placed in the hands of J. T. Bass, a constable of the county, who was also an employé of Murray-Lacy & Co., and as such charged with the duty of collecting outstanding obligations due to them. He took the warrant to the home of Glidewell, who resided in Lunenburg county some six or seven miles from the town of Victoria, and, not finding him at home, proceeded to Victoria and delivered the warrant to the town sergeant with instructions to execute the same, having first, however, had it duly indorsed by a Lunenburg justice as provided by section 3957 of the Code. The arrest was effected by the sergeant about 3 o'clock in the afternoon of that day. Bass was notified and returned at once to Victoria. Upon his return, he asked Glidewell "what he expected to do." After some conversation not detailed in the record, it was tentatively agreed between them that if Glidewell would execute a new note, with security, covering the \$93 mentioned in the warrant, the correctness of which as a civil liability he did not deny, he would be at once released and the warrant dismissed. He was not willing, however, to definitely conclude any adjustment of the matter without consulting

counsel, and accordingly the parties repaired to the law office of his attorney, Mr. Geo. E. Allen. Upon being asked by Mr. Allen, "What do you want?" Mr. Bass replied, "We want money." The subject of compromise was then taken up, and, upon an offer made by Glidewell (but against the advice of his attorney, who stated that Bass had no right to make the arrest, and that the law under which the warrant was issued was unconstitutional), the new note, with security, was executed, and Glidewell was immediately released. Bass then promptly proceeded to Halifax county and had the warrant dismissed.

In order to show fully all the circumstances under which Glidewell made the settlement, the following additional incidents should be mentioned: He had walked from his home to Victoria to get medicine for his sick child, but whether Bass was informed of this fact does not appear. The child's illness does not seem to have been regarded very seriously by him, as he remained in Victoria for some time after the settlement was made. He was told by Bass that unless the matter was settled he would not be released, but would be taken before the Halifax justice, and would certainly be convicted. After his arrest, he was not confined in jail, was allowed to stay at his brother's home, apparently without guard, was subjected to no harsh or oppressive treatment by the officers, but was kept under formal arrest from 3 o'clock in the afternoon until the settlement was concluded about 11 o'clock that night. During the negotiations, Bass refused to release the prisoner upon an offer by the latter's counsel to be responsible for his appearance to answer the warrant at a future day.

Shortly after the termination, in the manner already set out, of the criminal prosecution against Glidewell, he instituted the present proceeding, by notice of motion, against Murray-Lacy & Co. and T. J. Bass, to recover damages of them alleged to have resulted from his arrest and imprisonment. The notice charged that the defendants wrongfully, unlawfully, and maliciously sued out a criminal warrant against the plaintiff, and caused his arrest thereunder, "not for the purpose of enforcing the criminal laws of the commonwealth, but solely for the ulterior and unlawful purpose of enforcing the collection of a debt of which plaintiff would otherwise have been discharged." The notice, which was entirely informal, did not attempt to designate *eo nomine* the cause of action; but the petition upon which this writ of error was granted interprets it as "a tort consisting of the abuse of process in using the criminal law to collect a debt." The case, as attempted to be made out by the plaintiff, was tried upon this interpretation, and we shall deal with it accordingly.

Upon the trial, there was a verdict and judgment for the defendants.

[1] The cause of action sought to be maintained in this proceeding is not malicious prosecution or false imprisonment, but the kindred, though less common one, of abuse of process. So far as we know, there is no Virginia case upon the subject. It is well settled, however, as a general proposition of law, that abuse of process, as distinguished from malicious prosecution and from false imprisonment, may constitute an independent cause of action.

[2] The distinctive nature of an action for abuse of process, as compared with the actions for malicious prosecution and false imprisonment, is that it lies for the improper use of a regularly issued process, not for maliciously causing process to issue, or for an unlawful detention of the person.

In *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95, the court said:

"There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully used for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if after an arrest upon civil or criminal process the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong."

Freeman, in a note to *Bradshaw v. Frazier*, 86 Am. St. Rep. 406, says:

"An action for the abuse of a process of arrest usually presupposes that the arrest under the process was proper in its inception, and is founded on grievances arising in consequence of subsequent proceedings"—citing *Whitten v. Bennett*, 86 Fed. 406, 30 C. C. A. 140; *Wood v. Graves*, *supra*.

In 1 *Ruling Case Law*, pp. 101, 102, with reference to this particular cause of action, it is said:

"There has been considerable confusion in the books as to the scope of the action for abuse of process, and numerous cases may be found where it has been confounded with other classes of actions. * * * Abuse of process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured. * * * The cases based upon a pure abuse of process are comparatively few, though there are numerous cases referred to and cited as such which are in fact actions for malicious prosecution. * * * The distinctive nature of an action for malicious abuse of process, as com-

pared with an action for malicious prosecution, is that it lies for the improper use of process after it has been issued, not for maliciously causing process to issue."

In Cooley on Torts (3d Ed.) p. 355, the author says:

"Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. *Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process.*" (Italics added.)

See, also, to the same general effect as the foregoing, 32 Cyc. 541; 3 Ann. Cas. 722, note; Malone v. Belcher, Ann. Cas. 1915A, 830, note 831, 832.

[3] The civil injury now under discussion is sometimes referred to, even by the same text-writers and in the same judicial opinions, as "malicious abuse of process," and at other times merely as "abuse of process." This alternative use of these expressions is not usually intended to be discriminative, but there is at least a conflict of statement in the authorities as to the necessity of averring and proving malice in cases of this character. 3 Ann. Cas. 722; Ann. Cas. 1915A, 832. It seems to us, however, that there is no reason for any confusion of thought, or for any difference of opinion, as to the part which malice plays in such cases. The true rule would plainly seem to be that it is not necessary to allege or prove that the process was maliciously sued out, as in malicious prosecution, but that it is necessary to allege and prove that the process, after being properly sued out, was maliciously misused or abused. The authorities are practically unanimous in holding that to maintain the action there must be proof of a willful and intentional abuse or misuse of the process for the accomplishment of some wrongful object—an intentional and willful perversion of it to the unlawful injury to another. From such use or employment of the process, as from any other willful wrong, the law implies malice. It is safe to say that no action for abuse of process can be maintained without proof that the process was used under circumstances amounting to either actual or implied malice.

To sum up this branch of the discussion, if process is willfully used for a purpose not justified by the law, it is an abuse for which an action will lie. The abuse consists in the unlawful use. While it cannot be wrong to do a lawful act in a lawful way, it is a wrong to do a lawful act in an unlawful way. It is the unlawful method by which the act is done that gives rise to the action, and the intentional use of this method constitutes malice in law. The malice need not be expressly charged; but, if

not, there must be an averment of facts from which the law implies the malice.

The texts and judicial opinions to which we have referred are replete with citations to other similar discussions covering every conceivable phase of the tort known as "abuse of process." Further elaboration or more extended citation here would serve no good purpose. The opening brief of counsel for the plaintiff in error contains a very satisfactory collection and review of the leading authorities on the subject, and concludes with a summary which we believe to be a correct and a sufficiently complete compendium of the law for all of the purposes of the instant case. We therefore quote from the brief as follows:

"An examination of these authorities will clearly show that the only essentials of the action of abuse of process are, first, an ulterior motive, and, secondly, an act in the use of the process not proper in the regular prosecution of the proceeding, though it is immaterial whether such process is baseless or not, the abuse consisting in its perversion to some unlawful purpose and in the willful and oppressive use of it after its issue."

[4, 5] The plaintiff's case, however, when tested by the law as thus correctly stated by his counsel, cannot be maintained. It may be conceded that the first essential element of the tort, an ulterior motive, was established. To say the least of it, the evidence tended strongly to show that the real purpose of the defendants was not to enforce the criminal law, but to collect their debt, and as a general proposition, it is illegal to use the criminal processes of the state merely to redress a private wrong. But before this ulterior purpose can be made the basis of a recovery in an action for the abuse of process, it must be coupled with the second essential element; that is, with "an act in the use of the process not proper in the regular prosecution of the proceeding," amounting to its perversion to some unlawful purpose. Proof of indirect motive will not alone sustain the action. 1 R. C. L. 108; 86 Am. St. Rep. note p. 399; and other authorities cited, supra. It is at this point that the plaintiff's case unmistakably breaks down.

Whatever motive and purpose the defendants might have had, what they actually did was in keeping with the object of the act of March 11, 1912, and with the general legislative policy of the state with reference to misdemeanors of a minor character for which the party aggrieved has also a private remedy. There can be no doubt that the act under which the warrant was issued was primarily intended to protect tobacco warehousemen against the loss of advances of the kind made by the defendants in this case. Nor was there anything reprehensible or unlawful in the settlement which the defendants made with the plaintiff by virtue of which the prosecution was withdrawn and the war-

rant dismissed. The transaction does not fall within the condemnation of section 3760 of the Code against concealing or compounding offenses, but rather within the spirit, if not within the terms, of section 3973, authorizing a private adjustment between the parties immediately concerned in misdemeanors for which there is a remedy by civil action. The section last cited, so far as it need be quoted here, is as follows:

"When a person is in jail or under recognizance to answer a charge of assault and battery or other misdemeanor, for which there is a remedy by civil action, * * * if the party injured appear before the judge or justice who made the commitment or took the recognizance, and acknowledge in writing that he has received satisfaction for the injury, such judge or justice, in his discretion, may, by an order under his hand, supersede the commitment or discharge the recognizance as to the accused and witnesses."

It is contended that the formalities of the foregoing section were not complied with in the instant case. It does not affirmatively appear that the defendants ("parties injured") "acknowledged in writing that they had received satisfaction for the injury," nor just what were the terms of the final order of dismissal; but it does appear that they in fact received satisfaction, appeared before the justice, and had the warrant dismissed. This was done upon a proposition made by the accused, and was so much in accord with what he desired that he concluded the arrangement against the advice of his counsel. We need not stop to inquire whether this possibly irregular dismissal of the warrant would have constituted a valid and complete defense on his part against any subsequent effort by the commonwealth to proceed against him criminally for the same cause. It is certain that he himself cannot be heard to complain of the alleged irregularity.

[6] It is further argued, however, that section 3973 of the Code does not apply to cases of this kind, because the general words, "or other misdemeanor," following the specific words, "assault and battery," must, under the principle of *eiusdem generis*, be limited to other misdemeanors of the same kind as assault and battery, or, as otherwise expressed in the reply brief, "to cases of assault and battery or other misdemeanors resulting in personal injuries." Mr. Lile, in his Notes on Statutes (page 29, § 48), states the familiar rule of construction here invoked as follows:

"Where particular classes of persons or things are mentioned in a statute, general words preceding or following are to be restricted to persons or things of a like kind with those particularly mentioned, unless plainly otherwise intended."

It is clear that the construction of section 3973 is not within the rule, because "plainly

otherwise intended." The statute, instead of impliedly restricting the meaning of the words "other misdemeanor" to offenses of a kindred nature with assault and battery, expressly extends their meaning so as to include the misdemeanor here involved along with all others "for which there is a remedy by civil action."

[7] A voluntary compromise of a criminal prosecution, by the procurement or with the consent of the accused, in itself defeats a recovery in a subsequent action for malicious prosecution based upon the criminal proceeding. *Russell v. Morgan*, 24 R. I. 134, 52 Atl. 809, 811; *Langford v. Railroad Co.*, 144 Mass. 481, 11 N. E. 697, 699. If it be true, as contended on behalf of the plaintiff in error, that this rule does not apply in a case of abuse of process, still the existence of the rule itself shows that private adjustments of criminal prosecutions are not unusual and are frequently recognized as proper. We have seen that in Virginia settlements of this character are expressly provided for by statute as to misdemeanors like that for which the plaintiff in error was being prosecuted, and this is in accord with the general policy of the law. Of course, compounding or concealing crimes, or stifling prosecutions to defeat the ends of justice, will not be countenanced or permitted; but, as said in 3 Wharton's Criminal Law, § 1877, p. 2079:

"In prosecutions for offenses and cheats not involving any great offense against the public, the courts will encourage settlements between the parties as less injurious to the public than litigation."

Our conclusion is that there was no abuse, no malicious use, and no perversion of the process sued out against the plaintiff in error. There was no extortion thereunder, no collection of money not due from him, and he was subjected to no oppression, and to no indignity except such as was incident to an orderly arrest under due and regular process. The averment, in his notice of motion, that but for the criminal prosecution he "would have been discharged" from the payment of the debt, and the statement in his bill of particulars that he had been adjudicated a bankrupt, are not supported by any proof, and appear to have been abandoned. Whatever motive may have prompted the defendants, they had a moral and legal right to accept satisfaction and withdraw the prosecution substantially as they did; and there is no ground upon which the plaintiff can legally ask for damages against them in this action.

[8, 9] A number of decisions from other jurisdictions are cited in the brief of counsel for plaintiff in error to support the proposition there advanced that criminal process cannot be wrongfully used to collect a debt, and that in such cases it is not necessary to prove malice or want of probable cause. The

last-named element, want of probable cause, is of course immaterial in all such cases, because that relates to the suing out and not to the use of the process. We concede also, and indeed it follows from what we have already said in this opinion, that criminal process cannot be wrongfully used to collect a debt, if by "wrongfully" is meant a perversion or oppressive use of the process as distinguished from the secret motive which the party may have in procuring its issuance. As to the proof of malice, we have seen that such proof is not necessary as to the issuance, but is necessary to the use, of the process, in order to sustain an action of this character. If any of the decisions relied upon by counsel for the proposition recited at the beginning of this paragraph, or for any other proposition, are in real conflict with the conclusions we have reached, we should feel obliged to disregard them; but we think it will be found that there is no substantial conflict between those cases and our decision in the present case. We will advert to a few of them, by way of illustration:

In the case of *McClenny v. Inverarity*, 80 Kan. 569, 103 Pac. 82, 24 L. R. A. (N. S.) 301, which more nearly supports the plaintiff's contention than any other authority to which our attention has been called, "the evidence disclosed the fact that a warrant for the arrest of the plaintiff upon a criminal charge was used to collect a debt, and, it seems, to extort an additional amount"; and, moreover, there were aggravating and oppressive circumstances in that case in connection with the arrest.

Lockhart v. Bear, 117 N. C. 298, 23 S. E. 484, was a case in which a process of arrest was used to force a debtor to pay a debt out of property legally exempt from execution, and thus became a case for recovery because the process was used to compel the accused to do something which he was under no legal obligation to do, and against which he would have had a good defense in a civil proceeding.

Shaw v. Spooner, 9 N. H. 197, 32 Am. Dec. 348, was a case in which a criminal prosecution was instituted against a nonresident defendant, by virtue of which extradition was procured, and the defendant, thus brought within the jurisdiction, was then induced to settle a civil liability in order to rid himself of the criminal prosecution. The opinion clearly indicated that the process was improperly, if not dishonestly, used to bring about the extradition, and that the settlement made with the defendant was one not in accord with a sound legislative and judicial policy.

In *Wood v. Graves*, *supra*, a recovery was sustained, but the opinion in that case directly supports our conclusion here. That this is true is shown, not only by our quotation therefrom in a previous paragraph, but from the following language with which that opin-

ion, after reviewing the instructions, concludes:

"Under these instructions, the jury could not properly hold the defendants responsible for merely setting the criminal law in motion, and arresting the plaintiff and holding him in custody until his discharge; but only for some distinct act or omission, which amounted to a misuse or abuse of the process after it had issued, some indignity or oppression beyond the mere fact of arrest and detention, some separate pressure to compel him to make the settlement."

We may well conclude this reference to the authorities cited for the plaintiff by saying, in the language of the court in *Bartlett v. Christliff*, 69 Md. 219, 14 Atl. 518:

"All these are instances in which the writ, regularly and properly sued out, was perverted, abused, and made an instrument of oppression"—a classification which does not embrace the case at bar.

[10] It only remains to consider briefly two contentions on behalf of the plaintiff in error, not embraced in the foregoing discussion. The first is that the warrant was barred by limitation; and, the second, that the act of March 11, 1912, is unconstitutional. Regardless of their merits, neither of these propositions can be availed of by the plaintiff in this proceeding. Whether either or both of them are sound propositions, and what effect they might have had in an action for false imprisonment or malicious prosecution, are questions which suggest themselves, but which are not material to the present controversy. They have to do, not with the use or abuse of process, but with its original issuance and validity. The plaintiff chose to sue for abuse of process, apparently and perhaps correctly believing that, in view of the facts of his case, this form of action was more favorable to him than any other he might adopt. We need hardly repeat that an action for abuse of process presupposes an originally valid and regular process, duly and properly issued. Authorities cited, *supra*. There might, of course, be actionable abuses of process not thus originally regular and properly issued; but any action for such abuse would necessarily ignore the infirmities in the process itself and rely upon the abuse of it after it had been sued out, the latter constituting the gist of the action.

Having reached the foregoing conclusions, it becomes unnecessary to discuss in detail the numerous assignments of error upon which we are asked to reverse the judgment of the lower court. They relate to instructions given or refused, to the admission of certain evidence, and to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

[11, 12] Upon the evidence as introduced, a verdict for the defendants was the only one which the jury could have properly rendered; and, as a result, if there was any error in

regard to the instructions, it was harmless. *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101, and cases cited. The evidence which was admitted over the plaintiff's objection was of such a character as that its exclusion could not properly have produced a different result. Its admission, therefore, did not prejudice his rights. *Norfolk v. Southern Ry. Co.*, 117 Va. 101, 110, 83 S. E. 1085.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

(124 Va. 512)

BARRETT BROS. v. FELIE.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. TRESPASS §56—REMOVAL OF FURNITURE—DAMAGES—PUNITIVE DAMAGES.

Where defendants removed sublessee's furniture from premises as the result of a mistake, thinking the furniture belonged to lessee, and was not prompted in so doing by malice, sublessee was entitled to compensatory damages merely, and not punitive damages.

2. PARTNERSHIP §153—LIABILITY OF PARTNER—TRESPASS BY COPARTNER—PUNITIVE DAMAGES.

A partner who knew nothing of alleged trespass until after suit was brought, and neither authorized nor ratified such trespass, was not liable for punitive or exemplary damages.

Error to Circuit Court of City of Newport News.

Action by D. Felle against Barrett Bros. Judgment for plaintiff, and defendants bring error. Reversed, and case remanded, with directions.

J. A. Massie, of Newport News, for plaintiffs in error.

T. J. Christian and W. T. Moss, both of Newport News, for defendant in error.

WHITTLE, P. Defendant in error brought this action of trespass *quare clausum fregit* against plaintiffs in error, a partnership composed of W. E. Barrett and F. M. Barrett, to recover damages for breaking and entering his close and removing his furniture and effects from a building located in the city of Newport News leased by plaintiff from the defendants. There was a verdict and judgment in favor of plaintiff for \$500 to which judgment this writ of error was granted.

The material facts may thus be summarized: Plaintiffs in error, as partners, were general rental agents, the business being under the direction and control of F. M. Barrett, who leased and collected the rents of a house in the city of Newport News owned by W. E. Barrett and W. B. Vest. One A. Francesco verbally leased the ground floor for a restaur-

ant and the upstairs for living rooms. Francesco subsequently sold his restaurant and assigned both leases to the purchaser, who thereupon took possession and occupied the premises for some time. The purchaser failing to pay the entire purchase price, Francesco took the property back, including the leases, and then sold the restaurant to plaintiff, Felle, and transferred the possession of the entire building to him. Plaintiff conducted a restaurant on the ground floor and occupied the flat above, paying a rental of \$12.50 per month for each in advance, for the restaurant to August 1st, and for the upstairs rooms to August 10th. He failed to meet his deferred payments on the restaurant, and Francesco in July took possession of the same and refunded to plaintiff part of the cash payment he had made therefor. Francesco then went to the office of defendants and informed F. M. Barrett that he had taken the place back, and that plaintiff had removed to Richmond, and inquired if plaintiff owed them any rent, and was told that he only owed \$2 for water rent; that the rent for the restaurant and upstairs had been paid as before stated. Thereupon Francesco notified F. M. Barrett that he had sold the restaurant to one Beauchamp, and desired to put him in possession. F. M. Barrett informed Beauchamp that the rent had been paid for some days, and there would be no rent due until the beginning of the new month. F. M. Barrett inquired of Francesco what he was going to do about some furniture he owned upstairs, and Francesco told him that he would remove it next day. A day or two afterwards, F. M. Barrett sent Berger, who was employed in their office, to remove into the hall, as he thought, one or two pieces of old furniture belonging to Francesco in the upstairs rooms, so that Beauchamp might take possession of the entire premises. Berger went to the house to remove the stuff as directed, but found more furniture than was anticipated, and an old woman in the upstairs rooms, who subsequently proved to be Mrs. Felle, though F. M. Barrett did not know that it was Mrs. Felle, but thought she was another Italian woman who had been squatting in their property in that vicinity. Berger then, with the help of two colored men, had the furniture, consisting of three iron beds, three tables, six chairs, four rocking chairs, two beds, two trunks, with bed clothing and wearing apparel in them, moved into the alley, and fastened up the house. The articles remained in the alley until next morning, when a neighbor had them removed to his house, where some of them yet remain; the rest having been shipped to plaintiff in Richmond. This neighbor also took care of Mrs. Felle, without charge, until she joined her husband in Richmond. W. E. Barrett, the other partner, knew nothing of the alleged trespass

until after the institution of the suit, and then authorized his counsel to investigate the matter and pay the parties any actual damage they had sustained. F. M. Barrett thought the Felles had moved all their belongings, and that the furniture found on the premises belonged to Francesco, and directed it to be put in the hall, so that Beauchamp, to whom Francesco had turned over the property, could occupy it.

Plaintiff testified that he bought the furniture three years before at a cost of \$500, and that it "was worth more to-day than it was then and could not be replaced for less than \$500." At the request of the plaintiff, among other instructions, the court told the jury that if they should find for the plaintiff, in assessing his damages, they might take into account compensation for damage to his household furniture, and for mental suffering, if any, sustained by reason of such wrongful act or acts, including injury to his feelings, if any, sustained by reason of the occasion; and if the jury believed that the act complained of was committed with actual malice, forcibly, and with a design to injure or oppress the plaintiff, he might also recover punitive or exemplary damages—that is to say, the jury would not be limited to mere compensation for the actual damages sustained by him, but might give such further damages as they thought right, in view of all the circumstances proved at the trial, by way of punishment to the defendant as a salutary example to others to deter them from offending in like manner, but not exceeding \$1,000, the amount demanded.

In the case of *Wood v. American National Bank*, 100 Va. 306, 40 S. E. 931, it was held:

"Under the common-law system of pleading, damages which do not necessarily flow from the act or omission complained of must be specially pleaded, but damages which are the necessary and proximate result of such act or omission are termed general, and are legally imported, and may be recovered, although not specially claimed in the declaration. If the facts averred in the declaration show that the plaintiff is entitled to recover exemplary damages, they need not be claimed *eo nomine*. If a more specific statement of the elements of damage be desired, it may be demanded under the provisions of section 3249 of the Code."

The declaration in the present case is in common form, and covers general and not special damages. Punitive or exemplary damages are not only not claimed *eo nomine*,

but the declaration does not aver such a state of facts as shows that the recovery of such damages was contemplated. It is not even alleged that the trespass was done willfully, negligently, wrongfully, or maliciously; and the defendants had no reason to suppose that they would have to answer for other than actual or compensatory damages.

In a similar action to recover damages for breaking and entering plaintiff's close, and cutting and converting trees, this court held that, where the trespass was not willful, the damages were merely compensatory. *Wood v. Weaver*, 121 Va. 250, 92 S. E. 1001.

[1] The case of *Norfolk & Western Ry. Co. v. Neely*, 91 Va. 539, 22 S. E. 367, illustrates the considerations that should govern in assessing damages in this class of cases. Judge Riely delivered the opinion of the court, and it was held that—

"A passenger who is unlawfully expelled from a railroad train by the conductor thereof is entitled to recover damages therefor of the company. If the expulsion, though unlawful, did not proceed from any ill motive, and was not rudely or recklessly done, nor in such manner as to evince malice or a conscious disregard of the rights of others, and was simply the result of a mistake, the passenger cannot recover punitive damages, but only compensation, and, on the evidence certified, his damages should be limited to compensation for the inconvenience, delay and fatigue to which he was put, and a suitable recompense for the injury done to his feelings, in being expelled from the train."

[2] It should also be observed that the judgment under review is against the partnership, and rests equally upon W. E. Barrett, who knew nothing of the alleged trespass until after suit brought, and neither authorized nor ratified it. In these circumstances he was plainly not liable for punitive or exemplary damages. *Henry Myers & Co. v. Lewis*, 121 Va. 50, 92 S. E. 983.

Obviously, the case was tried upon an erroneous theory as to the correct measure of damages, both under the pleading and evidence, and that conclusion renders it unnecessary to notice in detail the other assignments of error, most if not all of which are not likely to arise at the next trial.

Upon these considerations, the judgment must be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial to be had conformably to the views expressed in this opinion.

Reversed.

(124 Va. 544)

CLARK et al. v. LANG.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. NEGLIGENCE \S 121(1) — PRESUMPTION — PROOF.

Negligence will not be presumed, but must, like any other fact, be established by evidence direct or circumstantial.

2. NEGLIGENCE \S 111(1)—PLEADING—FACTS AND CIRCUMSTANCES.

In action against owner of mill for damages caused by fire originating in mill, plaintiff cannot recover on mere allegations that defendants were negligent and allowed fire to escape from their premises; it being necessary to state facts and circumstances showing in what respect defendants were negligent.

3. NEGLIGENCE \S 139(8) — INSTRUCTIONS — PERSONS LIABLE.

In action for damages caused by fire escaping from a mill, court erred in adding words "or were interested in the proceeds of the business" to a requested instruction that jury could not find against defendants unless they had some control over the engine alleged to have caused the fire; evidence being very meager as to interest of one of defendants, and there being no evidence that the other had any control or was interested in proceeds.

Error to Circuit Court, Buckingham County.

Action by one Lang against C. H. Clark and another. Judgment for plaintiff, and defendants bring error. Reversed.

F. C. Moon and A. L. Pitts, Jr., both of Buckingham, for plaintiffs in error.

Hubard, Gayle & Boatright, of Buckingham, for defendant in error.

BURKS, J. Lang recovered a judgment in the circuit court of Buckingham county against the Clarks for \$2,000 damages, for negligently burning certain buildings and personal property belonging to Clark, and the case is here on a writ of error to that judgment.

The following errors are assigned: (1) Overruling defendants' motion to set aside the verdict as contrary to the evidence; (2) overruling defendants' demurrer to the third count of the declaration; and (3) in giving and refusing instructions.

It is unnecessary to pass upon the first assignment of error, as the verdict will have to be set aside for other reasons hereinafter set forth.

[1, 2] The next assignment of error is to the action of the trial court in overruling the demurrer of the defendants to the third count of the declaration. That count is as follows:

"And for this also, to wit, that the said plaintiff was on the day and year last aforesaid the owner of a certain farm in the county of Buckingham on which farm there were a number of buildings of great value and that in said buildings was stored much valuable farm machinery, tools, hay, grain, etc., of great value, to wit, of a total value of \$3,000; on the said day and year the said defendants, being the owners and operators of a certain sawmill, steam engine and boiler, using wood as fuel, all of which plant was located near the said buildings of the said plaintiff, and the said plaintiff avers that the said defendants well knew that his said buildings together with their valuable contents, were so located; and the place where said mill, etc., was located being filled with brush, and trash and other combustible material, it became and was the duty of the defendants to use all due and proper care to prevent the escape of fire from their said plant, but the said defendants, failed, neglected and refused to use due and proper care on their behalf, but so carelessly and negligently conducted themselves that fire escaped from their said plant on the day and year last aforesaid and burned, consumed and totally destroyed plaintiff's said buildings and their contents, to the damage of the plaintiff of \$3,000."

The right of the plaintiff to recover of the defendants is based upon the negligence of the defendants. This will not be presumed, but must, like any other fact, be established by evidence, direct or circumstantial. The burden was on the plaintiff. If he had the means of proving the negligence, he had knowledge of the facts and circumstances necessary to enable him to state in what respect the defendants were negligent, and this should have been done in the declaration. If he did not have such means, he had no right to hale the defendants into court on a mere guess or suspicion. The declaration does not measure up to the standard required by the former decisions of this court. *Ches. & Ohio Ry. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44, and cases cited. [3] The next error assigned is to the action of the court in modifying instruction No. 1, tendered by the defendants. The instruction as given, with the modification shown in italics, is as follows:

"The court instructs the jury that unless they believe from the evidence that the defendants, C. H. Clark and M. W. Clark, at the time of the fire had some control of the engine which is alleged to have caused the fire complained of in the declaration, *or were interested in the proceeds of the business*, they cannot find against the defendants, C. H. Clark and M. W. Clark."

We are of the opinion that the court erred in making the modification. The evidence, as certified, is very meager as to the interest of C. H. Clark, if any, in the sawmill and its operation, and there is no evidence that M. W. Clark had any control

over the operation of the mill, or was "interested in the proceeds of the business."

The case was tried on the third count of the declaration only. The other counts were stricken out on demurrer, and the ruling of the trial court thereon is not assigned as cross-error.

For the errors aforesaid, the judgment of the trial court must be reversed, the verdict of the jury set aside, and the defendants' demurrer to the third count of the declaration sustained, but with liberty to the plaintiff to amend his declaration if he shall so desire.

Reversed.

(124 Va. 535)

KEISTER'S EX'RS v. PHILIPS' EX'X.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. APPEAL AND ERROR ¶1039(10)—HARMLESS ERROR—BILL OF PARTICULARS.

In a suit on a note, error, if any, in denying defendant's motion based upon Code 1904, § 3249, for a bill of particulars stating the consideration, was harmless, where defendant's allegation that the note was given for stock in a corporation was admitted by plaintiff upon the trial.

2. PLEADING ¶816—DISCRETION OF COURT—FILING BILL OF PARTICULARS.

A motion to file a bill of particulars is addressed to the court's discretion and should be sustained, where the pleadings are not so drawn as to give the defendant a proper notice of the particulars of the claim.

3. EVIDENCE ¶271(5)—SELF-SERVING DECLARATIONS TO ATTORNEY.

Testimony by an attorney, in a suit on a note, that the payee, after the date of an alleged receipt indicating payment, sent him the note for collection, was not a self-serving declaration by the payee, but explained the attorney's possession of the note and tended to prove his principal's ownership.

4. EVIDENCE ¶123(1)—RES GESTÆ—STATEMENTS AS TO OWNERSHIP.

Testimony, by an agent of the payee, that, after the date of an alleged receipt indicating payment, the note was sent him for collection, if considered a declaration by the payee, was admissible in evidence, upon the issue of ownership, as part of the res gestæ.

5. PLEADING ¶299—VERIFICATION—FILING OF AFFIDAVIT—TIME.

In an action on a note permitting plaintiff during the trial to file an affidavit under Code 1904, § 3279, denying the genuineness of a signature to an alleged receipt, was not error; the court having a large discretion as to the time of filing such an affidavit.

6. APPEAL AND ERROR ¶960(1)—REVIEW—DISCRETION OF COURT—FILING OF PLEADINGS.

Action of the trial court in exercising its discretion as to the time of filing and perfect-

ing pleadings will not be reviewed unless clearly erroneous.

7. EVIDENCE ¶197—HANDWRITING—COMPARISON BY JURY.

In view of Code 1904, § 3388, permitting juries to take all documents introduced in evidence with them into the jury room, in an action on a note, in which the payee's signature to a receipt was disputed, specimens of the payee's handwriting, proved to be genuine, were properly received in evidence for comparison by the jury, without aid of expert testimony.

8. TRIAL ¶234(7)—INSTRUCTIONS—BURDEN OF PROOF.

Instruction that the burden of proving payment of the note sued upon rested upon the defendants held not erroneous as relieving plaintiff of the burden resting on him, defendants having pleaded payment.

9. PAYMENT ¶74(4)—RECEIPT—NOTE—AFFIDAVIT AS TO GENUINENESS.

A receipt is not prima facie evidence of payment of note, where the genuineness of the receipt is denied by affidavit.

Error to Law and Chancery Court of City of Norfolk.

Suit by Mary E. Phillips, executrix of W. H. Phillips, deceased, against M. L. Keister and another, executors of Z. E. Keister, deceased. From a judgment for plaintiff, defendants bring error. Affirmed.

E. R. F. Wells, of Norfolk, for plaintiffs in error.

Edward R. Baird, Jr., of Norfolk, for defendant in error.

PRENTIS, J. M. L. Keister and D. E. Keister, executors of the last will and testament of Z. E. Keister, deceased (defendants) complain of a verdict and judgment in favor of Mary E. Phillips, executrix of the last will and testament of W. H. Phillips, deceased (plaintiff).

The plaintiff's action is based upon a note for \$500, made by Z. E. Keister, payable to her testator, W. H. Phillips. The defendants pleaded the general issue and filed a special plea alleging that on July 16, 1916, their testator, Z. E. Keister, had paid to W. H. Phillips, the payee of the note, \$500 in part payment thereof, and that Phillips had signed and delivered to Keister a receipt in writing for that sum; and they paid into court a small balance admitted to be due.

[1, 2] 1. The first error alleged is that the court refused to require the plaintiff to file a bill of particulars stating the consideration of the note, basing their motion upon section 3249 of the Code. Such a motion is addressed to the sound discretion of the court and should be sustained in cases where the notice, declaration, or other pleading is so drawn as not to give the defendant proper notice of the particulars of the claim. Driv-

er v. Southern Ry. Co., 108 Va. 654, 49 S. E. 1000. In this case the error, if error it was, is clearly harmless, because the plaintiff's case was based upon a negotiable note, and the only reason alleged for desiring a bill of particulars was in order to have the plaintiff state the consideration for which the note was given. Upon the trial the plaintiff admitted that it was given for stock in the Campostella Heights Company, as alleged by the defendants. So that there was no surprise, and no good purpose would have been accomplished by having such a bill of particulars.

[3, 4] 2. It is alleged that the court erred in permitting the witness McCoy, an attorney, to testify that W. H. Philips, after the date of the alleged receipt, sent the note to him for collection. It is claimed that this evidence should have been excluded upon the same ground that the self-serving declarations of Philips would have been excluded, and that it was tantamount to admitting Philips' statement to the effect that the debt had not been paid.

We cannot agree with this suggestion. The fact testified to was not a declaration of Philips, but was a fact explaining the attorney's possession of the note, and tending to prove his principal's ownership. Even if considered a declaration by Philips that the note belonged to him at that time, it is admissible, for declarations and conduct as to the ownership of property, made by a person in possession thereof, are generally admissible in evidence upon an issue as to such ownership as part of the *res gestæ*, 10 R. C. L. 984.

[5, 9] 3. It is alleged that the court committed error in allowing the plaintiff during the trial to file an affidavit denying the signature to the receipt, and in this way to put in issue the genuineness of that signature. The defendants relied upon section 3279 of the Code, reading thus:

"Where a bill, declaration, or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the fact alleged shall be required, unless an affidavit be filed with the pleading putting it in issue, denying that such indorsement, assignment, acceptance, or other writing was made by the person charged therewith, or by any one thereto authorized by him"

—and objected to any evidence denying the genuineness of the signature to the receipt. Their objection was properly sustained. Then upon motion of the plaintiff she was permitted to file an affidavit denying the genuineness of such signature. We have no doubt whatever of the correctness of this ruling. Trial courts have a very large discretion as to the time of filing and perfecting pleadings, which this court will not review unless such action is clearly erroneous and harmful. *Whitley v. Booker Brick Co.*,

118 Va. 434, 74 S. E. 160; *Dean v. Dean*, 122 Va. 513, 95 S. E. 431.

[7] 4. The court allowed various specimens of the handwriting and signature of W. H. Philips upon checks and letters, proved to be genuine, to be introduced for the purpose of comparison by the jury, and this is also alleged to be erroneous. This question has been the subject of much discussion and of many statutes, and formerly there was the greatest contrariety of decision. In this state, in the case of *Hanriot v. Sherwood*, 82 Va. 1, this court, discrediting *Rowt's Adm'x v. Kile's Adm'r*, 1 Leigh (28 Va.) 216, and *Burress v. Commonwealth*, 27 Grat. (68 Va.) 934, held that expert testimony can be received by the jury to test by comparison disputed handwriting with other writings admitted or proved to be genuine; and this later ruling is followed in *Johnson's Case*, 102 Va. 927, 46 S. E. 789. The precise question, however, here is whether the jury, without the aid of expert testimony, may make such comparison. The multitudinous decisions on the subject are collected in a note to *University of Illinois v. Spalding*, 62 L. R. A. 817, and it is there said, on page 867, that—

"Comparison by the jury is allowed, it has been seen, in every jurisdiction except North Carolina and Louisiana; the exclusion of this kind of proof in North Carolina being in accordance with a supposed common-law rule refusing the jury permission to see written documents in the case; and in Louisiana owing to a statute limiting comparison to experts appointed by the court, according to the civil-law rule."

It is noted, in passing, that the reason for the rule prevailing in North Carolina does not apply in Virginia because of the statute (Code, § 3388) expressly permitting juries in this state to take all documents introduced in evidence with them to the jury room. The former rule has been repudiated in most, if not all, jurisdictions, and it is now generally held that such comparison of the writings is a rational method of investigation; that similarities and dissimilarities thus disclosed are of probative value; and that it is as satisfactory in the search for truth as any other method yet pursued. Indeed, it is difficult to understand why there should ever have been any doubt about it. Mr. Justice Coleridge, in *Doe v. Suckermore*, 7 A. & E. 706, suggests as an objection that "the English law has no provisions for regulating the manner of conducting the inquiry," and, as Mr. Wigmore so pungently says, this objection "illustrates that perverse disposition of the Anglo-Saxon judge—the despair of the jurist—to tie his own hands in the administration of justice; to deny himself, by a submission to self-created bonds, that power of helping the good and preventing the bad which an untechnical common sense would never hesitate to exer-

dise." 3 Wigmore on Ev. § 2000. The modern rule which is fully approved by this court is well stated in 10 R. C. L. p. 994.

We have no doubt whatever that genuine specimens of handwriting or the signature of the person whose handwriting is involved in the issue to be determined may be introduced, subject to proper control by the judge, and that, without the testimony of experts, such specimens may be subjected to comparison with the disputed writing by the jury. There should, of course, be no doubt whatever as to the genuineness of the specimens offered for such comparison.

Rowt's Adm'r v. Kile's Adm'r, supra, and Burress v. Commonwealth, supra, on this point are overruled.

[8] 5. It is alleged that the court erred in granting the instruction No. 1, reading thus:

"The court instructs the jury that the burden of proving payment on the note sued on is upon the defendants, and, unless they believe from the preponderance of the evidence that said note has been paid, they should find for the plaintiff."

It is claimed that the vice of this instruction is that it relieves the plaintiff of the burden, which always rests upon him throughout the trial, to prove his case by a preponderance of the evidence. While, of course, this burden never shifts and the instruction should have been more carefully drawn, we find no substantial objection to it. The possession and production of the note by the plaintiff, without other evidence, was sufficient to prove his case, and, the defendants having pleaded payment, the burden of proving such payment was upon the defendants. This is all the court intended to say to the jury, and there is no reason to doubt that they understood it.

[9] 6. It is also alleged that the court erred in refusing to instruct the jury that the receipt introduced in evidence is prima facie evidence of payment. No authority is cited for this proposition, and we think it unsound. The genuineness of the receipt had been denied by the affidavit filed by the plaintiff, as is above stated, and this shifted the burden to the defendants to prove the fact of payment. If genuine, the receipt was convincing evidence thereof, and, if a forgery, was unworthy of credit.

Affirmed.

(124 Va. 663)

SMITH v. HOLLAND et al.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. EXEMPTIONS ¶119(1) — TIME FOR MAKING CLAIM—"SUBJECTED."

Where a creditor levied execution against property and other creditors entered into the controversy claiming prior liens, and there was

a decree settling the priorities, which became final at adjournment of term of court, the property was "subjected" under a decree within meaning of Code 1904, § 3842, and judgment debtor could not set apart his homestead.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject.]

2. EXEMPTIONS ¶119(1)—TIME FOR MAKING CLAIM.

Where execution was levied against judgment debtor's property and other creditors entered into controversy which lasted for some time, and a decree was entered disposing of the property between the creditors, the decree, which became final after adjournment of term of court, precluded judgment debtor from thereafter setting apart his homestead.

3. JUDGMENT ¶713(2) — RES JUDICATA — MATTERS THAT MIGHT HAVE BEEN LITIGATED.

The effect of a final decree is not only to conclude parties as to every question actually raised and decided, but every claim which properly belonged to subject of litigation which parties in exercise of reasonable diligence might have raised at time.

4. JUDGMENT ¶650 — CONCLUSIVENESS — FINAL JUDGMENT.

A decree is final so as to conclude parties as to issues decided, where no further action is necessary except such as might be used to enforce the decree.

Appeal from Circuit Court, Northampton County.

Suits by Clarence W. Holland against William G. Smith, and by the latter and others against the former, which were heard together. From a decree refusing to grant his petition, praying that certain moneys be paid over to him as a part of his homestead exemption, William G. Smith appeals. Affirmed.

J. Brooks Mapp, of Accomack, for appellant.
Stanley Scott, of Eastville, and Jas. E. Heth, of Norfolk, for appellees.

PRENTIS, J. William G. Smith, who appears to have been largely indebted to persons from whom he rented lands, and to others who had made advances to him which were secured by crop liens, on June 30, 1916, conveyed the unsevered crops, on three farms rented and cultivated by him, to a trustee for the benefit of a number of other creditors. Among those other creditors was the Farmers' & Merchants' Bank of Cape Charles, Va.

Clarence W. Holland had, on November 10, 1908, recovered a judgment against Smith for \$730, with interest, and upon that judgment had issued an execution on June 1, 1916, under which there had been a levy upon Smith's property. Under this state of facts, Holland brought a chancery suit against his debtor, claiming a lien in his favor on the unsevered crops, and the trustee and cer-

tain of the other creditors who alleged that their liens were superior to that of Holland also instituted a suit against Holland and the sheriff of Northampton county, praying for an injunction to prevent the levying upon or subjecting any of the severed or unsevered crops. The injunction was refused, but the attorneys for the opposing interests were appointed receivers to take possession of and to market the crops. The two suits were thereafter heard together. The receivers, acting under the decrees of the court, converted the crops into money, and all of the fund has been distributed under the decrees of the court except the residue thereof now here in controversy. That fund is the sum of \$569.96, which represents the dividend assigned to, and which but for this litigation would have been paid upon the debt of the bank. Holland claimed a lien under his execution superior to the lien of the bank under the deed of trust, because he alleged that the bank had notice of his execution. He sustained this claim, and showed that the bank had been served with garnishee process on the 24th day of June, 1916, which was prior to the date of the deed of trust, June 30, 1916, under which the bank claimed. The court, therefore, on November 21, 1917, decreed that this amount, which would otherwise have been paid to the bank, should be paid to Holland, the execution creditor. The same decree directs the payment of all of the costs of the suit, and disposes of the entire fund in the hands of the receivers. After this, on the 14th day of December, 1917, Smith filed a homestead deed, claiming the amount so decreed to be paid to Holland as a part of his homestead exemption, and thereafter, at a subsequent term of court on March 22, 1918, filed his petition in the chancery causes referred to, praying that it be paid over to him as a part of his homestead. The court, over the objection of Holland, permitted the filing of this petition, but refused to grant its prayer, and dismissed it. Of this ruling Smith is here complaining.

[1-3] In the view which we take of the case, the question presented is single and narrow. The statute, section 3642, permits a householder to set apart his homestead "at any time before the same is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process." So that we have only to determine whether the fund here involved had been "subjected" within the true intent and meaning of that statute before the execution of the homestead deed. As to this we have no doubt. The litigation had been pending for some time, and Smith was a party to it. While he had waived his homestead exemption as to the debt of the bank, and had not waived it as to Holland's debt, at the same time he knew of the controversy, and must be deemed to

have known that the question might be decided in Holland's favor. When it was thus decided, he doubtless then could have claimed the fund as a part of his homestead at any time before that decree became final; that is, before the adjournment of that term of court. Having failed to exercise this privilege, he is concluded by that decree, not only because the fund had been subjected thereby, but because it was a final decree settling every controversy which had arisen in the cause. The effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly belonged to the subject of litigation, and which the parties, by the exercise of reasonable diligence, might have raised at the time. *Diamond State Iron Co. v. Rarig*, 93 Va. 595, 25 S. E. 894; *Miller v. Smith*, 109 Va. 651, 64 S. E. 956.

[4] No further action of the court in this cause was necessary. If any further action had been necessary, it would not be in the cause, but beyond it; that is, in order to enforce the decree. The necessity for such further action does not prevent the decree from being final. *Rawlings v. Rawlings*, 75 Va. 76; *Jones v. Buckingham Slate Co.*, 116 Va. 120, 81 S. E. 28. We are therefore of opinion that the question has been correctly determined.

Affirmed.

(124 Va. 518)

BERNARD-SMITH CO. et al. v. BERNARD.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. APPEAL AND ERROR §843(2)—REVIEW—MATTERS NOT AFFECTING MERITS.

Where, under undisputed facts, defendants clearly failed to establish their defense so that plaintiff was entitled to recover in any event, defendant's criticisms of instructions given at plaintiff's request need not be considered.

2. CORPORATIONS §121(5)—MISREPRESENTATION IN PROCUREMENT—EVIDENCE.

In action on note drawn by corporation, indorsed by stockholders, and given to manager as part consideration for his stock, in which defendants set up misrepresentation and failure of consideration, a defense under Negotiable Instruments Law, § 28, evidence held insufficient to show that defendants were misled to their damage by statement made by manager at annual meeting as to resources and liabilities of corporation.

Error to Circuit Court of City of Lynchburg.

Proceedings by S. M. Bernard against the Bernard-Smith Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Harrison & Long, of Lynchburg, for plaintiffs in error.

Caskie & Caskie, of Lynchburg, and S. W. Williams, of Roanoke, for defendant in error.

PRENTIS, J. This is a proceeding by motion on a note drawn by the Bernard-Smith Company, payable with interest to J. B. Bernard, and indorsed by J. R. Muse and others, stockholders of the company, and by the payee, J. B. Bernard, who assigned it after maturity to S. M. Bernard, the plaintiff, who took it, therefore, subject to all of the equities between the original parties.

The defendants (except J. B. Bernard) pleaded the general issue, and as grounds of defense allege misrepresentations in the procurement of the note sued on, and failure of consideration, making the defense authorized by section 28 of the Negotiable Instruments Act (Acts 1897-98, c. 866), which provides that—

"Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained or liquidated amount, or otherwise."

The consideration of the note was one-half of the purchase price of 125 shares of the stock of the Bernard-Smith Company, of the par value of \$12,500, which was purchased for the corporation by the other stockholders for \$6,250—that is, 50 cents on the dollar—of which one half was paid in cash and the other half is represented by this note. There was a verdict and judgment in favor of the plaintiff for \$3,125, subject to a credit of \$675.

[1] The defendants complain of three instructions given by the court at the request of the plaintiff. While it may be true that some of the criticisms of these three instructions are justified, still, in the view which we take of the case, it is unnecessary to consider or discuss these alleged errors, because we think that, upon the undisputed facts of the case, the defendants clearly failed to establish the defense set up by them, so that upon proper instructions the plaintiff was entitled to recover in any event.

[2] The pertinent facts, as we understand them, omitting many details which do not affect our conclusion, are that J. B. Bernard, who owned \$12,500 out of a total of \$23,000 of the capital stock of the company, and had been the active manager thereof for 12 months, made a statement of the resources and liabilities of the company to the stockholders at their annual meeting February 11, 1913. The entire defense is based upon this statement, and it is shown that there were several material errors in it. It further appears, however, that the other stockholders

had been long dissatisfied with the management and progress of the business, and frankly discredited the statement. They clearly desired to eject Bernard from the management. At this meeting, although the statement indicated a surplus of \$1,794.11, they suggested a receivership or an assignment, and to this Bernard replied that he would rather sell his stock at 50 cents on the dollar than to accept this suggestion. Certain of the discrepancies were then pointed out in the statement, all of the books and papers on which Bernard had made it up were exhibited to the stockholders, and there was general dissatisfaction and failure to agree as to a future policy. This meeting adjourned without any action. There were two other meetings during the month of February, but no action taken for a settlement of their differences, except that Muse, the president, and Bernard were appointed a committee to secure another manager. Bernard, however, made no effort to do so. During this time Bernard offered, either to buy the remainder of the stock, or to sell all of his stock, at 50 cents on the dollar; but the other stockholders declined to do either. After the third meeting had adjourned without definite action, Bernard agreed with Muse to buy his 25 shares of stock at 60 cents on the dollar. After this and when Muse had gone to take a train, the other stockholders, at night, went to the house of J. B. Bernard and proposed to him to accept his proposition to buy his stock at 50 cents on the dollar. He replied informing them that he had just bought out Muse at 60 cents on the dollar, and that he could not consider their proposition unless Muse would release him from his contract. They then sought Muse at the station and induced him to release Bernard, and then, on the next day, Bernard sold his stock for the consideration above stated. There is no indication in the evidence that Bernard was anxious to sell, or sought to make the sale. Shortly after the defendants had taken charge of the business, they made a statement to a mercantile agency, showing that the capital stock of the company was unimpaired. They also employed an expert accountant to examine the books of the company; but they failed to produce this accountant as a witness at the trial, or to show the results of his investigation. They took charge of the business, and at the time of the last trial, three years after the transaction, the corporation was still a going concern.

The defendants' case is based upon the claim that they were misled to their damage by the statement of resources and liabilities above referred to; but, in our opinion, the evidence falls to sustain this defense, and it is perfectly clear from the evidence that the defendants did not rely upon this statement, discredited it from the beginning, and made such investigation as they

desired before the transaction was consummated, and subsequently thereto made a complete investigation into the affairs of the company, the results of which latter investigation they do not disclose. The burden was upon them to establish the defense set up, and they have utterly failed to do so.

Affirmed.

(124 Va. 667)

SOUTH NORFOLK LAND CO. et al. v. TEBAUT et al.

(Supreme Court of Appeals of Virginia.
March 13, 1919.)

1. CORPORATIONS §189(1/2)—ACTION BY MINORITY STOCKHOLDERS—NATURE OF ACTION.

Minority stockholders' bill, against the corporation and majority stockholders, to enforce collection of debts due the corporation and charging management of corporation in the interest of the president, diversion of corporate funds, and refusal to hold regular and necessary meetings of stockholders and directors, is not an action for dissolution of a corporation, under Code 1904, § 1105a, par. 15, and is not demurrable for failure to state facts bringing action within such statute.

2. CORPORATIONS §189(10)—RIGHTS OF MINORITY STOCKHOLDERS—ACTION—RECEIVER.

Where corporation has been successfully managed, big dividends have been paid, and the assets have greatly increased in value, the business of the corporation will not be placed in the hands of a receiver on application of minority stockholders, who have been deprived of participation in the management of the corporation, but court will retain jurisdiction of the case, with leave to minority stockholders to apply for relief, if necessary.

3. CORPORATIONS §189(14)—ACTION BY MINORITY STOCKHOLDERS—COSTS.

Where minority stockholders' action against corporation and majority stockholders was made necessary by the misconduct of the president in refusing to permit minority stockholders to participate in the affairs of the corporation, the costs of the action were rightly awarded against president.

4. COSTS §237 — APPEAL — REVERSAL IN PART.

In minority stockholders' action against corporation, where injunction stopping the company's business is dissolved on appeal, but jurisdiction of the case is retained by the court, so that minority stockholders can apply for relief, if necessary, the costs on appeal will be taxed against the corporation and paid out of its assets.

Appeal from Law and Chancery Court of City of Norfolk.

Suit by Jennie T. Tebault and others against the South Norfolk Land Company and others. Decree for plaintiffs, and de-

fendants appeal. Reversed in part, and in part affirmed.

Wolcott, Wolcott, Lankford & Kear, J. T. Lawless, and T. H. Synon, all of Norfolk, for appellants.

John B. Jenkins, Jr., G. Tayloe Gwathmey, and E. R. F. Wells, all of Norfolk, for appellees.

WHITTLE, P. This suit was brought by Jennie T. Tebault and others, minority stockholders of the South Norfolk Land Company (a domestic corporation organized and chartered to acquire a certain boundary of land in South Norfolk, to be subdivided into lots for sale), against the company and the majority stockholders.

The bill sets forth in outline the history and formation of the corporation, and was filed to enforce the collection of debts due to the company, alleging that the stockholders and a majority of the board of directors had refused to authorize a suit for that purpose. It alleges that the corporation is practically managed and dominated by T. H. Synon, the president, who owns and controls the majority stock, and that it is being run in his interest. It charges delinquencies of both commission and omission on his part, which manifest a disregard of the rights and wishes of the minority in many particulars, such as withholding from them information affecting their interests, the diversion of corporate funds, and the neglect or refusal to hold regular and necessary meetings of the stockholders and board of directors, and that when such meetings are held the rights and recommendations of the minority are ignored. The prayer of the bill is for the appointment of a receiver to take charge of the assets and business of the company, for an audit of the accounts of the officers, the ascertainment of debts due, especially from T. H. Synon, as president and administrator of the estate of his deceased wife, M. Denver Synon, late treasurer of the company, including all moneys received or that should have been received by them, and what disposition has been made of the same; that the court will wind up the affairs of the company, and take charge of its assets, and distribute them amongst those entitled; and, finally, for general and special relief.

The defendants filed a demurrer and answers to the bill. The demurrer was overruled and the case referred to a commissioner in chancery, to make certain inquiries and take certain accounts along the line of and in accordance with the allegations and prayer of the bill. The ground of demurrer that was chiefly stressed is that the facts charged do not bring the case within the provisions of section 1105a, par. 15, Va. Code 1904. This contention indicates a misappre-

hension of the scope and objects of the bill. It was not brought under section 1105a, *supra*, for the purpose of dissolving the corporation, nor are the facts alleged therein sufficient to entitle the plaintiffs to invoke that statutory remedy. This plainly appears from the foregoing statement of the case, read in connection with the opinion of this court in *Radford, etc., & Co. v. Cowan*, 101 Va. 632, 44 S. E. 753.

In the syllabus to the case of *Camden v. Va. Safe Deposit Corp.*, 115 Va. 20, 78 S. E. 596 (which is a correct epitome of the decision), it is said:

"A bill filed by directors of a corporation, who are also stockholders, for the sole purpose of collecting its assets and distributing them equitably amongst those entitled, is in no sense a bill to wind up the corporation. The result may be the application of all the assets of the corporation to the discharge of its liabilities, and its consequent inability to continue business, but neither insolvency nor the appointment of a receiver operates a dissolution of the corporation. * * *

[1] The instant case comes within the influence of that decision, and is an appeal to the general equity jurisdiction of the court, and, consequently, the demurrer was rightly overruled.

On the merits, the record discloses no great conflict in the evidence upon the essential issues of the case. The special grievance of appellants is to that part of the decree which adopts the views of the commissioner with respect to the character and measure of relief to which the appellees are entitled. The plan proposed by the commissioner was suggested by and adopted from the decision of the Vice Chancellor in an analogous case of *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499. In that case the Vice Chancellor advised a decree to ascertain and set off to appellees (the minority stockholders), by way of final dividend, their proportionate share (based on stock holdings) of the unsold lots, and the turning over of their stock to the majority stockholders. In other words, the decree operated a partition of the real estate of the company between the majority and minority stockholders. The facts of that case appealed much more strongly to the Vice Chancellor to grant the extreme relief accorded than do the facts of the case in judgment. In the former, the majority stockholders were systematically robbing their associates; the Vice Chancellor characterizing the whole transaction as "a piece of gross and bungling thievery." The situation in the case before us is essentially different. Here the original investment was \$30,000, and the company, under the judicious and economical management of Synon, has already paid the stockholders \$48,295, and it still owns 192 lots, of the estimated value of \$80,000. Obvi-

ously, the machinery of the corporation and the good will and co-operation of all the stockholders is essential to the successful sale of the remaining lots. The commissioner's report, which is sustained by the evidence, shows that Synon "is not to be charged in any sense with dishonesty or fraud," and the phenomenal success of the company demonstrates his capacity, under proper restrictions, to manage its affairs.

"The head and front of his offending hath this extent, no more." In the language of the commissioner: "He had an exaggerated idea of the rights of the majority stockholders in a corporation and of their duties toward the minority interests." There is no question but that Synon carried this obsession to the indefensible length of stifling the voice of the minority in their participation in the management of the company's affairs. Nevertheless, the circumstances of the case do not call for the drastic remedy applied in the decree under review. Plainly, its affirmation would operate to the injury of all concerned. It is furthermore proper to observe that, on appeal to the Court of Errors and Appeals of New Jersey (*Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886), the decree of the Vice Chancellor in the case of *Fougeray v. Cord*, *supra*, in the particular we are discussing, was reversed. The appellate court, with clearness and precision, defines the rights of minority stockholders, and says:

"So much of it [the decree] as * * * directs a transfer to the complainant of a part of its net assets, and a conveyance to him in fee of one-third of the unsold real estate, must be reversed. * * *

And in order that the matter might remain under the scrutiny and control of the court, it was held that the case, when remanded, should be retained, with leave to the complainant to apply to the court for relief in the premises, if it should become necessary for him to do so.

[2] The wisdom of the conclusion reached by the Court of Errors and Appeals commends itself to our judgment, and accords with our view in the instant case on the main proposition, and therefore will be followed. The injunction stopping the company's business, which is continued in force until the further order of the court, should be dissolved.

The remaining assignments of error are without merit and do not demand special notice.

[3, 4] The litigation was rendered necessary by the misconduct of T. H. Synon, and the costs accruing to the date of the decree appealed from were rightly awarded against him; but all subsequent costs, including the costs of this appeal, should be taxed against the company and paid out of its assets.

Upon the whole case, we are of the opinion that the decree appealed from, so far as it directs that a proportion of the assets of the company in kind be set apart to appellees jointly, and further directs that the injunction granted on July 27, 1917, be continued in force until the further order of the court, is erroneous, and must be reversed and annulled, and in all other respects is without error, and is affirmed. And the case will be remanded to the court of law and chancery of the city of Norfolk for further proceedings to be had therein, not in conflict with the views expressed in this opinion.

Reversed in part and affirmed in part.

PRENTIS, J., absent.

(124 Va. 721)

VIRGINIA TALC & SOAPSTONE CO., Inc.,
v. HURKAMP.

(Supreme Court of Appeals of Virginia.
March 18, 1919.)

1. WORK AND LABOR §24(1) — ISSUES, PROOF AND VARIANCE.

In assumpsit, though declaration contained only common counts, plaintiff was entitled to recover upon proof of a special, unbreached, fully executed contract calling for the payment of money as compensation for services to be performed.

2. APPEAL AND ERROR §1002—CONCLUSION BASED ON CONFLICTING EVIDENCE—REVIEW.

Question of fact having been concluded against defendant by verdict based on conflicting evidence, court on appeal cannot disturb conclusion.

3. EVIDENCE §116—EXPLANATORY STATEMENTS—ADMISSIBILITY.

Where plaintiff, without objection, gave a narrative of his connections with defendant company, and stated that he had an agreement with defendant's president by which plaintiff was to be paid \$300 a month for a year, but that he had accepted \$1,600 in full for the first eight months, his further testimony as to how it was that he accepted \$1,600 was relevant, to clarify his narrative.

4. WITNESSES §383 — IMPEACHMENT — CONTRADICTORY STATEMENTS.

Where defendant's president, on examination in chief, had testified that he had not made contract of employment, and on cross-examination denied that he had stated to impeaching witness that he had made the contract, this was not collateral or immaterial, but a matter directly in issue, and testimony of impeaching witness that president had made a statement, in conflict with testimony, was admissible.

5. TRIAL §251(2)—INSTRUCTION ON MATTERS NOT IN ISSUE.

Where services of plaintiff as secretary or director of defendant corporation were not al-

leged as a basis of recovery, or recovery sought for services performed by plaintiff as secretary or director, an instruction with reference thereto was properly refused.

6. WORK AND LABOR §9—EFFECT OF EXPRESS CONTRACT.

Where there is special contract, which has not been breached by either party during period covered by it, its provisions measure quantum of services to be performed by employé.

7. MASTER AND SERVANT §38—WRONGFUL DISCHARGE—RIGHTS OF SERVANT.

When contract of hiring is breached by discharge of person employed, latter cannot recover his hire or wages for whole original contract period, merely by continuing to perform services originally required thereby; right of action in such case being for damages for breach of contract.

8. MASTER AND SERVANT §42(1)—WRONGFUL DISCHARGE—MINIMIZING DAMAGES.

When contract of hiring is breached by discharge of employé, contract is at an end, and employé must minimize damages by doing all reasonably within his power to obtain employment elsewhere.

Error to Corporation Court of Fredericksburg.

Assumpsit by Charles H. Hurkamp against the Virginia Talc & Soapstone Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action of assumpsit, brought by the defendant in error, as plaintiff, against the plaintiff in error, to recover \$4,000 of indebtedness of the latter to the former, alleged as existing as of June 30, 1915.

The declaration contains only the common counts. It does not declare specially upon any contract.

There is ample evidence for the plaintiff, however, in the record, to have warranted the jury in finding that Haas, the president of the defendant company, was authorized by it to employ the plaintiff, Hurkamp, as general manager for the period from July 1, 1914, to June 30, 1915, inclusive, and to bind the company to pay Hurkamp such an amount as such salary as the president and Hurkamp might agree upon; that such two parties did agree upon the sum of \$3,500 as the amount of such salary which the company should pay for the services of Hurkamp as general manager for the period aforesaid; that Hurkamp was not discharged by the company from such employment during such periods; and that Hurkamp continued in such employment of the company during the whole of such period and fully performed the contract on his part, by doing all of the work he was obligated to do thereunder. Such evidence consists for the most part of the testimony of the plaintiff, Hurkamp.

There was evidence for the company in conflict with that above mentioned, consisting for the most part of the testimony of the said president and certain letters of the plaintiff, in which he did not make it plain that he claimed, prior to the bringing of his action, that there had been the express contract of hiring aforesaid.

In the progress of the trial there were two exceptions to the admission of testimony for the plaintiff, which are made the basis of assignments of error.

(a) The first of these admissions of testimony, over the objection of the company, will appear from the following questions and answers in the examination in chief of the plaintiff, Hurkamp:

"25Q. State to the jury how it was that you accepted the \$1,600 for the period beginning November 1, 1913, to July 1, 1914. * * *

"A. Well, the company was hard up all the time; that is, it was hard to get money from them. I had different talks with Haas, occasionally with Buckingham, treasurer of the company, who practically conferred with Haas, and they said they were taking nothing out of it; couldn't I take less; that after a while they would make it up to me, and on the promises they made I scaled it from \$300 to \$200.

"27Q. To \$200?

"A. Yes, sir."

(b) The second of these admissions of testimony, over the objection of the company, consisted of the admission of the testimony of a witness for the plaintiff, after due foundation had been laid therefor, to the effect that the president of the company, in July, 1914, made a statement to the witness in conflict with the testimony of such president that he had not made the contract of employment as claimed in the testimony of the plaintiff.

The court instructed the jury that they could consider such testimony only in connection with the purpose of the plaintiff to impeach the said president as a witness, "and for no other purpose whatever."

The instructions further clearly submitted to the jury the questions of fact referred to in the third and fourth paragraphs of the statement above.

The jury found a verdict for the sum of \$3,500, which the trial court declined to disturb, and it entered the judgment under review accordingly.

A. T. Embrey, of Fredericksburg, for plaintiff in error.

Wm. K. Goolrick and C. O'Connor Goolrick, both of Fredericksburg, for defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error raise the questions which will be passed upon in their order as stated below.

[1] 1. The action being one of assumpsit, the declaration containing no count declaring on a special contract, and the proof disclosing a special contract, but one which was not breached by either party thereto during the period covered thereby and one fully executed by the plaintiff, so as to entitle him to demand payment of the compensation fixed by the contract for the work done by him under it, and the contract calling for the payment of money by the defendant as such compensation, is the plaintiff entitled to recover on such a contract upon such a declaration?

The question must be answered in the affirmative.

It is true that the general rule is that an action of assumpsit, in which the declaration contains only the general counts, cannot be maintained on a special contract. But when "the claim is merely pecuniary, and is founded on a consideration past or executed, it is sufficient to declare upon the general, or, as they are often styled, the common, counts. * * *

4 Minor's Inst. (3d Ed.) pt. 1, p. 695. To the same effect are Burk's Pleading, pp. 132, 133, 4 Cyc. 328, and authorities cited by these works. See B. & O. R. R. Co. v. Polly, 55 Va. (14 Grat.) 447.

[2] Indeed, we do not understand that this well-settled proposition is disputed by the plaintiff in error. It is its contention, first, that no special contract of hiring existed; secondly, that the contract, if any, was an implied one, arising from a short continuance of service of the plaintiff after the expiration of a former service and that the plaintiff was discharged from such continuing service when it had existed only eight days; that plaintiff rendered little, if any, service to the defendant thereafter; and that for such service the plaintiff can recover, if at all, only upon proof of the value of such service. This position would be sound in law, upon the same authorities as are above cited, if correct in fact. The question of fact has been concluded against the defendant, however, by the verdict of the jury upon conflicting evidence, as outlined in the statement preceding this opinion. Under the familiar statutory rule governing our consideration of the evidence, we cannot disturb that conclusion.

[3] 2. Did the court below err in admitting the testimony of the plaintiff set forth in paragraph (a) of the statement preceding this opinion?

The objection of the defendant to the admission of such testimony was that it was irrelevant to the issue and that it tended to the prejudice of the defendant, and hence such action of the trial court is assigned as reversible error.

The witness, in his preceding testimony on examination in chief, had, without objection on the part of the defendant given a narrative of his connection with the company from its organization in 1912, in the course of which he had testified that he had an agreement with Mr. Haas, the president of the defendant company, by which plaintiff was to be paid, as general manager, \$300 per month for the period from November 1, 1913, to November 1, 1914, but that he was actually paid only an aggregate of \$1,275 or \$1,280 of this salary by July 1, 1914, and that he was paid a balance of \$325 or \$320 in the fall of 1914, making \$1,600, which he accepted in full of salary to July 1, 1914. He was then asked the questions and made the answers objected to as aforesaid.

We are of opinion that such testimony was relevant to clarify and make definitely understood his narrative of his prior dealings with the defendant, which was already in testimony unobjected to, and that the particular subject of these questions was material to an understanding of the testimony bearing on the direct issue in the case.

Hence we find no error in the action of the trial court in admitting such testimony.

[4] 3. Was there error in the action of the trial court in admitting the impeaching testimony referred to in paragraph (b) of the statement preceding the opinion?

The witness Haas, sought to be impeached, had on examination in chief testified that he had not made the contract of employment of the plaintiff as per the testimony of the latter. Thereupon, on cross-examination, Haas was asked, in substance, if he had on a certain occasion, etc., stated to the impeaching witness that he had made such contract.

The fact about which Haas was being cross-examined was the making of the contract in question. This fact was not collateral or irrelevant, but directly in issue. Therefore, under the authority, cited for the plaintiff in error on this point, of *B. & A. R. Co. v. Hudgins*, 116 Va. 27, 81 S. E. 48, and *Forde v. Commonwealth*, 57 Va. (16 Grat.) 547, 556, therein quoted from, the impeaching testimony objected to was admissible.

It was not the fact as to whether Haas had made such contradictory statement, about which he was being cross-examined (as is urged in the petition of the plaintiff in error), but the fact as to whether he had made the contract of employment which Haas had denied making.

The sole remaining question for our determination, raised by the assignments of error, is the following:

[5] 4. Was there error in the refusal of the trial court to give the following instruction asked for by the defendant in error?

"(7) The court instructs the jury that plaintiff, Hurkamp, is not entitled to recover any money in this action for any services performed or alleged to have been performed by him, as secretary or director of defendant company, since by the by-laws of said company its officers and directors were to perform their duties as such without compensation, unless he devoted his whole time thereto."

This instruction was properly refused, because such a recovery was not in issue in the case. Such a recovery was not sought by any testimony for the defendant in error, nor were services of the plaintiff as secretary or director alleged in any way as the basis for such recovery. It was an instruction upon an immaterial issue, and could have served no purpose except to confuse the jury.

[8-8] This instruction was especially likely to confuse the jury, because of its reference to the matter of the devotion of plaintiff in error's "whole time," which defendant in error erroneously contended throughout the trial was essential to the plaintiff in error's right of recovery; the true rule being that where there is a special contract, which has not been breached by either party during the period covered by it, its provisions measure the quantum of services to be performed by the plaintiff, suing or recovering thereon, for he in such case recovers, not upon the basis of quantum meruit, but the contract price of his services, if he proves that he has fully performed the services required by the contract, be they much or little. *B. & O. R. R. Co. v. Polly*, 55 Va. (14 Grat.) 447. When a contract of hiring is breached by the discharge of the person employed, then, of course, the latter cannot recover his hire or wages for the whole original contract period, merely by continuing to perform the services originally required thereby, for the contract is then at an end; his right of action is, in such case, not upon the contract, but for damages for the breach of it, and he must minimize the damages by doing all reasonably within his power to obtain employment elsewhere. Such is the principle on which rest the cases of *Willoughby v. Thomas*, 65 Va. (24 Grat.) 521, *Crescent Co. v. Eynon*, 95 Va. 151, 27 S. E. 935, and other like authorities cited on this point for the defendant in error.

If there had been any evidence in the case tending to show that the plaintiff devoted his whole time to services as secretary or director of the company (which there was not), there was no claim on his part or evidence tending to show that this kind of service would have entitled him to any recovery.

On the whole, therefore, we find no error in the action of the trial court complained of, and the judgment under review will be Affirmed.

(124 Va. 490)

ATLANTIC COAST REALTY CO. v. TOWNSEND.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. FRAUDS, STATUTE OF §59(6)—INTEREST IN LAND—CONSTRUCTION OF CONTRACT.

Agreement, whereby land broker was given exclusive contract to sell land for one year, in consideration of agreement to advance funds for development and subdivision of land into lots and parcels, and for advertisement of land, and whereby broker was to receive stipulated share of profits after owner had received specified amount of the proceeds of sales of the lots, was a contract of agency, and not a partnership agreement, and therefore not required to be in writing by Code 1904, § 2840, subd. 6.

2. CONTRACTS §152 — CONSTRUCTION—WORDS.

In construing contracts, words are to be given, primarily, their usual and ordinary meaning, unless a contrary meaning plainly appears.

3. CONTRACTS §147(1) — CONSTRUCTION—INTENT.

In construing contracts, the intention of the parties, if not contrary to law, must be carried out.

4. PRINCIPAL AND AGENT §36—REVOCATION—ACTS CONSTITUTING.

An agency is effectually revoked when the principal disposes of his interest in the subject-matter of the agency in a manner inconsistent with the authority conferred, as by assignment, conveyance, contract of sale, or otherwise.

5. PRINCIPAL AND AGENT §33—REVOCATION—RIGHT TO REVOKE.

Though principal has power to revoke authority, where agency is not coupled with an interest, and does not involve rights of third parties, he has no right to revocation, where contract of agency otherwise provides.

6. PRINCIPAL AND AGENT §41—WRONGFUL REVOCATION—LIABILITY.

Principal is liable in damages to agent for wrongful revocation.

7. BROKERS §7—LAND CONTRACT—CONSIDERATION.

Land broker's agreement to advance money for the development and subdivision into small tracts of the land to be sold was a valuable consideration for the exclusive right to sell the land for a period of one year.

8. BROKERS §10 — AGENCY COUPLED WITH AN INTEREST.

Agreement, whereby land broker was given the exclusive right to sell land for a period of one year, in consideration of the advancement of money wherewith to develop and advertise the land, and whereby broker was to have stipulated share of profits, after owner had received specified amount of proceeds of sale, was not an agency agreement so coupled with an interest as to make it irrevocable.

9. BROKERS §11 — LAND AGREEMENT—LIABILITY FOR BREACH.

Where land broker was given the exclusive right to sell land for a period of one year, in consideration of advancing funds wherewith to develop, subdivide, and advertise the land, and where broker was to receive a certain share of the profits after owner had received stipulated amount from the proceeds of the sales, neither party could violate the agreement without becoming responsible to the other for the breach.

10. COURTS §107 — JUDICIAL OPINIONS—CONSTRUCTION.

Judicial opinions must be interpreted in the light of the particular facts to which they are applied.

11. BROKERS §11—REVOCATION BY PRINCIPAL—LIABILITY TO AGENT.

Where broker is given the exclusive right of sale for a definite period by agreement based upon a valuable consideration, principal cannot break contract without becoming liable in damages to broker.

12. DAMAGES §23—CONTEMPLATED PROFITS.

Where contemplated profits constitute the sole purpose and object of the contract, and the plaintiff alleges a breach and a subsequent loss of profits, he has stated a prima facie case.

13. DAMAGES §40(2) — LOSS OF PROFITS—CERTAINTY.

When profits claimed may reasonably be presumed to have been within the intent and mutual contemplation of the parties when the contract was made, the mere fact that the exact amount cannot be calculated with mathematical certainty does not preclude a recovery.

14. DAMAGES §40(2)—LAND BROKER—LOSS OF PROFITS.

Where land brokerage concern of many years' experience and success in business secured exclusive right for a year to sell large tract of land, under agreement whereby land was to be divided into small lots and broker was to receive certain share of profits after owner had received specified amount out of proceeds of sale, owner cannot defeat broker's recovery of damages for breach of the contract, upon ground that the enterprise of selling the lots had not been established, and that damages therefor could not be measured, where owner himself had sold the property at a large profit over the minimum he was to receive under the brokerage contract.

15. PRINCIPAL AND AGENT §41—BREACH BY PRINCIPAL—RIGHTS OF BROKER.

A principal cannot, after making a valid contract with an agent for the exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale.

Error to Hustings Court of Petersburg.

Action by the Atlantic Coast Realty Company against J. M. Townsend, executor of

Wirt Robertson, deceased. Judgment sustaining demurrer to declaration, and plaintiff brings error. Reversed and remanded.

Lassiter & Drewry, of Petersburg, and Mann & Tyler, of Norfolk, for plaintiff in error.

Mann & Townsend, of Petersburg, and O. V. Meredith, of Richmond, for defendant in error.

KELLY, J. This writ of error calls in question a judgment of the hustings court of the city of Petersburg sustaining a demurrer to a declaration in an action of assumpsit, wherein the Atlantic Coast Realty Company was plaintiff and J. M. Townsend, executor of Wirt Robertson, deceased, was defendant.

The allegations of the declaration were as follows:

That the plaintiff had for many years been engaged in the business of selling tracts of land for customers, by first improving, developing, and subdividing the lands into building lots and small acreage parcels, so as to make the same more valuable and salable; that such sales were made by it, both at public auction and private sale, and upon contracts with the owners for the exclusive right to sell, and for compensation to be measured either by commissions or by a fixed portion of profits over and above an agreed valuation of the land to be sold; that the defendant's decedent, Wirt Robertson, was the owner of 418 acres of land, called the "Baker property," so situated as to be peculiarly well adapted to profitable subdivision and sale under plaintiff's method of making sales; that on September 9, 1915, "the said Wirt Robertson made a contract with the plaintiff through a certain W. E. Burke, who was then, and is now, one of the agents of said plaintiff, authorized and empowered by it to enter into contracts on its behalf; that the said Wirt Robertson in substance and effect stated that he was familiar with the methods of business of said plaintiff, that he had followed its recent sales made in the neighborhood of the said 'Baker property,' that he knew the said plaintiff had acquired an interest in another piece of land called the 'Buren property,' situated near the said 'Baker property,' and that he was afraid said plaintiff would subdivide and sell said 'Buren property' before he could organize a sale of the 'Baker property'; that he wanted the said plaintiff to acquire a pecuniary interest in the sale of the said 'Baker property,' so that it would be just as vitally interested therein as he was, that he was unwilling to spend any money for development purposes, and proposed that said plaintiff take the exclusive agency for the development, subdivision, and handling, together with the exclusive right to sell the said 'Baker property' at public auction and at private sale within 12 months thereafter, and in a manner similar to the way in which the plaintiff had handled the Battle Ground addition, which had been sold, as was known to said Robertson, in lots and parcels upon terms of one-fourth cash and the balance in 4, 8, and 12 months, with interest at 6 per cent., the title to the said property to

remain in said Wirt Robertson, and to be conveyed by him direct to the purchasers; that it provide a valuable consideration for this exclusive right to sell, by agreeing to spend its own money for engineers, laborers, tools, teams, advertising, auctioneers, and other necessary purposes in that connection; that out of the first proceeds of the said sales said plaintiff be reimbursed for its expenditures so to be made, upon expense vouchers to be submitted by it to him; that after the payment of said expenses the said Wirt Robertson should then receive out of the proceeds of said sales the sum of \$40,000, and that whatever residue might be produced by such sales should be divided equally between said plaintiff and said Wirt Robertson; that said W. E. Burke, agent and contract representative of said plaintiff as aforesaid, forthwith accepted the said offer so made to him on behalf of said plaintiff, and suggested that he would immediately prepare a written memorandum of agreement embodying said proposition and its acceptance; that said Wirt Robertson replied that he preferred to have a contract drawn up in legal form by his lawyer, which he then and there promised to have done the next day; that said Burke then asked said defendant whether or not said Wirt Robertson understood said offer, and the acceptance thereof by him on behalf of said plaintiff, to be a contract between said Wirt Robertson and the said plaintiff, and said Wirt Robertson then and there replied that he did so understand it, whereupon the said Burke, agent as aforesaid, and the said Wirt Robertson shook hands in token of agreement; that forthwith said Burke informed J. W. Ferrell, president of the plaintiff corporation, who was then in Greenville, N. C., of the terms of the contract he had just concluded with said Wirt Robertson; that said Ferrell, acting for the said plaintiff and within his authority as its president, proceeded at once to buy a road machine, at a cost of, to wit, \$200, and to hire additional men to enable the said plaintiff to begin at once to carry out its part of the aforesaid contract and undertaking; that on, to wit, the 13th day of September, in the year 1915, said J. W. Ferrell, accompanied by said W. E. Burke, went to the home of the said Wirt Robertson, in the county of Chesterfield, near Petersburg, Va., for the purpose of executing on behalf of said plaintiff the written memorandum of the contract so entered into, which the said Wirt Robertson had promised to have drawn by his lawyer; that, when asked whether the papers were ready for signature, said Robertson replied, 'No,' and when asked when said papers would be ready, said Robertson replied, 'Gentlemen, I have sold the land;' that said Robertson was then informed by said Ferrell that the plaintiff had given a valuable consideration for the exclusive agency to sell said 'Baker property,' and had already begun its part of said contract by spending money for necessary tools and by employing additional men; that said Wirt Robertson, notwithstanding his promises and undertakings aforesaid, then and there refused to perform his part of the said contract, and then and there refused to permit said plaintiff to perform its part of said contract, although the said plaintiff was then and there ready, willing, and able to perform the agreements on its part to be done, kept and performed. * * *

The declaration then states that sale by Robertson referred to in the latter part of the foregoing quotation was a sale of the entire property to Chas. S. Barrow for the sum of \$80,000, and concludes thus:

"And the plaintiff says that the said Wirt Robertson and the said J. Morton Townsend, his executor, have hitherto neglected and refused, and still do neglect and refuse, to pay to the said plaintiff its part of the profits which might, should, and would have been derived from the sale of the said 'Baker property,' had the said plaintiff been permitted to improve, subdivide, and sell the same in accordance with the terms of the contract above mentioned.
* * *

The defendant demurred to the declaration on four grounds, which we shall presently take up and dispose of in their order. Before proceeding to do this, however, it may not be amiss to observe that neither of these grounds challenges the validity of the contract on account of the fact that a written memorandum thereof was to be subsequently executed. It is apparently conceded, as of course it must be under the contract as alleged, that the parties were fully agreed, and regarded the contract as complete and binding, notwithstanding that its terms were to be thereafter reduced to writing. *Boisseau v. Fuller*, 96 Va. 45, 30 S. E. 457.

[1] The first and principal reason assigned for the demurrer was as follows:

"It appears upon the face of said declaration that the alleged contract stated therein was one providing for a sale of an interest in real estate, and was not in writing, as required by the statute set forth in subdivision 6 of section 2840 of the Code of Virginia."

The statute here invoked, familiarly known as the statute of frauds, provides that no action shall be brought—

"upon any contract for the sale of real estate, or for the lease thereof for more than a year, * * * unless the * * * contract, * * * or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent."

The leading contention of the defendant, and the chief ground upon which the lower court sustained the demurrer, is that the contract as alleged constituted a partnership between the parties, and thus made the transaction one whereby the plaintiff, instead of becoming merely an agent to sell land for the defendant, became interested as a principal—a joint owner—with the defendant in the real estate to be sold. In no other way, of course, could it be plausibly said that the contract was one "for the sale of real estate" within the meaning of the statute.

To sustain this position, the case of *Burgwyn v. Jones*, 113 Va. 511, 75 S. E. 188, 41 L. R. A. (N. S.) 120, Ann. Cas. 1918E, 564, is cit-

ed and confidently relied upon; but we think there is a clear distinction between that case and the one at bar. It will be observed that both cases rest upon the allegations of the party seeking to enforce the contract, and the distinction between the two not only appears at once in the respective designations of the contracts involved, but proves, upon analysis of the facts alleged, to be substantial and vital. The bill in the *Burgwyn Case* designates the contract as one of partnership, and the facts as alleged in detail disclose that the complainant was to acquire, not a mere interest in the profits in case of a sale, but an interest in the property itself equal to that of any of the then owners after deducting the cost of the property and the expense of maintaining the same. The prayer of the bill was for an ascertainment and recovery of complainant's share of profits on an undivided half of the land which Jones had already sold, *and for the establishment and protection of his interest in the undivided interest remaining unsold and held in the name of Jones*. In other words, he not only claimed to have acquired an interest in the land itself, by virtue of what he declared to be a partnership agreement, but he alleged facts which if true and evidenced by writing, would have entitled him to an interest in the corpus of the estate. This court, therefore, was of opinion:

"That the verbal agreement set up by the appellant in his pleadings was one providing for the sale of an interest in real estate and within the statute requiring the same to be in writing, and that the circuit court did not err in refusing the relief prayed for and dismissing his bills."

The opinion by necessary implication shows that there was room for serious debate as to whether the interest thus claimed to have been acquired in the real estate by virtue of a partnership agreement should be regarded as personal instead of real property, and therefore not within the statute of frauds. But, having decided that question against the complainant, thereby distinguishing the *Burgwyn Case* from the case of *Miller v. Ferguson*, 107 Va. 249, 57 S. E. 649, 122 Am. St. Rep. 840, 18 Ann. Cas. 138, the court plainly could not have reached any other conclusion than that the complainant's contract, to be enforceable, must have been in writing. It was a contract for a partnership in lands which at the time of the partnership were owned by other members of the firm than the complainant; and it was so, not merely because the complainant so named it, but also because his allegations showed that it was such in fact. All *Burgwyn* lacked was a written contract to enable him to have his interest in the property itself established and protected.

In the case at bar, on the other hand, the plaintiff alleges a contract of agency, claims no interest in the corpus of the property,

and would clearly be entitled to none, if it did make such claim. If its contract, as it alleges it, had been in writing, no circumstances could have arisen under which it could have made any valid claim to an interest in the real estate itself. It simply bought, for an agreed consideration, the exclusive right of sale for one year, thereby acquiring "a pecuniary interest in the sale" (not in the property) for that period. If it had failed to make the sale within that time, it would have received what it bought, and the contract would have been at an end.

[2, 3] It is quite true, as contended, that parties cannot convert what in legal effect is a partnership agreement into a contract of agency merely by calling themselves principal and agent, respectively; but, in construing contracts, words are to be given, primarily, their usual and ordinary meaning, unless a contrary meaning plainly appears, and the intention of the parties, if not contrary to law must be carried out. In this case the contract was based upon defendant's proposition, "that the plaintiff take the exclusive agency," right of sale, etc., for a consideration to be provided by the latter; and all the facts and circumstances alleged tend to establish the relationship of principal and agent. In 1 Mechem on Agency (2d Ed.) p. 33, § 51, it is said that—

"While parties may create a partnership without actually intending that specific result, where they voluntarily enter into an arrangement whose necessary legal effect is the creation of a partnership, courts are reluctant to surprise parties into that relation, when they clearly did not intend it."

And in London Assurance Corporation v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688, Mr. Justice Harlan said:

"Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

In Jackson v. Haynie's Adm'r, 106 Va. 365, 56 S. E. 148, this court, in discussing the constituent elements of a partnership, said:

"The principles of the law of partnership lead to the conclusion that if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits, while they are undivided and remain as profits, the two are partners; the general rule being that to constitute a partnership there must be a community of interests inter sese, and that the parties should share the profits and losses. It is, however, far from being universally true that a mere participation in the profits constitutes the party a partner. At most it is

true only sub modo. The same principle that leads to the general rule mentioned leads directly to the other conclusion that a mere payment, or promise to pay, out of the profits a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits, and no right to the profits, but only a personal claim for such share of the profits, after they are ascertained and may be divided. If a party has no interest whatsoever in the capital stock, and as between himself and the other party has no rights as a partner, or no mutuality of powers and duties, but is simply employed as an agent, and is to receive a proportion of the profits as a compensation for his labor and services, he will not be deemed a partner from that fact alone. Story on Partnership, § 30 et seq.; Parsons on Partnership, p. 72 et seq. It is clear from the authorities that, if the parties merely occupy the relation of principal and agent, or employer and employé, no partnership can be predicated upon the fact that such agent or employé receives a share of the profits as compensation for his services or other benefits conferred. This proposition is illustrated by numerous decisions of the courts. Bowyer v. Anderson, 2 Leigh [29 Va.] 598; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766; Sodiker v. Applegate, 24 W. Va. 411, 49 Am. Rep. 252; Berthold v. Goldsmith, 24 How. 542, 16 L. Ed. 762; Blanchard v. Coolidge, 22 Pick. [Mass.] 151; Rice v. Austin, 17 Mass. 197; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 287. * * *

"In the case at bar the weight of the evidence shows that no partnership was intended by the parties, nor did one result from the verbal understanding between them. It sufficiently appears that the appellee's intestate was employed by the appellant to take charge of his mill as miller, and for his services in that behalf the deceased was to receive one-third of the profits. This interest in the profits, to which Haynie became entitled when they were ready to be divided, did not make him a partner. It merely constituted the manner of payment and the measure of his compensation for his services as miller."

An action on the contract here involved was first brought in the District Court of the United States for the Western District of Virginia, and, as alleged there, it was the same as stated in the declaration in this case, except that no time was specified for the duration of the agency. The defendant demurred upon the sole ground that the contract was not in writing. The District Court sustained the demurrer, basing its judgment upon Burgwyn v. Jones, supra. Upon appeal to the United States Circuit Court of Appeals, that judgment was reversed, in an opinion by Judge Pritchard, concurred in by Judges Knapp and Woods. See 240 Fed. 372, 153 O. C. A. 296. After the cause had been remanded to the District Court for trial, the plaintiff asked leave to amend the declaration by inserting an averment that the sale was to be made within 12 months from the date of the contract. This leave was de-

nied, and the plaintiff thereupon suffered a nonsuit, and instituted this action in the hustings court. Upon the branch of the demurrer now under consideration, the case, as passed upon by the Circuit Court of Appeals, was identical with this one. That court, in the course of a very satisfactory opinion, said:

"Thus it will be seen that the Burgwyn Case, supra, is not analogous to the case at bar. There the sole purpose of the suit was to ascertain the interest in the tract of land growing out of the partnership between the parties; also there was nothing in that case upon which plaintiff could reasonably contend that the agency had been established. * * *

"For the reasons stated, we are impelled to the conclusion that the contract as set forth in the complaint constitutes an agency rather than a partnership, and it necessarily follows that such contract is not required by the laws of Virginia to be in writing."

The first ground of the demurrer is not, in our opinion, well taken.

The second ground was this:

"It appears upon the face of said declaration that the alleged contract stated therein was revocable and that it was revoked by the defendant's decedent."

The learned judge of the hustings court, basing his decision solely on the first ground of demurrer, as appears from the written opinion filed with the record, made only a casual reference to the second, evidently leaning to the view, however, that the latter could not be maintained. His comment thereon was:

"Of course Robertson had the power to revoke; but it is questionable, if the contract were a valid one, whether he had the right."

No question as to rights of third persons is here involved, and there is no claim that the agency was, in a technical sense, coupled with an interest. Under the facts as alleged in the declaration, it is not denied, and it is clear, that the defendant not only had the power to revoke, but did in fact effectually revoke, the agent's authority, by making, on his own behalf and independent of the agency, a sale of the subject-matter of the contract. In 2 O. J. 554, it is said:

"An agency is effectually revoked when the principal disposes of his interest in the subject-matter of the agency in a manner inconsistent with the authority conferred, as by assignment, conveyance, contract of sale, or otherwise."

[4, 5] This is a familiar and settled proposition of the law of agency; but it by no means follows that such a revocation can be made by the principal as a matter of right and without liability to his agent. The latter question depends upon the character and terms of the agent's contract. Quoting again

from 2 O. J. at page 533, the following general and comprehensive statement is peculiarly germane in this connection:

"As between principal and agent, the right to terminate the agency depends upon the ordinary principles of contract, and is governed by the same rules as apply to any other contract of employment. Although, as has been stated, a principal has the undoubted power, so far as the agency is executory, to revoke the agent's authority, it by no means follows that he has always a right to do so, since the contract of agency may provide otherwise. Accordingly, if he revokes the agency in violation of the contract, he becomes liable to the agent for the damages caused thereby, although it should be observed in this connection that the agent is limited to his action for damages; the courts will not specifically enforce the contract against the principal. But if the contract of agency contains no terms indicating the creation of an agency for a definite period, or if the contract is not supported by a sufficient consideration, it is terminable at will, and the principal by revoking the authority incurs no liability to the agent, unless the agent has entered upon performance of the contract so that a revocation of his authority will work him legal injury."

See, also, to the same effect, 1 Mechem on Agency (2d Ed.) § 568; 21 R. C. L. p. 823, § 8.

[6] It follows from these authorities, to which many more might be added, that when an agency is not such as to constitute what in legal parlance is called a power coupled with an interest, and no third party's rights are involved, the agency, so long as it remains unexecuted, may be effectually revoked at the will of the principal, but that a wrongful revocation will nevertheless render him liable in damages to his agent. In other words, the agency may always be revoked, but the contract of employment will not necessarily be thereby rescinded. The distinction, in principle, is well stated by Judge Cardwell in Rowland Lumber Co. v. Ross, 100 Va. 275, 281, 40 S. E. 922, 924, as follows:

"Either party to a contract, however solemn its character or binding its form, has the power to violate it, and the courts of law give no redress to him who is injured except compensatory damages, but it is not accurate in law or in morals to say that a party has a right to break its contract. It would be to assert that it is legally right to do what is legally wrong. A person bound by a contract to do or not to do a thing may find it to his advantage not to keep his engagement, for the obligation may be more onerous than the damages likely to be imposed for its breach, but the violation of the contract cannot be regarded as a contractual right."

[7-9] In the instant case we are of opinion that a valuable consideration for the agreement itself, as distinguished from the mere chance of the agent to earn a commission or compensation, was sufficiently alleg-

in the declarations; and, while the agency was not coupled with such an interest as to make it irrevocable, the contract which created it was a mutual agreement between competent parties for a lawful purpose and upon a valuable consideration, with the result that neither party could violate it without becoming responsible to the other for the breach.

The case of *Perrow v. Rixey*, 119 Va. 192, 89 S. E. 101, is relied upon as sustaining the claim that the agency in the case at bar was revocable. That was a case in which the authority to sell was given by Rixey to Perrow in writing and to the following effect:

"I hereby agree to sell that portion of my 'Richlands' farm to the west of the fence * * * to any purchaser brought to me by B. F. Perrow, provided that said land nets me * * * \$25 per acre cash and provided further that said sale is consummated within 30 days from date."

Before the 30 days expired, but also before the agent produced a purchaser, this authority was revoked, and the agent brought suit to recover commissions, on the ground that he had produced a purchaser within the 30-day period. There was a verdict and judgment for the defendant, and on appeal this court affirmed the judgment and held that as "the paper was unilateral, not under seal, and expressed no valuable consideration," it was a bare power, and revocable at will, without liability on the principal. The language quoted above differentiates the two cases, as does also the following quotation in the opinion in the *Perrow* Case, taken from Walker on the Law of Real Estate Agency, § 15:

"Ordinarily, unless a contract of employment is coupled with an interest, or is given for a valuable consideration, the authority of the agent may be terminated at will by giving notice, subject only to the requirement that it be given in good faith, and before the broker finds a purchaser."

It is true that in the *Perrow* Case there was in the paper conferring the power a time fixed within which it was to be exercised, and also true that this court quoted with approval the following language from the case of *Brown v. Pforr*, 88 Cal. 550:

"We are unable to perceive how, under any circumstances, a mere limit as to the time allowed for the performance of a contract of agency to sell land can be construed into an agreement on the part of the principal not to revoke the power."

[10, 11] This court was then dealing with a power not supported by a valuable consideration. It was, indeed, the case of a mere offer of a contract not consummated by a legal acceptance before the revocation was declared. See 2 *Mechem on Agency*, § 2446,

cited below. All judicial opinions must be interpreted in the light of the particular facts to which they are applied, and the decision in the *Perrow* Case does not hold that a contract of agency, carrying the exclusive right to sell real estate, for a definite time, and based upon a valuable consideration, is revocable without liability on the principal. The three elements of (1) exclusive right of sale, (2) definite time limit, and (3) valuable consideration all appear in the case under review, and the authorities seem to show conclusively that in such a case the principal must respond to the agent in damages if he breaks the contract. See, in addition to the authorities already cited, 1 *Am. & Eng. Ency. L.* (2d Ed.) 1104; 31 *Cyc.* 1528; 1 *Mechem on Agency* (2d Ed.) § 1552; 21 *R. C. L.* p. 835, § 18; 2 *C. J.* 535.

We may well conclude the discussion of this branch of the case with the following extracts from 2 *Mechem on Agency* (2d Ed.):

"Where a time is fixed for performance by the broker, a number of considerations arise. If all that the negotiations amount to is an offer by the principal that he will pay a commission if a purchaser be found within a certain time, the offer will only be accepted and ripen into a contract by the finding of a purchaser within that time. At any time before that event, the offer may be withdrawn by the principal." (This was the gist of the decision in *Perrow v. Rixey*, supra.)

But, again, on the same page, the author says:

"If what the negotiations amount to is a contract of employment for the fixed period, or a binding contract that a commission will be paid if a purchaser is found within that time, the broker will usually be entitled to damages in the first case, and usually to the amount of his commissions in the second, if he finds a purchaser within that period, although the principal may, in the meantime, have sold the property or withdrawn it from sale."

See page 2039, § 2446.

And again, after showing that a mere offer for a fixed time does not become binding on the principal until the agent has accepted it by producing a purchaser (because "until so accepted there is no contract, the broker has promised nothing, * * * he may perform or not as he pleases"), the author says:

"But, as has already been seen, there may easily be cases in which the principal has so invited the broker to enter upon an undertaking requiring time for its full completion that the actual commencement of the performance with the intention of completing it would be such an acceptance as would prevent the principal's withdrawal without liability." *Id.* § 2452, pp. 2049-2051.

The third ground of demurrer is as follows:

"It appears upon the face of the said declaration that the damages sought to be recovered for the breach of the alleged contract therein set out are too remote and speculative to be recovered in a court of law."

[12, 13] The plaintiff bought from the defendant's decedent the exclusive right to sell the property for a period of one year. The sole purpose of the contract was the acquisition of a profit. While there is more or less uncertainty and confusion in the authorities upon the general subject of profits as an element of damages in suits for breach of contracts, it is safe to say that, when contemplated profits constitute the sole purpose and object of the contract, and the plaintiff alleges a breach and a consequent loss of profits, he has stated a prima facie case, and is entitled to recover such amount as he can prove, with reasonable certainty, he would have made but for the breach. Of course, this general statement of the law is subject to the general qualification that, if the declaration should allege such a state of facts as would enable the court to say that no profits at all could be proved, a demurrer would end the case. But when the profits claimed may reasonably, or, as in this case, must necessarily, be presumed to have been within the intent and mutual contemplation of the parties when the contract was made, the mere fact that the exact amount cannot be calculated with mathematical certainty does not preclude a recovery. In such cases, as said in 1 Sutherland on Damages (3d Ed.) § 60:

"The injured party is entitled to gains prevented and losses sustained if he can prove them with sufficient certainty."

To the same effect is the following language from the opinion by Judge Riely in *Burruss v. Hines*, 94 Va. 413, 416, 26 S. E. 875, 876:

"The prohibition against the recovery of profits or gains, when not excluded as unnatural or remote [here they were natural and direct], is due mainly to the inability to prove with reasonable certainty that the injury prevented the receipt of profits or gains, and their amount. But if it be shown that the loss of profits or gains was the natural and proximate result of the wrongful act, and their extent is also satisfactorily proved, they may be recovered."

The same principle is recognized and approved in *Bristol, etc., Ry. Co. v. Bullock Co.*, 101 Va. 652, 44 S. E. 892.

In *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, the Supreme Court said:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it,

the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill [N. Y.] 69 [42 Am. Dec. 38], they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.'"

Citation of authorities to the foregoing effect might be multiplied almost indefinitely, as will appear from the copious citations in those from which we have quoted.

The plaintiff is suing for the loss of profits which he alleges he would have realized if there had been no breach of the contract. Such profits having been the purpose of the contract, and mutually contemplated by the parties, and, the circumstances alleged tending clearly to show that the same to some extent would have been realized, he is entitled to go to the jury with his case, and to recover such amount as his proof will establish with reasonable certainty.

The last ground of demurrer is stated as follows:

"It appears upon the face of the said declaration that the damages sought to be recovered are profits which would have been realized from a business or enterprise never established; such damages cannot be measured, and hence cannot be recovered."

The case chiefly relied upon to sustain this branch of the demurrer is *Whitehead v. Cape Henry Syndicate*, 111 Va. 193 (68 S. E. 263). In that case the gist of the decision is stated thus in the syllabus:

"Pound fishing in which a party has been engaged only one month is a new business, and the profits to be derived therefrom depend, not only upon the future bargains and states of the market, but upon other contingencies, such as the run of the fish and the kind and quantity caught. Such profits are dependent upon too many contingencies and are too uncertain to furnish a safe guide in fixing the measure of damages for an injury to, or destruction of, such business, and hence cannot be recovered."

[14] The instant case might fall within the reason and influence of the case cited, but for these distinguishing features: (1) The commodity dealt with in the former was a certain tract of land, while in the latter it was an uncertain supply of fish to be caught; (2) *Whitehead's* business had only been un-

der way for one month, and was held to be a new business, while the realty company had been in business for many years, and the successful conduct thereof in the immediate vicinity of Robertson's property was the avowed inducement on his part to engage the company's services; (3) in the Whitehead Case there was no way to prove, with any degree of certainty, that the fish, even if caught, could be sold at a profit, while in this case Robertson himself demonstrated the existence of a market by selling the property at a large profit over what he was to have as a minimum in his contract with the realty company, and he cannot be heard now to say that the company could not have done at least as well.

[16] A principal cannot, after having made a valid contract with an agent for the exclusive right to sell, render performance on the part of the agent impossible by making the sale himself, and then successfully defend an action for breach of the contract by claiming that the agent might not have made the sale. *Sparks v. Reliable Dayton Motor Car Co.*, 85 Kan. 29, 116 Pac. 363, Ann. Cas. 1912O, 1251; *Schiffman v. Peerless Motor Car Co.*, 13 Cal. App. 600, 110 Pac. 460, 462; *Green v. Cole*, 127 Mo. 587, 30 S. W. 135; 2 *Mechem on Agency* (2d Ed.) § 2445.

We are of opinion that the demurrer should have been overruled; and this court will enter an order to that effect, and remand the cause for further proceedings.

Reversed.

(124 Va. 529)

CITY OF RICHMOND v. VIRGINIA RY. & POWER CO.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. TAXATION ¶204(2)—EXEMPTIONS—STATUTES—CONSTRUCTION.

Statutory provisions relied on to have effect of relinquishing taxing power or of authorizing a municipality to do so will be strictly construed against claim of relinquishment, and intention of Legislature to make or to authorize making of such a relinquishment will not be inferred or presumed.

2. MUNICIPAL CORPORATIONS ¶967(2) — POWERS OF TAXATION—EXEMPTIONS.

Municipalities of a state have no power to exempt property from taxation, except as they are expressly authorized by the state.

3. MUNICIPAL CORPORATIONS ¶967(2) — TAXATION—EXEMPTIONS—"TERMS."

Acts 1874-75, c. 219, as to taxes, authorizing sale of certain land on such terms as the city shall deem proper, does not empower city of Manchester to exempt such land from taxation; the word "terms," as used in such statute, referring only to terms of payment of purchase money, including manner of securing any

deferred payments, etc. (citing Words and Phrases, Terms).

4. MUNICIPAL CORPORATIONS ¶967(1)—TAXATION—AGREEMENT TO EXEMPT PROPERTY —EQUITABLE SET-OFF.

A purchaser of land from a city, a very material part of consideration paid being an invalid agreement of city to exempt property from taxation, has no right of equitable set-off against an annual tax, in absence of a continued service to be rendered to city or proof of amount paid on account of tax exemption covenant.

Appeal from Chancery Court of Richmond.

Suit by the City of Richmond against the Virginia Railway & Power Company. Decree for defendant, and the plaintiff appeals. Reversed and remanded.

This is a suit in equity by the city of Richmond having for its object the enforcement of the lien of certain city taxes assessed in the year 1913 for that year, and also for the preceding years, 1909, 1910, 1911, and 1912, on certain real estate belonging to the Virginia Railway & Power Company located in the territory which was embraced in the city of Manchester prior to the annexation of the latter with the city of Richmond, which occurred in 1910. The bill prays for a renting or sale of said real estate, or a part thereof to enforce the payment of said taxes and interest thereon, and for general relief.

The real estate aforesaid consists of approximately 29 acres, including the Manchester Canal and certain appurtenant water rights.

The railway and power company acquired this real estate, along with a large amount of other property, by deed of date June 29, 1909, from certain special commissioners of court in execution of a decree of sale thereof, along with such other property, under which decree such company became its purchaser. The total consideration for such purchase and conveyance was \$8,100,000. It does not appear in evidence what part thereof was the consideration paid by the railway and power company for the said real estate. Such real estate was assessed by the State Corporation Commission at a valuation of \$200,750 for state taxation for the years 1909 to 1913, inclusive, and it was on such valuation that the city taxes aforesaid were assessed; and there is a stipulation of counsel in the record which provides, in substance, that such valuation should be adopted by the commissioner in chancery in stating an account of the fee-simple value of said real estate under the requirements of a decree in the cause before us made in pursuance of the statute in such case made and provided.

The railway and power company's title to said real estate traces back of its said deed of 1909 to a sale and conveyance thereof by the city of Manchester in 1881 to the Rich-

mond & Alleghany Railroad Company, a predecessor in title of the railway and power company.

It was covenanted in a written contract evidencing the last-named sale, and in the last-named conveyance, as follows:

"That a part of the consideration for the purchase by the party of the second part of said property is that the city of Manchester is to and does hereby exempt said property forever from taxation by its authorities, either direct or indirect, general or special, and also all improvements or other property now thereon or which may hereafter be added thereto."

\$200,000 was the amount of the money consideration paid to the city of Manchester by its said vendee and its successors in title (the Virginia Railway & Power Company itself having paid a part thereof evidenced by certain bonds of the city of Manchester assumed by such vendee but what part does not appear in evidence), in accordance with the terms of the last-named sale and conveyance; of which, in accordance with the evidence in the cause, only about \$100,000 was paid for the real estate, and the remaining \$100,000 was paid as the consideration for three other things, viz.: (1) For said city tax exemption; (2) for the dismissal of a certain suit then pending of the city of Manchester against the Richmond & Danville Railroad Company for damages for alleged injuries done by it and others to certain water rights of the city and the release of all such claims of damages; and (3) for certain rights, so far as the city of Manchester could give them, of laying certain railway tracks in certain localities in such city and of contracting with another railroad company for the use of certain of its tracks in such city or for building tracks alongside or near to such tracks and connecting therewith, etc. But what portion of such \$100,000 was for the said tax exemption, and what for the other subjects (1) and (2) aforesaid, does not appear in evidence. There is evidence in the cause, however, tending to show that such tax exemption "was a most vital part of the consideration, was thoroughly discussed by the attorneys for the railroad company and the city attorneys for the city of Manchester, * * * was considered by them to be proper and legal and necessary," and that perhaps the purchase would not have been made but for the tax exemption covenant aforesaid.

At the time of said 1881 sale, the reservoir of the city of Manchester was supplied with water from the said Manchester Canal by pumps furnished and operated by the city. The contract of sale of 1881 aforesaid contained an agreement that the city of Manchester might "continue to have the use of the water from said canal to the same extent it now has," but it was therein provided that in no event should this water be drawn off in excess of "a total of eighty feet (cubic) per second during twenty-four hours, this

amount to include the supply to the reservoirs and the power necessary to pump the same"; and there was the additional provision that the city should have "the right of ingress, egress and regress to and from said pumps so long as they are so used as aforesaid." The deed aforesaid of 1881 conformed to such agreement on the subject of such water supply.

Such use of such water ceased following the annexation of the city of Manchester to the city of Richmond and before this suit was instituted.

There were a number of leases of certain of said water rights, from the city of Manchester to various manufacturing and other companies and persons, existing at the time of said 1881 sale and conveyance, which were for terms of years expiring at different times, but which it seems, from the evidence in the cause (the leases themselves not being in evidence), were renewable at the option of the leaseholders provided the terms thereof were complied with, which made such leases possible perpetual leases. By the contract and deed of 1881 aforesaid, the vendee and grantee thereunder took said real estate subject to such leases and covenanted "to carry out * * * the covenants" with the lessees in all of such agreements. It is shown in evidence, however, that the rental return to such vendee from such leases was some \$5,000 per year in excess of all expense to it of carrying out such covenants, so that this undertaking was a benefit and not a burden, and has so continued in the hands of subsequent owners of said real estate down to the railway and power company, which received its conveyance of said real estate with notice of said leases and now holds such real estate subject to such of said leases as have not been forfeited under the provisions thereof.

The said real estate was acquired by the city (then the town) of Manchester in 1769, when Col. William Byrd, the founder thereof, as well as of the city of Richmond, laid off the town of Manchester in blocks and streets. The real estate involved in this suit was set apart as a "common forever." See *Mayo v. Murchie*, 3 Munf. (17 Va.) 358, decided in 1811, for a history of the subject. The town of Manchester was chartered by act of the Legislature in 1769 (8 Hening's St. at Large, p. 421); and, under subsequent acts of Assembly authorizing it so to do, the leases aforesaid were made. In 1874, the town became the city of Manchester by act of Assembly approved March 20th of that year (Laws 1874, c. 118).

It is in evidence that the city of Manchester was in the year 1875 seriously financially embarrassed and so continued, or grew worse, until the sale aforesaid was made in 1881, having difficulty in paying the outstanding interest on its bonded indebtedness; but that such sale wholly relieved it from such embarrassment, and that the sale was made

for that purpose on the part of the city of Manchester.

The legislative authority under which the city of Manchester inserted said city tax exemption covenant in said 1881 contract of sale and deed is contained in Acts of Assembly 1874-75, p. 264, and, so far as material, is as follows:

" * * * It shall be lawful for the common council of the city of Manchester * * * to make sale of the Commons, including the water power * * * of said city, by such mode and upon such terms as said common council shall deem proper."

It is a concession in the cause that the common council of the city of Manchester made the sale and conveyance aforesaid and included therein the city tax exemption covenant aforesaid.

It is in evidence that the city of Manchester, after 1881 and until its separate corporate existence was extinguished by the annexation aforesaid, assessed no city taxes against said real estate or leaseholds or other water rights appurtenant to such real estate. Prior to 1881, as such property belonged to such city, it, of course, assessed no city taxes against it and derived no revenue by taxation from it.

The decree under review dismissed the bill of the city of Richmond, holding, as per the memorandum opinion of the court made a part of the decree, in substance, that the tax exemption covenant aforesaid is valid, that it ran with the land, and that the railway and power company holds said real estate exempt from municipal taxation.

H. R. Pollard and Geo. Wayne Anderson, both of Richmond, for appellant.

E. R. Williams, A. B. Guigon, and T. J. Moore, all of Richmond, for appellee.

SIMS, J. (after making the foregoing statement). We will consider and pass upon the questions raised by the assignments of error and the positions of the appellant, the city of Richmond, and the railway and power company, the appellee, in their order as stated below:

1. Is the municipal tax exemption above set forth valid?

If such question depended for its decision upon the inquiry as to the constitutionality of an act of the Legislature authorizing such exemption, it would arise under sections 1 and 8 of article 10 of the Constitution of 1870. The language of those sections of that Constitution are different from the provisions on the same subject in sections 168 and 183 of our present Constitution of 1902. The former Constitution differed from the latter in this: It did not unquestionably contain an express provision that all property should be taxed except such as it mentioned as subject to exemption by the Legislature;

and, with respect to the clause allowing the Legislature to exempt certain property mentioned, it did not contain an express statement that no other property should be exempt. The Constitution of 1902 supplies the defects mentioned in both particulars by providing, in section 168, that "*All property, except as hereinafter provided, shall be taxed, * * **" and, in section 183, that, "except as otherwise provided in this Constitution, the following property and *no other*, shall be exempt from taxation. * * *" (Italics supplied.)

Because of the absence in the Constitution of 1870 (and in the preceding Constitution of 1851) of such express provisions as those in the Constitution of 1902 above italicized, a difference of opinion existed among the eminent and learned judges of this court, in the cases which arose prior to the Constitution of 1902, involving the question of whether it was in the power of the Legislature to exempt, or to authorize a municipality to exempt, other property from taxation than that mentioned in the tax exemption clauses of such former Constitutions; and that point was left undecided. See *Whiting v. Town of West Point*, 88 Va. 905, at pages 911, 913, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750, and cases cited. And we may also leave such point undecided, although it is urged upon us in argument.

In the view we take of the statute of 1875 (Acts 1874-75, p. 264), relied on by the railway and power company as furnishing legislative authority to the city of Manchester to make the tax exemption in question, the Legislature in this instance has not undertaken to authorize such exemption.

[1, 2] Statutory provisions relied on to have the effect of relinquishing the taxing power or of authorizing a municipality to do so will be strictly construed against the claim of relinquishment, even when the legislative right to so act in the premises unquestionably exists. The intention of the Legislature to make or to authorize the making of such a relinquishment will certainly not be inferred or presumed from the language of a statute which is plainly capable of another construction.

As said by Chief Justice Marshall, in the case of *Bank v. Billings*, 4 Pet. 514, at page 561 (7 L. Ed. 939), in speaking of the taxing power:

"It would seem that the relinquishment of such a power is never to be assumed."

As said on the same subject by Mr. Justice Field, in *Minot v. Phil., etc., R. Co.*, 18 Wall. 206, 21 L. Ed. at page 894:

" * * * Before any exemption * * * can be admitted, the intent of the Legislature to confer the immunity * * * must be clear beyond a reasonable doubt."

As said in 4 Dillon on Mun. Corp. (5th Ed.) § 1401:

"As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed more strongly against those claiming the exemption"—citing numerous authorities.

The same principle applies in the construction of a statute relied on to confer the power of tax exemption upon a municipality. Accordingly, it is well settled that a charter provision (which is, of course, a statute), or other statute, will not be construed to confer upon a municipality the authority to make a tax exemption, unless such authority is expressly given. *Whiting v. Town of West Point*, supra (88 Va. 905, at pages 906, 910, 14 S. E. 698, 699 [15 L. R. A. 860, 29 Am. St. Rep. 750]), and authorities cited; 1 Cooley on Taxation (3d Ed.) p. 344.

As said by the last-cited authority:

"Pertaining, as it does, to the sovereign power to tax, the municipalities of a state have not the exempting power, except as they are expressly authorized by the state"—citing numerous authorities.

[3] The language in the statute of 1875 (quoted in the statement preceding this opinion) on which the railway and power company must rely to confer the power in question merely confers the power of sale of the property upon the common council of the city "upon such terms as said common council shall deem proper." The word "terms" may have a broad meaning, it is true, and might be given the meaning contended for by the appellee in the case before us. But, to say the least, such language is equally susceptible of the construction that the terms referred to are merely the terms of payment of the purchase money, including the manner of securing any deferred payments, etc., as it is of the construction that a tax exemption was thereby intended to be authorized. Similar language is frequently used in deeds, wills, and other writings creating powers of sale, and the former is the usual and ordinary meaning of the word "terms" when used in connection with provisions conferring a power of sale. 8 Words and Phrases (1st Ed.) p. 6922; *Id.* (2d Ed.) pp. 884, 885. And such, as we think, is the meaning with which the language we are dealing with was used in the statute under consideration.

The above question must therefore be answered in the negative.

We come now to the consideration of another subject:

2. Although invalid, the tax exemption covenant aforesaid unquestionably constituted a very material part of the consideration

to the Richmond & Danville Railroad Company to make the purchase of the real estate and to pay the consideration therefor aforesaid. This was perhaps also true, although probably in a lesser degree, of the purchases by its successors in title down to and including the appellant, the Virginia Railway & Power Company; but such facts are not shown in evidence. It is assumed by the last-named company, without any sufficient evidence thereof in the record as we think, that said tax exemption covenant entered into the consideration for its purchase of said real estate to an amount in excess of the city taxes which have accrued thereon for 1909 to 1913, inclusive, and which may accrue in future, and appellee contends that, if such taxes are held to be assessable and enforceable, there has been a failure of consideration to appellee to that extent, and that (as is said in the brief for appellee), "without going into a careful analysis of the doctrines of set-off, or recoupment, or counterclaim, or the statutes pertaining thereto, it is plain that in this court of equity, if the covenant be held to be invalid, the defendant company" (the appellee) "is entitled to receive due credit and compensation for this large investment which has enured to the benefit of the city, without any return to the company," and that hence the appellee is entitled "to an equitable offset against the city for an amount at least equal to the taxes claimed." (The quotations just made, from the brief of counsel for appellee, are not in the order in which the language quoted is used, but are believed to fairly convey the meaning intended.)

Neither the issues made by the pleadings nor the evidence in the cause are, or is, sufficient to enable us to enter upon the decision of the questions which are here presented, even if the court below had jurisdiction of the subject in this cause—as to which we express no opinion. At any rate, such questions were not in issue in the court below so far as appears in the record, and they were not passed upon by such court so far as appears from the decree under review and the memorandum opinion made a part of the decree, nor have they been argued before us, except the narrow question of whether the principle of the case of *Phillips v. City of Portsmouth*, 115 Va. 180, 78 S. E. 651, and kindred cases referred to below, is applicable to the said claim of an equitable set-off; so that we wish to be understood as expressing no opinion on such questions, except upon the narrow question last referred to. The last-mentioned question having been fully argued before us, we feel that we should pass upon it, and will, accordingly, now do so.

The question last mentioned may be stated as follows:

[4] 3. Is the appellee, the Virginia Railway & Power Company, under the doctrine of the cases last above referred to, entitled to

the set-off claimed by it as aforesaid against the annual city taxes which have been assessed against said real estate and appurtenant water rights owned by it, as aforesaid, and which may in all future time ("forever," per said tax exemption covenant) be so assessed, whether "direct or indirect, general or special, * * *" not only on the land and other property conveyed by the 1881 deed aforesaid, and "also (on) all buildings and improvements and other property thereon," but likewise on all such property and on all "other property which" (since 1881 may have been added and which) "may hereafter be added thereto, including capital added thereto or used or employed thereon"?

The cases relied on by the Virginia Railway & Power Company to support an affirmative decision of the question just stated, or which are cited in the brief for such company on the point urged, viz. that tax exemptions are valid which are supported by a valuable consideration, are the following: *City of New Orleans v. New Orleans Waterworks Co.* (1884) 36 La. Ann. 432; *Conery v. New Orleans Waterworks Co.*, 41 La. Ann. 910, 7 South 8; s. c. 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; *City of Frankfort v. Capital, etc., Co.* (Ky. 1895) 29 S. W. 855; *Bartholomew v. City of Austin, Texas*, (1898) 85 Fed. 359, 29 C. C. A. 568; *Montclair Water Co. v. Town of Montclair* (1911) 81 N. J. Law, 573, 79 Atl. 258; *Grant v. City of Davenport* (1873) 36 Iowa, 396; *Maine Water Co. v. City of Waterville* (1900) 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294; *Phillips v. City of Portsmouth* (1913) 115 Va. 180, 78 S. E. 651.

The whole extent to which the holdings of those cases go, on the question under consideration, is this: That where a continuing service is to be rendered to a municipality for which it has the power to contract, and it does make a contract for such service which is reasonable and valid in other respects, and therein, either expressly or substantially, agrees to pay each year for such service the amount of the city taxes on certain property, and the amount so agreed upon appears to be only a fair return, or but a reasonably adequate consideration for the service rendered, the courts will hold such an agreement not to be, in truth, a tax exemption, but an agreement to make compensation for such service, and that hence such an agreement is enforceable, either by action to recover for the service rendered at the contract price therefor, which is the annual tax, or by set-off of the value of such service against the annual tax as it accrues, so long as such service continues under such contract.

In those cases the failure of consideration, caused by a holding of the tax exemption to be invalid, was a failure of consideration for service actually rendered or to be rendered to the municipality. In the cause before us, it does not appear that the appellee has

ever rendered or is obligated to render to the appellant, the city of Richmond, any service whatsoever. The only service which its predecessors in title rendered to the city of Manchester under the 1881 tax exemption covenant aforesaid was the water supply from the Manchester Canal mentioned in the statement preceding this opinion. That ceased certainly following the annexation aforesaid which occurred in 1910. It does not appear in evidence whether such water supply was furnished in 1909 by appellee. If so, that fact might, upon proper pleading, if the court has jurisdiction of the matter in such a suit as this, furnish a basis for future decree in the cause in the court below for the relief of the appellee from the city taxes for that year, but no farther.

No authority has been cited before us extending the doctrine of the cases next above discussed to the point of holding that a municipality may, for any other valuable consideration than services to it such as aforesaid, contract away its taxing power, and that such contract will be held not to be a tax exemption. And, on principle, it will be at once perceived that such a broad power of contract would annul all constitutional provisions against exemption of property from taxation. It is not a question of the presence or absence of a valuable consideration to support tax exemptions against which such constitutional provisions are directed. There has seldom, if ever, arisen a case of tax exemption where such a consideration was not supposed by the taxing authority to exist at the time, and a supposedly sufficient consideration. But the evil of allowing such a power to exist, even in the Legislature, is so manifest that the rules of construction applicable to every alleged tax relinquishment, above adverted to, and the constitutional inhibitions which are now in force in Virginia against the exercise of such a power, have been adopted, and have their foundation deep-seated in principles which are immutable under our form of government.

The foregoing has proceeded upon the idea that the tax exemption in fact sought in the case before us was but an exemption for a reasonable time upon property reasonably certain as to its identity and value. Such, however, is not the case before us. The exemption sought is "forever"; it extends, not only to certain property which existed in 1881, but to all which may have been placed thereon since, and, also, to all "other property which may hereafter be added thereto, including capital added thereto or used or employed thereon." This would apply to the leaseholds heretofore created or which may hereafter be created touching the real estate and water rights aforesaid, as well as to the remainder of the property, and doubtless to others besides the appellee who may now hold portions of the original property, and, if the construction of said covenant for tax exemption con-

tended for by appellee were upheld, there would be established within the city upon the 29 acres of real estate involved in this cause an imperium in imperio indeed, which we cannot hold to have been within the power of the city of Manchester to create under the authority of the act of Assembly under which it made the covenant aforesaid; aside from any consideration of the power of the Legislature under the Constitution of 1870 to have granted such authority.

For the foregoing reasons, we are constrained to reverse the decree under review and to remand the cause for such further proceedings therein as may be proper, not in conflict with the views expressed in this opinion.

Reversed.

(149 Ga. 1)

GEORGIA RY. & POWER CO. v. RAILROAD COMMISSION OF GEORGIA et al.
(No. 1174.)

(Supreme Court of Georgia. March 15, 1919.)

(Syllabus by the Court.)

1. CARRIERS §12(9) — STREET RAILROAD FARES—REGULATION—CONTRACTS.

Under the proviso contained in the fifth section of the act approved August 23, 1907, now embodied in Civil Code 1910, § 2682, the Railroad Commission of this state was without authority to exercise the powers conferred and extended by that act, so as to determine or fix fares upon lines of street railroads within the limits of any town or city between which and the street railroad company operating such lines there was a valid, subsisting contract at the time of the passage of the act.

(a) There was such a contract between the city of College Park and the Georgia Railway & Power Company, and between that company and the city of Decatur as to one line running from Decatur to Atlanta.

(b) But as between the cities of Atlanta and East Point and the Georgia Railway & Power Company there was no such contract.

(c) But there was a contract covering the subject of transfers, which provided that upon the payment of one full fare a transfer should be given; and the Railroad Commission was without jurisdiction to deal with the matter of transfers.

2. CARRIERS §12(1) — MUNICIPAL CORPORATIONS §57 — DELEGATED POWERS — CONSTRUCTION—STREET RAILROAD FARES.

"A grant of power to a municipal corporation must be strictly construed; and such a corporation can exercise no powers except those which are expressly given, or are necessarily implied from express grants of other powers." Applying this principle to the facts contained in this record, the city of Atlanta was without authority to pass an ordinance fixing the rates of fare upon the lines of the street railroad company which it had constructed within the limits of the municipality, and any attempt by the municipality to pass such ordinances was nugatory.

3. CARRIERS §12(1) — STREET RAILROAD FARES—REGULATION—JURISDICTION.

In the absence of a valid, subsisting contract and ordinance upon the subject of fares, it was the duty of the Railroad Commission, upon application by the Georgia Railway & Power Company, a street railroad company, to fix and determine the rates of fare upon the lines of the street railroad in the city, in accordance with the law defining the powers and duties of the commission.

(Additional Syllabus by Editorial Staff.)

4. CARRIERS §12(1)—POLICE POWER—RAILROAD FARES—REGULATION.

The regulation of passenger tariffs, and the fixing of fares on street and steam railways, is a matter falling within the police power.

5. MUNICIPAL CORPORATIONS §593—POLICE POWER.

Under Const. art. 4, § 2, par. 2 (Civ. Code 1910, § 6464), neither the Legislature nor any municipality can, by ordinance or contract, abridge the exercise of the state's police power, but a municipality may make a contract on such subject, where state has not exercised its police power with reference thereto.

6. STREET RAILROADS §24(3)—GRANT OF PRIVILEGE — CONDITIONS — CONSTITUTIONAL PROVISIONS.

Under Const. art. 3, § 7, par. 20 (Civ. Code 1910, § 6448), forbidding General Assembly to authorize construction of street passenger railway within city or town without consent of corporate authorities, such authorities may impose conditions upon which a street railway may construct its track in streets, and contract with corporation as to conditions on which it may construct railway within municipal limits.

7. CARRIERS §12(9) — STREET RAILWAYS — CONTRACT.

Where the state has not exercised, and is not seeking to exercise, its police power as to street railway fares, a municipality and a street railroad may enter into valid contracts on such subject.

Fish, C. J., dissenting, and Hill, J., dissenting in part.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Mandamus by the Georgia Railway & Power Company against the Railroad Commission of Georgia and others for an increase in street railroad fares. Judgment for defendants, and petitioner brings error. Reversed in part, and affirmed in part.

King & Spalding, C. T., L. C., & J. L. Hopkins, Brewster, Howell & Heyman, Colquitt & Conyers, and Rosser, Slaton, Phillips & Hopkins, all of Atlanta, for plaintiff in error.

James K. Hines, J. L. Mayson, R. R. Arnold, S. D. Hewlett, E. E. Pomeroy, C. E. Cotterill, A. C. Broom, and G. M. Watkins, all of Atlanta, for defendants in error.

BECK, P. J. The plaintiff in error, hereafter called the railway company, filed a petition to the Railroad Commission of Georgia, for an increase in street railway fares. In the application it was claimed that an increase of rates for street car and suburban fares was absolutely essential in order for the applicant, in view of the unusual war conditions which had prevailed for more than a year, to effectively discharge obligations of the company to the public. The facts upon which this claim of the necessity for a raise in the rates of street car fares was based were fully and elaborately set forth in the petition to the commission. Upon hearing the application the commission held that, by reason of certain contracts between the railway company and the cities of Atlanta, Decatur, East Point, and College Park, it had no jurisdiction to grant increased fares, and reached the conclusion that, having found the contracts referred to to be physically existent, their validity was not a question for the commission, but for the courts, to decide; that when dealing with the rates of a street railroad under the terms of the act of 1907, embraced in Civil Code, § 2662, they were brought face to face with a contract or an ordinance in existence at the time of the passage of that act, and still subsisting, that the commission could go no further in dealing with the rates until the obstacle should be removed by legal procedure before a court of competent jurisdiction, or until the General Assembly should further act. The commission, having concluded that there were contracts in existence which were an obstacle to their further proceeding, stated as their opinion that the applicant was entitled to an increase in street car fares, and that a six-cent fare would be reasonable and just "so long as existing abnormal war conditions prevailed," and recommended to the municipal authorities of Atlanta, Decatur, and College Park the justice of granting the increase "by amendment to existing contracts or ordinances." The railway company then brought to the superior court of Fulton county its petition against the commission, and prayed that the writ of mandamus issue, requiring the commission to take jurisdiction in the matter of fixing the rates, it being insisted that the commission had erred in declining to take jurisdiction in the matter, for the reason that there were no contracts, valid or otherwise, between the city of Atlanta and petitioner fixing the street railroad fares, or that there was in existence in 1907 an ordinance, valid or otherwise, passed by the city of Atlanta fixing street railroad fares, and that if there existed at said time any such contracts or ordinances the same were invalid because the city of Atlanta lacked the charter power to make such contracts or ordinances, and because, if the city of Atlanta had charter power to make such contracts

and ordinances they would be void because violative of article 4, § 2, par. 1, of the Constitution of the state of Georgia, conferring upon the General Assembly alone the power of regulating passenger tariffs, preventing unjust discrimination, and fixing reasonable and just rates. Applicant also insisted that the alleged contracts between applicant and the towns of Edgewood, East Point, Decatur, and College Park were invalid because these towns were without charter power to make such contracts, and that if they had such power the contracts would be void because in violation of that section of the Constitution referred to. The further contention was made that, even if there were valid contracts between the petitioner and one or more of the municipalities referred to, the existence of such valid contract would not prevent the commission from exercising its jurisdiction to fix street railroad fares in cases other than those covered by such valid contracts, and that if there were with the cities, whose streets were occupied by petitioner, valid existing contracts, the act of the commission in fixing and approving just and reasonable rates would not be an impairment of such contracts under the Constitution of this state.

[1] 1. We will first consider the question as to whether, if there were contracts in existence on the 23d day of August, 1907, between the municipalities named, or any of them, by the terms of which the street railroad fares were fixed as to that municipality, such a contract would prevent the fixing of the street railroad fares by the commission. The act to revise and enlarge the powers and duties of the Railroad Commission of Georgia, etc., approved August 23, 1907, contains the statutory provision now embraced in section 2662 of the Civil Code, and so far as relates to the questions under consideration in this case reads as follows:

"The powers and duties hereinbefore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies, or persons owning, leasing, or operating street railroads in this state: Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance."

Until the passage of the act of 1907 the commission was without authority to deal with the subject of fixing fares for street railways. Until the enactment of that statute they did not exercise, as to street railway companies, the power to make the rates of charges for transportation of passengers on the lines of street railways operated by street railway companies, like that of the applicant in this case. But the act of 1907,

as indicated by its caption, extended and enlarged the powers and duties of the commission, and embraced in these enlarged and extended powers and duties there was, among other things, the authority to fix fares upon street railroads, and to otherwise exercise control over street railroad corporations or companies operating street railways, but in section 5 the section of the act of 1907 extending the powers of the commission so as to embrace authority to fix fares upon street railroads, the Legislature enacted as a part of that section the proviso "that nothing herein [in the statute extending the powers and duties of the commission] shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company [street railroad company]."

In our opinion the effect of the proviso is to leave the commission where it was before the enactment of the statute as to its power and authority to determine and fix fares upon street railroads in any municipality which had a valid subsisting contract covering that subject with the street railroad company.

[4, 5] Counsel for the railway company contend in their arguments that it was not competent for the municipality to enter into a contract with the street railroad company upon this subject; that the fixing of fares upon street railroads and other railroads is a matter that falls within the police power of the state, and that under the provisions of the Constitution of the state, especially that part of the Constitution which declares that the exercise of the police power of the state shall never be abridged (Civil Code, § 6464) the municipality and the railway company could not make a binding contract upon this subject. We cannot agree with this contention in full. We readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railways, as well as upon steam railways, is a matter falling within the police power, and that neither the Legislature of the state nor the legislative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the state, but we do not think that in all cases and in reference to every subject which might fall within the police power of the state it is incompetent for a municipality or other corporation to make a contract in reference to such subject-matter, where the state has not seen fit to exercise the police power in reference thereto.

[6] Under the Constitution of this state (article 3, § 7, par. 20; Civil Code, § 6448) the General Assembly cannot authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities. Under such provisions the city authorities may withhold their consent for

the construction of a street railroad upon any of the streets of the municipality. It would seem that if they can do this they might impose conditions upon which a railroad company might construct its tracks in the streets and enter into a contract with the corporation as to the conditions upon which it should be permitted to construct a railway within the limits of a municipality. In the case of Atlanta, etc., Co. v. Transit Co., 113 Ga. 481, 39 S. E. 12, it was said:

"Our Constitution, in paragraph 20, § 7, art. 3, declares that the General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city without the consent of the corporate authorities. But when a corporation to duly construct such a railway has been created. * * * it is within the power of the corporate authorities of the city, in whose streets it is proposed to be constructed, to refuse it admission altogether, as well as to confine it to certain streets and routes, and to impose, as a condition precedent to such construction, such reasonable terms as the corporate authorities, looking to the interests of the citizens, may deem best."

Where application is made to the municipal authorities by a street railroad company for the consent of the authorities to the construction of a railway in its streets it does not seem to be sound to say that the city authorities could only say "yes" or "no" to such a petition; that the city is compelled to refuse admission altogether or to admit it without any conditions whatever. In the case of St. Louis, etc., Co. v. City of Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300, the Supreme Court of Missouri says:

"It would be difficult to conceive of a more positive and unequivocal veto than that conferred upon the cities, towns, and villages of this state by section 20 of article 12 of the Constitution and section 2548, Rev. St. 1889, to prevent the construction and operation of railroads upon their streets and highways, without their consent. When such power is given to cities and towns it is not limited to a mere 'Yes' or 'No,' but they may impose such conditions upon their consent as they see fit. * * * Judge Elliott, in his work on Railroads (volume 3, section 1081), says: 'When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, the authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railroad in its streets.'"

In the case of People v. North Tonawanda, 70 Misc. Rep. 91, 126 N. Y. Supp. 186, the Supreme Court of New York says:

"A city may refuse to assent to the construction of a railroad in its streets and may, therefore, impose any conditions it thinks proper as conditions precedent to the giving of its assent; and if the city attaches conditions which the company deems unreasonable, the only remedy of the latter is to refuse to accept the assent."

See, also, *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Quinby v. Public Service Commission*, 223 N. Y. 244, 119 N. E. 433. In *Kalamazoo v. Circuit Judge*, 200 Mich. 146, 166 N. W. 998, it is said that a constitutional provision, giving cities reasonable control of their streets, authorizes them to impose reasonable rates upon a public utility as a condition to the occupancy of the streets, the reasonableness of the rate being reviewable by the courts. In the case of *Detroit v. Detroit Citizens' Railway*, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 562, it is said:

"The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded fixed until another rate was adopted by a like agreement."

See, also, *City of Barre v. Barre & M. Traction & Power Co.*, 88 Vt. 304, 92 Atl. 237, and *State v. Public, etc., Commission (Mo.)* 204 S. W. 497.

[7] We do not base our opinion that a street railroad company and a municipality may, under certain circumstances, contract with reference to rates of fare entirely upon that part of the Constitution which provides that the Legislature shall not authorize a street railroad company to construct its railways in the limits of a municipality without the consent of the municipal authorities. We think that where the state has not exercised its police power, and is not seeking to exercise its police power, over the subject of fares upon street railroads, the municipality and the street railway might enter into contracts upon this subject that will be valid; but the right of the municipality to refuse absolutely its consent to the construction of a street railway within its limits, and the constitutional and statutory provisions in regard thereto, strengthen us in the view that it is competent for the municipality and the street railroad company to enter into contracts upon this subject.

Having reached this conclusion, in the further consideration of the issues involved in this case we must inquire whether there was a contract between the city of Atlanta and other municipalities named and the railway company upon the subject of fares.

We take up first the question as to whether or not the city of Atlanta had a contract on August 23, 1907, and prior thereto with the railway company upon the subject of fares. Whether it had such a contract is to be gathered from the facts, which we state briefly as follows: The Atlanta Street Railroad was Atlanta's original and principal railway. It included the lines upon several of the principal streets of the city. On January 1, 1866,

the city granted consent to this street railroad company to occupy the streets of said city, by an ordinance, one of the conditions of which was as follows:

"Fourth. The charges for passage on said road shall not exceed 20 cents for any through line, and not exceeding 10 cents for half lines or short distances."

On December 18, 1882, the city of Atlanta granted its consent to the Metropolitan Street Railway Company to occupy certain streets upon condition that—

"Franchises granted subject to the conditions and limitations of ordinances heretofore passed in reference to the Atlanta and Gate City Street Railroad Companies."

On July 4, 1877, a like grant on the same terms was made to Atlanta & Edgewood Street Railway Company. On December 7, 1891, a grant was made to Atlanta Consolidated Street Railway Company to occupy certain streets in the following language:

"The rights and franchises consented to and granted to said several street railroad companies (including Atlanta Street Railroad Company) * * * are hereby reconferred and regranted to said Atlanta Consolidated Street Railroad Company on the terms specified in said grants both as to privileges and obligations."

Subsequently, August 23, 1899, the city of Atlanta granted a consent to the Atlanta Rapid Transit Company to occupy with its lines certain named streets. Among the terms of this consent was the following:

"This grant is made on the further condition that the charge for fare for a single passenger from any point on the lines of said company to any other point on the lines of said company within the city limits of Atlanta as now or hereafter defined shall not exceed five cents, except on cars that may be run after midnight and before five o'clock, a. m., for which fares for single passengers as aforesaid shall not exceed ten cents."

Prior to February 8, 1902, the name of Atlanta Consolidated Street Railroad Company had been changed to that of Atlanta Railway & Power Company, and there was in existence at said time in Atlanta only two street railway companies, the Atlanta Railway & Power Company and Atlanta Rapid Transit Company. These two railroad companies, together with the Georgia Electric Light Company and the Atlanta Steam Company, desired to consolidate, and the consent of the city was sought to permit and authorize such consolidation. This consent of the city was obtained, and was embodied in what is known as the "consolidation ordinance" of February 8, 1902. In this ordinance in which the consent was granted, it was provided:

"The said consolidated company shall, for the purpose of giving one continuous ride inside the

city of Atlanta from a point on one of its lines to a point on another of its lines grant one transfer ticket on the payment of one full fare."

We have gone carefully through these ordinances conferring certain rights and franchises upon the street railroad companies mentioned, have considered the terms of what might be called the consent contract in the consolidating ordinance, and we cannot find that there were the elements of a contract existing in view of the provisions of the consolidating ordinance. The Railroad Commission of the state, in passing upon the question when the application for increase in fares was before it, in rendering their decision set forth at some length the grounds upon which they based the conclusions reached, and in announcing the conclusion and decision used, as a part of their opinion, the following language:

"The physical existence of a contract in 1907 between the town of Decatur and the lessor of applicant, prescribing a five cent maximum fare between Decatur and Atlanta, is admitted. A similar contract between College Park and applicant's lessor, was in existence.

"The Georgia Railway & Electric Company obtained its Atlanta franchises under an ordinance of the city of Atlanta, approved February 8, 1902, known as the 'Consolidating Ordinance.' This ordinance contained the terms and provisions upon which the consolidation of the street railways therein named could be made. It was accepted by the Georgia Railway & Electric Company. The proposition of the city and its acceptance by the company constituted a contract, which contract was in existence in 1907.

"The 'Consolidating Ordinance' does not, in direct terms, prescribe rates. It, however, contains this provision: 'The said consolidated company shall for the purpose of giving one continuous ride inside the city of Atlanta from a point on one of its lines to a point on another of its lines, which, however, does not carry the passenger on a parallel line or in the same general direction from which he came, grant one transfer ticket upon the payment of one full fare, provided such transfer is requested at the time of the payment of the fare.'

"At that time the universal fare throughout the city of Atlanta upon each and all of the lines embraced in the ordinance was five cents. A 'full fare' must have meant the then prevailing fare. To compel the grant of transfers and at the same time throw no restrictions upon an increase in the primary rate would have been to leave the way open to nullify the free transfer, by increasing or doubling the original and customary charge without transfers.

"But whether this be the correct view as to what was a 'full fare' or not, it is immaterial to a proper conclusion as to the grant of the prayer of petitioner for authority to charge two cents for a transfer; to grant it would, to that extent, repeal the consolidating ordinance under which the petitioner is now operating."

It will be seen that the commission laid especial stress upon that clause which we have already quoted from the consolidating

ordinance. Whether, as they say, the uniform prevailing fare at the time of the adoption of the ordinance was five cents or not, this consolidating ordinance, that is, the clause which we have quoted, does not fix the fare at five cents. It deals directly and expressly with the question of transfers, declaring that upon the payment of one "full fare" the consolidated company shall "grant one transfer ticket." That means, it seems to us clearly that upon payment of one full fare, whatever that may be, whether four cents, five cents, six cents, or more or less, the transfer shall be granted. We find nothing in the contract tending to bind either the company or the municipality as to the amount of a full fare. No attempt was made to state what was a full fare, and it does not appear to us to have been the intention of the contract and parties to do this. The thing contracted about was transfers, and we cannot assume from the words of the ordinance that one "full fare" was a five cent fare. Upon this point we agree with counsel for plaintiff in error that the matter of fares was so important that it would not have been left to inference, but would have been the subject of definite contract if the city intended at that time to fix the amount of fares.

As between the municipality of East Point and the railroad company, the contract was to the effect that—

"Passengers from all other parts of the town of East Point shall be accorded each and every privilege which may be accorded citizens of Atlanta with regard to transportation."

If that is a contract upon the subject of fares at all the fares would seem to follow, as to amounts, the fares for passenger transportation fixed for Atlanta.

The contract with the municipalities of College Park and Decatur stand upon a different footing. Those contracts were in existence on the 23d day of August, 1907, and are still subsisting contracts. As we decided in the first part of this opinion, these contracts are not invalid, but are valid and subsisting contracts, and were valid and subsisting contracts on the 23d day of August, 1907, and the commission properly held that they were without jurisdiction to fix the fares between the two towns just referred to and the city of Atlanta over the lines of the railway company.

Nothing that we have said in regard to the matter of contracts between municipalities and street railway companies upon the subject of fares is to be construed as in any way impairing the police power of the state. We are of the opinion that at any time that the state may act in regard to this matter and extend the powers of the Railroad Commission so as to cover the matter of fares upon street railways in towns where there are existing contracts, then, regardless of such con-

tracts, the commission, in the exercise of the branch of the power thus conferred, can act.

But we are of the opinion that the effect of the proviso in the section of the act of August 23, 1907, which we have quoted above, is to leave the commission without authority to fix rates of fare upon street railroads in towns and cities where there were existing contracts at the time of the passage of the law between such towns and cities and the street railroad companies, and that therefore the commission did not have the authority to determine and fix rates of fare as between the town of College Park and the city of Atlanta and upon one line running from Decatur to the city of Atlanta, because these two last lines referred to are expressly covered by contracts which were valid subsisting contracts at the time of the passage of the law. Nevertheless, there was no existing contract which prevented the commission from taking jurisdiction of the matter of rates of fare in the city of Atlanta and upon lines of the railway company running into the city of Atlanta, except from the two points just mentioned.

[2] This leaves for consideration and determination any valid ordinance upon the subject of fares which would bring the city within the purview of the proviso that the act should not operate as a repeal of any existing municipal ordinance, and we are of opinion that so far as concerns the question of fares there was not in Atlanta any municipal ordinance which could prevent the jurisdiction of the commission over the question of rates of fare from attaching. Under the view we take of the case we do not think it is necessary to determine whether there was or was not among the ordinances of the city one purporting to regulate the matter of fares on the street railroad, for whether there were such ordinances, or whether those ordinances on this subject had been repealed, cannot affect the decision on his branch of the case under the principles of law which we have held to be sound, for we are of opinion that the city of Atlanta was without authority to enact such an ordinance, and an ordinance passed without authority cannot have the effect of a law, but is void and without effect. Towns and cities have only such powers as are granted them by the state, either in their charters or in general laws, and in determining the question as to whether cities have the power to pass any ordinances in question we have to examine their charters and the general laws, for in that way are to be found the sources of their powers as municipalities, and in doing this it must be remembered that all grants of power to municipalities are to be strictly construed, and, if not expressly granted or necessarily implied from express grant of other powers, then no such grant of powers exists. "A grant of power to a municipal corporation must be construed strictly, and such a corporation can exercise no powers ex-

cept such as are expressly given or are necessarily implied from express grants of other powers." *Lofton v. Collins*, 117 Ga. 438, 43 S. E. 710, 61 L. R. A. 150; *Walker v. McNelly*, 121 Ga. 114, 48 S. E. 718. In the case of *Lockwood v. Muhlberg*, 124 Ga. 662, 53 S. E. 92, it is said:

"And the rule is general that the powers granted to municipal corporations are to be strictly construed; and if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative. 21 Am. & Eng. Enc. Law (2d Ed.) 950, and citations. 'The intent of the Legislature should be sought for in every instance, and carried out if possible; but the courts have generally favored the common-law rule that municipal like all grants of power from the state are to be construed in favor of the state, and against the grantee, whenever a reasonable doubt exists.' *Tied. Mun. Corp.* § 110. See, also, *Dill Mun. Corp.* § 88; *McQuillin's Mun. Ord.* § 48." *Mayor v. Wilson*, 49 Ga. 476; *Frank v. City of Atlanta*, 72 Ga. 428.

Applying these principles to the facts of the present case, we do not find that the city of Atlanta, nor the other municipalities whose right to fix fares upon street railroads is involved in this case, have the charter power to pass ordinances upon this subject. We do not think that the sections of the charter of the city of Atlanta giving them control over the streets, nor that authorizing the municipality to prescribe "reasonable charges to be collected by hacks, cabs, drays or other licensed vehicles for the transportation of persons," etc., nor that part of the charter authorizing them to pass ordinances generally for a municipal purpose not in conflict with the charter nor the Constitution or laws of this state or of the United States, nor similar provisions in the charter, grants to the city the power to fix the rates of fare upon lines of street railroad; that power is not expressly given in any of these provisions of the charter, nor is it to be necessarily inferred from any of the powers actually granted. Many authorities, including text-books, decisions by the Supreme Court of the United States, and decisions by the courts of other states, might be here quoted and cited to support the ruling which we have made, but we do not deem it necessary, as the doctrine here restated is so generally recognized, and the conclusion which we have reached under the facts in this particular case necessarily follows from an application of that doctrine.

[3] 3. In those cities, where there was no valid contract upon this subject, which we have pointed out, the Railroad Commission had power and authority, and it was their duty, to fix the fares upon the lines of railroad of the Georgia Railway & Power Company, for no ordinance passed by any of these municipalities upon the subject would be valid or binding, because where such ordinances were passed it was without charter

authority to do so, and, as we have ruled in the preceding division of this opinion, any attempt to pass an ordinance on this subject was nugatory. Under the provisions of the act of 1907, except as to the two municipalities which we have indicated, the way is clear for the Railroad Commission of the state to perform the duty and exercise the power of fixing the rates in the municipalities involved in this case other than the two expressly named above.

No question as to the right to have the writ of mandamus issue in the event the Railroad Commission of the state has jurisdiction of the street railroads touching the matter of fares was raised; indeed it is stated in the bill of exceptions that both sides agreed that "procedure by mandamus was the proper procedure in the cause, and the parties so stated in open court."

It follows then from what we have above held that the court should have granted the writ requiring the commission to pass upon and determine the rates of fare upon the other lines of street railroad not covered by the contracts between the railway company and the cities of Decatur and College Park, and the judgment of the court below is reversed in so far as it refused to issue the writ of mandamus requiring the commission to take jurisdiction as indicated. The judgment is affirmed in so far as it refused the writ as to passenger fares covered by the contract between the towns of Decatur and College Park and the railway company.

Judgment reversed in part and affirmed in part.

All the Justices concur, except FISH, C. J., who dissents, and HILL, J., who dissents in part.

FISH, C. J. I cannot concur in the entire conclusion reached by the majority of the court. To my mind the state Railroad Commission, in view of the facts of the case and the law applicable thereto, rightly held that it was without jurisdiction to grant the relief sought by the railway company, and that the judge of the superior court correctly refused to grant the writ of mandamus against the commission. It follows, of course, that in my opinion the judgment under review should be affirmed in its entirety.

HILL, J. I cannot concur in the opinion of the majority of the court in its entirety. I concur in the judgment in so far as it reverses the judgment of the trial court, and dissent from that portion which affirms the judgment in part. The view I take of this case is that the Constitution of the state confers the exclusive power to make passenger rates, etc., upon the Legislature. Article 4, par. 1, of the Constitution (Civil Code 1910, § 6463), declares:

"The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reason-

able and just rates of freight and passenger tariffs are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this state, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

In pursuance of that authority the Legislature provided for the creation of the Railroad Commission of the state, with authority to regulate and fix freight and passenger rates, etc., over the railroads of this state, street railroads being excepted. Acts 1878-79, p. 125. In 1907 (Acts 1907, p. 72; Civil Code 1910, § 2662) the Legislature amended the act of 1878-79, and enlarged the powers of the Railroad Commission so as to include street railroads within its jurisdiction. Nowhere else is express authority conferred to make just and reasonable passenger fares or rates. Under the Constitution the General Assembly must fix the rates, and even that body could not contract as to rates. And if this is so, it could not authorize a municipality to so contract. *Ga. R. R. v. Smith*, 70 Ga. 694. article 3, § 7, par. 20, of the Constitution (Civil Code 1910, § 6448) provides:

"The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

And section 2600 of the Civil Code of 1910 declares:

"All the provisions of the preceding division shall govern in the incorporation, control, and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement: That they must in their petition specify what city, town, or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate. * * *

It is insisted that the last-quoted provision of the Constitution and Code section confer the power upon municipalities to contract rates. To this I cannot agree. Power cannot be granted which is inconsistent with the Constitution or the general law of the state. Civil Code, §§ 6391, 6392. To grant power to

a municipality to make contract rates in this state would be inconsistent with both the Constitution and general law. The Constitution does provide that railways shall not be constructed on streets without the consent of the municipality. Civil Code, § 6448. But the power to consent to the construction and operation of street railroads over city streets does not include the power to make rates. *City of Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210; *Public Utilities Commission v. Chicago*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50; *Tampa Waterworks v. Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170. Nor does the power to make rules and regulations as to the construction of street railroads in the streets of a city confer the authority to make rates. The city of Atlanta has not, by authority of the Constitution, nor its charter, nor general law of the state, authority to make rate ordinances or rate contracts relatively to the state itself. Rate making is not inherent in municipalities, and no such authority has been conferred in Georgia on them, either by the Constitution or general law of the state. See *Henderson v. Heyward*, 109 Ga. 377, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384. Even if the rate ordinances and contracts under review are "valid subsisting contracts," they must give way to the demands of the state whenever the state undertakes to exercise its police power in order to make change or revise rates through the Railroad Commission. And this would not have the effect of impairing the obligation of contracts. In *Union Dry Goods Co. v. Ga. Public Service Co.*, 142 Ga. 841, 83 S. E. 946 (3), L. R. A. 1916E, 358, it was held by this court:

"The Railroad Commission Act of 1907 (Acts 1907, p. 72), giving to the commission jurisdiction over electrical lighting and power companies, and the order of the commission fixing maximum rates in the instant case, are not void as in opposition to the clauses in the federal and state Constitution prohibiting the passage of any ex post facto law, or law impairing the obligation of contracts, or the taking of property without due process of law, or for public use without just compensation."

And see *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508; *R. R. Com. v. L. & N. R. R. Co.*, 140 Ga. 828, 80 S. E. 327, L. R. A. 1915E, 902, Ann. Cas. 1915A, 1018.

(177 N. C. 269)

MAULTSBY v. GORE. (No. 296.)

(Supreme Court of North Carolina. April 2, 1919.)

RECEIVERS ⇨ 167—RIGHT TO RECOVER PROPERTY—AGREEMENT BY PERSON IN POSSESSION.

Where receiver made demand on defendant for possession of personalty, and defendant and

son surrendered possession, and receiver rented property to defendant on his agreement to abide by court's order, and court ordered property to be delivered over to person for whom the receiver was such, and on demand defendant refused to surrender as he had agreed, receiver is entitled to recover property from defendant.

Appeal from Superior Court, Columbus County; Devin, Judge.

Action by E. A. Maultsby, receiver for Nellie Bright, against C. O. Gore, to recover possession of a mule, a buggy, and harness. From a judgment of nonsuit, plaintiff appeals. Reversed.

Donald MacRackan, of Whiteville, and S. Brown Shepherd, of Raleigh, for appellant. Irvin B. Tucker, of Whiteville, for appellee.

ALLEN, J. The plaintiff testified as follows:

"I know the property described in the complaint filed in this action. The property consists of one grey mule, one top buggy, and one harness. I was appointed receiver in the case of Nellie Bright v. T. L. Bright. I went out to see Mr. C. O. Gore. His son claimed the property. He said the property was his, and did not much want to give it up. They said they wanted to see their attorney. I told them, 'All right;' if they would agree to bring me the property next morning, I would leave the property with them; and they said, 'All right.' I left their place, and when I had gone about one mile Mr. Gore and his son overtook me. They said they had decided to give me up the property, and I took the property and brought it to Whiteville and kept it all night.

"The next day there was a hearing in the case of Nellie Bright v. T. L. Bright before Judge Bond, and the case was continued, and I released the mule to C. O. Gore. Alton Gore claimed the mule. I rented the mule to C. O. Gore, the defendant, in the presence of Joe Byrd, and the understanding was he would keep the mule, and pay me a nominal price for the use of the mule, not exceeding \$3, provided Judge Bond ordered the mule to be returned back to Mrs. Nellie Bright, and they agreed to this. When Judge Bond ordered me to turn the property over to Mrs. Nellie Bright, I went to Mr. C. O. Gore, to whom I rented the mule, and told him what the order of the court was, and he said he would have to see his lawyer, and when he came back and told me he would not give up the mule, the matter went on for several days, and I did not take any other steps, and finally I did take claim and delivery."

This evidence shows that the plaintiff was appointed receiver in the case of Nellie Bright v. T. L. Bright; that as receiver he made demand upon the defendant for the possession of the property in controversy; that the defendant and his son surrendered the possession of the property to the plaintiff; that the plaintiff then rented the property to the defendant for a nominal rent, upon his

agreement to abide by the order of the court in the action in which the plaintiff was appointed receiver as to the disposition of the property; that the court ordered the property to be delivered over to Mrs. Nellie Bright, and that upon demand the defendant refused to surrender the property as he had agreed to do; and this, in our opinion, is ample evidence, if believed by the jury, to entitle the plaintiff to recover possession of the property.

There is error in the judgment of nonsuit.

Reversed.

(177 N. C. 227)

COX et al. v. KINSTON CAROLINA R. & LUMBER CO. et al.

(Supreme Court of North Carolina. March 26, 1919.)

1. APPEAL AND ERROR ⇐660(1)—DISMISSAL FOR FAILURE TO DOCKET—CERTIORARI—LACHES.

Where appellee was entitled to dismiss under Court Rule 5 (174 N. C. 823, 81 S. E. vii) and Rule 17 (81 S. E. ix), and moved to dismiss at 1:30 p. m. on a certain day, and appellant thereafter at 6 p. m. on same day moved to docket and asked for certiorari for case on appeal on ground that judge had not settled case on appeal, motion of the appellee will be granted, as appellant was guilty of laches.

2. COURTS ⇐85(1)—RULES OF COURT—OBSERVANCE.

The rules of Supreme Court are necessary for regular and orderly dispatch of business and not perfunctory, to be observed or not as the parties may choose, and, where not observed, the negligent party must pay penalty of his neglect.

3. APPEAL AND ERROR ⇐567(2)—SETTLING CASE—TIME.

The time in which cases shall be settled on appeal being statutory, the court below has no power to extend the statutory time.

4. APPEAL AND ERROR ⇐567(2)—SETTLING CASE—EXTENSION OF TIME—CONSENT OF PARTIES.

Although parties by consent may extend the statutory time for the settling of a case on appeal, such practice will not be encouraged.

Appeal from Superior Court, Lenoir County; Allen, Judge.

Action by James W. Cox, Jr., and others, against the Kinston Carolina Railroad & Lumber Company and others. From a judgment for plaintiffs, defendants appeal. Appeal dismissed.

By consent 30 days was given to serve case on appeal and 20 days thereafter to serve counter case. The appeal was required by the rules to be docketed here on or before Tuesday, February 25th, at 10 a. m.,

or the appellant was entitled to docket and dismiss under Rule 17 (81 S. E. ix), unless the case was docketed or a certiorari on good ground was applied for before the motion to dismiss was made.

Cowper, Whitaker & Hamme, of Kinston, for appellants.

J. S. Manning, of Raleigh, for appellees.

CLARK, C. J. Rule 5 of this court (174 N. C. 823, 81 S. E. vii) provides:

"Rule 5. *When Heard.*—The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under rule 17, if the appellee files a proper certificate prior to the docketing of the transcript."

[1] The appellee docketed and moved to dismiss at 1:30 p. m. on Saturday, March 1st, and was entitled to have the motion allowed. The appellant thereafter at 6 p. m. on the same day moved to docket and asked for a certiorari for the case on appeal upon the ground that the judge had not settled the case on appeal.

Without going into the controversy as to whose fault it was that the case was not settled in time, it is clear that the appellant was in laches in not applying for certiorari before the time at which under the procedure and practice of this court the appellee was entitled to docket and dismiss.

[2] As Judge Merrimon well observed in Walker v. Scott, 102 N. C. 490, 9 S. E. 488, the rules of the court are necessary for the regular and orderly dispatch of business and not perfunctory, to be observed or not as the parties may choose. If not observed, there would be a great waste of the time of this court in arguing whether or not the rule ought to be observed in a given case or ought not. It is absolutely necessary that these rules shall be observed and that a party who neglects to do so shall understand that he must pay the penalty of his neglect.

[3, 4] This court has always held that, the time in which cases shall be settled on appeal being statutory, the court below has no power to extend the statutory time. Gup-ton v. Sledge, 161 N. C. 213, 76 S. E. 527, and cases there cited. Though we have recognized the right of the parties by consent to extend the statutory time, it is not a practice to be encouraged and very frequently leads to such controversies as in this case. In this case, however, there was ample time to settle the appeal after the expiration of the extended time.

The appellee, having docketed the motion to dismiss, under rule 17, before the appellant filed his application for certiorari, was

within his rights and is entitled to have the appeal dismissed, and the motion for certiorari must be denied. The necessity of the court adhering to its rules has been repeatedly stated. Among other cases, this is discussed in *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *Vivian v. Mitchell*, 144 N. C. 477, 57 S. E. 167; *Lee v. Baird*, 146 N. C. 363, 59 S. E. 876.

We have, however, read the record with care and find no merits in the appeal which was probably taken merely for delay. In any event, the appellee is entitled to have his motion to dismiss allowed.

Appeal dismissed.

(177 N. C. 531)

WILLIAMS v. KEARNEY et al. (No. 250.)

(Supreme Court of North Carolina. March 26, 1919.)

1. USE AND OCCUPATION \Leftrightarrow 1—CHARGEABILITY WITH RENTAL VALUE.

Defendant, having had the use and possession of plaintiff's farm, and having been credited with repairs held chargeable with the rental value, in plaintiff's action to recover money due by note and open account.

2. APPEAL AND ERROR \Leftrightarrow 1144 — REMAND—FAILURE TO PASS ON ITEM.

Where plaintiff, suing to recover money due by note and open account, defendant pleading a counterclaim, on hearing of exceptions to referee's report produced check drawn by himself in favor of defendant, and contended it had been collected by defendant without crediting plaintiff, and court did not pass on contention, plaintiff's application to court will be treated as in nature of motion for new trial for newly discovered evidence, and cause be remanded, with direction to hear evidence and find facts, and to allow or disallow credit for check accordingly, though the judgment as modified is affirmed.

3. APPEAL AND ERROR \Leftrightarrow 1144—AFFIRMANCE—ADDITIONAL FINDINGS.

Where Supreme Court, though affirming judgment as modified, is not able to determine from referee's report, in action to recover money due by note and open account, just how far contentions of plaintiff as to items of account have been passed upon in findings of fact, trial court will be directed to make additional findings thereon.

4. APPEAL AND ERROR \Leftrightarrow 1022(2)—REVIEW—SUPPORT OF FINDINGS.

The referee's findings of fact, supported by evidence, and adopted by the trial court, are conclusive on the Supreme Court.

Appeal from Superior Court, Franklin County; Calvert, Judge.

Action by O. S. Williams against Isaac H. Kearney and another. From a judgment for

plaintiff for a less amount than claimed, he appeals. Judgment, except as modified, affirmed, with reservation, and cause remanded.

This is an action to recover money alleged to be due by note and by open account, in which the defendant pleaded a counterclaim.

The plaintiff alleges in his complaint that the defendant is indebted to him in the sum of \$10,000 or \$12,000, by note and open account, and the defendant in his answer admits part of the debt to be due and alleges that the plaintiff is indebted to him in the sum of about \$14,000, due by open account.

The accounts of the plaintiff and the defendant involve many items and cover several years.

The issues raised by the pleadings were tried before a referee and an account stated, and they were then heard by his honor on exceptions filed by the plaintiff to the report, and judgment was rendered in favor of the plaintiff for \$946.22 with interest from August 26, 1918, from which the plaintiff appealed, contending that he was entitled to a larger recovery.

T. T. Hicks, of Henderson, for appellant.
W. M. Person, of Louisburg, for appellees.

PER CURIAM. The defendant admits that there is a mistake in the account against the plaintiff of \$33.51 for sawing timber, and that he was in possession of the McGee farm and was allowed in the account \$288, for repairs made while in possession, and that he was not charged with the rental value of \$200.

[1] The judgment must be reformed in these two particulars, as the mistake as to the timber is admitted, and the defendant, having had the use and possession of the McGee farm, and being allowed for his repairs, is justly chargeable with the rental value.

[2] At the hearing of the exceptions before his honor, the plaintiff produced a check drawn by himself in favor of the defendant and showing on its face that it had been given for cotton seed, and contended that the check had been collected by the defendant, and that, although he had been charged with the value of the cotton seed, he had not been given credit for the check.

His honor, not understanding that the check was offered in evidence, did not pass on this contention of the plaintiff, and to the end that a true account may be stated, and treating the application of the plaintiff as in the nature of a motion for a new trial for newly discovered evidence, the cause is remanded, with the direction to hear evidence and find the facts, and to allow or disallow the credit for the check according as the facts are found.

The court is also directed to make more specific findings on the following contentions:

1. The plaintiff contends that the purchase price of the Hight land was \$3,775.50, and that the note executed for a part of the purchase money was \$3,303.56, and that he paid the difference between these two amounts and has been allowed no credit therefor.

This seems to be admitted by the defendant, but the fact is not specifically found by the referee or by the court.

2. The plaintiff contends that he paid for the Armory lot for the benefit of the defendant, and that certain cotton delivered to him and with which he has been charged, was in payment therefor, and that this ought to be stricken out, or that he ought to be credited with the price of the lot.

[3] We are not able to determine from the report just how far these contentions have been passed upon in findings of fact, and the court will therefore make additional findings thereon.

[4] The other exceptions of the plaintiff, except as to interest, which has not been pressed upon the argument because interest was not allowed on either account, involve practically findings of fact, supported by evidence, which are conclusive upon us, and the judgment, except as modified by correcting the mistake as to the timber and the rental value of the McGee lot, is affirmed, reserving, however, further modification of the judgment in accordance with the findings upon the three items herein specifically referred to, to wit, the check presented to his honor, the difference between the note executed and the purchase price of the Hight lot and the items of debit and credit as to the Armory lot.

Remanded.

(177 N. C. 248)

JONES-ONSLOW LAND CO. v. WOOTEN
et al. (No. 219.)

(Supreme Court of North Carolina. March 26, 1919.)

1. JUDGMENT ¶143(10)—DEFAULT—"EXCUSABLE NEGLIGENCE."

Failure of defendant to pay any attention to cause, though complaint had been on file six months and his counsel two months previously had left the county to enter the army, was not "excusable neglect."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

2. APPEAL AND ERROR ¶1024(4)—FINDINGS—REVIEW.

On appeal from order setting aside judgment by default final, the facts found by the trial judge are conclusive if there is any evidence on which to base findings.

3. APPEAL AND ERROR ¶842(1)—MATTERS OF LAW—REVIEW.

On appeal from order setting aside judgment by default final, whether the facts found constitute excusable neglect or not is a matter of law and reviewable on appeal.

4. JUDGMENT ¶145(2)—DEFAULT—SETTING ASIDE—MERITORIOUS DEFENSE.

Although the facts found justify conclusion that neglect was excusable, the court cannot set aside default judgment, unless there is a meritorious defense.

5. ADVERSE POSSESSION ¶73—ACTUAL POSSESSION—COLOR OF TITLE.

Where plaintiff has an unbroken chain of title running back to a grant issued about 1795, and defendants' claim of title runs back to a grant in 1893, any actual possession of defendants or those under whom they claim would be of no avail, in view of Revisal 1905, § 1699, providing that every grant made since March, 1893, of land theretofore granted shall constitute no color of title.

Appeal from Superior Court, Onslow County; Allen, Judge.

Action by the Jones-Onslow Land Company against J. S. Wooten and another. From an order setting aside a prior judgment by default final, obtained by plaintiff, plaintiff appeals. Reversed.

T. D. Warren and A. D. Ward, both of Newbern, for appellant.

Cowper, Whitaker & Hamme, of Kinston, for appellees.

CLARK, C. J. [1] This was a motion by J. S. Wooten, one of the defendants, to set aside a judgment by default final, rendered at October term, 1918, on the allegation that the judgment was irregular, and also on the ground of excusable neglect. There was no irregularity in taking the judgment, and upon the facts found the neglect of the defendant was not excusable.

This action was begun by the plaintiff, alleging that it was in possession and asking to set aside the claim of the defendant as a cloud upon title. The summons issued in June, 1913, returnable to Onslow. The complaint, duly verified, was filed at April term, 1918. There was no answer filed at that term, and the July term of the court was not held. At October term, 1918, no answer having been filed, the plaintiff took judgment by default final. The judge finds that the defendant originally employed T. C. Wooten, counsel residing at Kinston to defend him; that subsequently he dispensed with the services of said counsel, though it does not appear when, and employed J. Frank Wooten, counsel resident in Jacksonville, to attend to the case; that on August 15, 1918, said J. Frank Wooten entered the army, but he had not entered an appearance in the action, and

had filed no answer. It does not appear that the defendant had paid any attention to the cause at all, though the complaint had been on file six months and his counsel two months previously had left the county to enter the army, which must have been a matter well known to him. This was not such conduct as a man of ordinary prudence would have given to his important business matters.

In *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424, it is held:

"It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give to it that amount of attention which a man of ordinary prudence usually gives to his important business."

This case cites many others to same effect, and has itself been cited often since. See 106 N. C. Anno. Ed. Besides, it is not necessary to discuss the point, for there is no finding by the judge that the defendant has a meritorious defense, nor would the facts found have sustained such finding.

[2,3] Unless the judge finds that there was excusable neglect and this finding is correct as a matter of law, he is not authorized to set aside the judgment. The facts found by him are conclusive if there is any evidence on which to base such finding of fact. Whether the facts found constitute excusable neglect or not is a matter of law, and reviewable upon appeal.

[4] But even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269, where the subject is fully discussed with full citation of authorities. See, also, cases cited thereto in the Anno. Ed. In the recent case of *Glisson v. Glisson*, 153 N. C. 188, 69 S. E. 56, Brown, J., says:

"Unless the court can now see reasonably that defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside? *Jeffries v. Aaron*, 120 N. C. 169 [26 S. E. 696]; *Cherry v. Canal Co.*, 140 N. C. 423 [53 S. E. 138, 111 Am. St. Rep. 850, 6 Ann. Cas. 143]."

This is cited with approval by Walker, J., *Harris v. Bennett*, 160 N. C. 347, 76 S. E. 217.

In the still more recent case of *Lumber Co. v. Cottingham*, 173 N. C. 329, 92 S. E. 12, Walker, J., after citing and approving the analysis set out in *Norton v. McLaurin*, supra, says:

"It would be idle to vacate a judgment if there is no real and substantial defense on the merits. But we need not decide as to this

feature of the case, for there must be both excusable neglect and a meritorious defense, as the cases cited by us will show."

In *Crumpler v. Hines*, 174 N. C. 284, 93 S. E. 780, Allen, J., citing many authorities, says:

"One who asks to be relieved from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party."

[5] The judge further finds as facts that the plaintiff's and defendants' chain of title both cover the land in controversy; that defendants' chain of title is a grant March 10, 1898, *mesne conveyances* to T. C. Wooten, who on February 17, 1911, conveyed to the defendants by deed, which was recorded February 27, 1911; also that the "plaintiff's claim is under grant issued about 1795, which covers land in controversy, also under tax deeds, and connected with same by unbroken chain of title"; and also that it acquired the T. C. Wooten title (under which defendants claim) by lien which attached prior to the said Wooten's deed to defendants, by virtue of a regular sale under execution on a judgment against T. C. Wooten docketed in Onslow on February 10, 1911, 11 days before the deed from said Wooten to the defendants was registered, and 7 days before it purports to have been executed.

There is not only no finding, or evidence set out in any affidavit to justify such finding, of any actual possession by defendants or those under whom they claim; but, even if they had been in actual possession from the date of the grant, it would have been of no avail, as the grant was issued after 1893, to wit, March 10, 1898. Revisal, § 1699, provides:

"Every grant of land made since the sixth day of March, eighteen hundred and ninety-three, in pursuance of the statutes regulating entries and grants shall, if such land or any portion thereof has been heretofore granted by this state, so far as relates to any such land heretofore granted, be absolutely void for all purposes whatever, shall confer no rights whatever upon the grantee or grantees therein or those claiming under such grantee or grantees, and shall in no case and under no circumstances constitute any color of title * * * to any person whomsoever."

The statute was sustained in *Weaver v. Love*, 146 N. C. 414, 59 S. E. 1041.

Upon the facts found the defendant has not shown any meritorious defense, and the judge has not so found.

The judgment below must be reversed.

(177 N. C. 256)

BARNES et. al. v. SALEEBY et al.
(No. 105.)

(Supreme Court of North Carolina. April 2, 1919.)

1. JUSTICES OF THE PEACE ⇨161(1)—APPEAL—TIME FOR.

Appeals from justice's judgments should be docketed at the next term of the superior court.

2. JUSTICES OF THE PEACE ⇨161(1)—APPEAL—"NEXT TERM."

The phrase "next term," within rule requiring appeals from justice's judgments to be docketed at the next term, means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Next Term.]

3. JUSTICES OF THE PEACE ⇨161(1)—APPEAL.

The superior court has no power to permit the docketing of an appeal at a term subsequent to the one to which it should have been returned, though if the appeal is docketed it can allow for cause the notice of appeal to be entered nunc pro tunc.

4. JUSTICES OF THE PEACE ⇨161(1)—APPEAL—ABSENCE OF COURT AT ENSUING TERM.

An appeal from a justice of the peace to superior court should be docketed at the next ensuing term, though the judge did not attend such term; all matters pending thereat being carried over to the next term in view of Revisal 1905, § 1510.

5. JUSTICES OF THE PEACE ⇨202(1)—APPEAL—RECORDARI.

On appeal from a justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where superior court judge was absent from such next term, to file motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court.

6. JUSTICES OF THE PEACE ⇨161(1)—APPEAL—FAILURE TO DOCKET AT NEXT TERM.

Upon appellant's failure to docket appeal from justice of the peace to superior court at the next term, appellee, under Revisal 1905, § 608, could move to dismiss at such term, but his failure to so do did not estop him from asserting appellant's failure to docket appeal at the next term as a bar to the trial of the case in the superior court.

7. FRAUDS, STATUTE OF ⇨44(4) — PAROL LEASE FOR INDEFINITE PERIOD.

Landlord's verbal agreement not to rent property while it was occupied by tenant without first giving the tenant an opportunity to renew his five-year lease, being a verbal contract to lease for an indefinite period, is void under the statute of frauds.

8. LANDLORD AND TENANT ⇨86(1) — CONTRACT TO LEASE—CONSIDERATION.

Landlord's agreement during the lease, and not constituting part of lease, not to lease prop-

erty without first giving tenant an opportunity to renew lease was unenforceable, being without consideration.

9. FRAUDS, STATUTE OF ⇨129(7) — PAROL CONTRACT TO LEASE—IMPROVEMENTS.

That tenant had made improvements did not take landlord's parol agreement not to rent property while tenant was in occupancy, without first giving tenant opportunity to renew his lease, out of the statute of frauds.

10. FRAUDS, STATUTE OF ⇨129(5)—VERBAL CONTRACT TO LEASE—PARTIAL PAYMENT.

A partial payment of the purchase money or of lease money would not validate a verbal contract rendered void by the statute of frauds.

11. LANDLORD AND TENANT ⇨89½—RIGHTS OF TENANT—RENEWAL OF LEASE.

Tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease.

12. EVIDENCE ⇨441(4) — LEASE — PAROL AGREEMENT.

In the case of a written lease, evidence of an oral contemporaneous agreement to renew or extend the lease is not admissible to add to the written lease, in accordance with the general rule that evidence of oral contemporaneous agreements is inadmissible to add to or vary written contracts.

13. LANDLORD AND TENANT ⇨86(1)—OPTION TO RENEW—CONSIDERATION.

An option in the original lease to renew would not be without consideration, but a promise during the lease to give the tenant such option is without consideration.

14. APPEAL AND ERROR ⇨786—DISPOSITION—DISMISSAL.

Wherever it appears upon the record that no serious assignment of error is made, the appeal will be dismissed.

15. APPEAL AND ERROR ⇨786—DISMISSAL—FRIVOLOUS APPEAL—EFFECT OF BOND.

A frivolous appeal by hold-over tenant will be dismissed, though bond had been given for payment of rent, as landlord is entitled to his property.

Appeal from Superior Court, Wilson County; Bond, Judge.

Action by E. T. Barnes and another against G. R. Saleeby and others. From a judgment dismissing appeal from justice of the peace to the superior court, defendants appeal. Appeal dismissed.

This action—summary proceedings in ejectment—was begun before a justice of the peace in Wilson county on January 2, 1919, and heard the same day. Judgment for possession and for costs was rendered, from which the defendant, in open court, January 2, 1919, gave notice of appeal to the superior court, and filed with the justice a bond to stay execution. The next ensuing regular term of the superior court was scheduled by

statute to be held the week beginning January 13, 1919. The judge did not attend that term of the court, although the clerk had placed all cases returnable to and pending in the court on the docket. The justice before whom the case was heard did not make any return of the notice of appeal until February 1, 1919. The appellant did not file with the clerk any motion or papers of any kind, with reference to the case during the week commencing January 13, 1919.

A regular two-weeks term of the superior court of Wilson convened on February 3, 1919. On the first day of the term, the plaintiff made a motion, on notice to the defendant, to dismiss the appeal, stating that he desired the appeal dismissed, but if the defendant would consent to a trial of the case on its merits, the motion to dismiss the appeal would be withdrawn and the case tried on its merits. The court continued this motion until Thursday of that week, when the motion was again made; the plaintiff again offering to withdraw the motion if the defendant would consent to a trial of the case on its merits. The case could not be tried except by consent because of rule 24 of Practice in Superior Court (81 S. E. xix). Upon the defendants again declining to consent to a trial of the case on its merits, the plaintiff insisted on his motion, and judgment dismissing the appeal was entered as set out in the record. From the judgment dismissing the appeal the defendant gave notice, in open court, of an appeal to the Supreme Court, and filed bond for rent, to stay execution as provided by statute.

As appears from the certificate of the clerk of the superior court, the defendant has paid into the office of the clerk of the superior court \$70 rent due from January 1, 1919, to the date of the judgment, February 6, 1919.

On February 8, 1919, the appellees served notice on the appellant that motion would be made in the Supreme Court at the opening of court on Tuesday, February 18, 1919, to docket the appeal and dismiss same for the reason that the appeal was not taken in good faith from any error in the judgment, as would appear from an inspection of the record, but was taken merely for the purpose of delay.

This motion was made on February 18th, and the court ordered the transcript printed and the appeal placed at the foot of the calendar of the Seventh District for hearing.

John E. Woodard, of Wilson, for appellants.

W. A. Lucas, of Wilson, for appellees.

CLARK, C. J. The defendants entered into the possession of a store on Nash street in Wilson on January 1, 1914, under a written lease, by the terms of which the defendants were to make certain repairs, in consideration of which they were to enjoy the

occupancy of the premises at a stipulated rent for a term of five years ending December 31, 1918.

In the answer of the defendants to the motion made in this court to dismiss the appeal, the defendants say that after the repairs had been made and they had been in the possession of the property for two years or more, they approached the plaintiff, E. T. Barnes, and requested him to negotiate with them before the property was leased to others, and the plaintiff, Barnes, said that he would do so.

On January 1, 1917, the plaintiff, E. T. Barnes, in a written contract leased the property to the Barnes-Graves Grocery Company, his coplaintiff, for a term of three years commencing January 1, 1919, and immediately notified the defendants of this fact. On January 1, 1919, the defendants refused to vacate and surrender the possession of the property, and this action was instituted.

There was no error in dismissing the appeal from the justice of the peace. Judgment was rendered, and notice of appeal to the superior court given in open court when the judgment was rendered on January 2, 1919. The next term of Wilson superior court was January 13, 1919.

[1, 2] Appeals from justice's judgments should be docketed at the "next term." Barnes v. Railroad, 133 N. C. 131, 45 S. E. 531; Sondley v. Asheville, 110 N. C. 89, 14 S. E. 514; Ballard v. Gay, 108 N. C. 544, 13 S. E. 207. "Next term" means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. Blair v. Coakley, 136 N. C. 408, 48 S. E. 804; Johnson v. Andrews, 132 N. C. 376, 43 S. E. 926; Pants Co. v. Smith, 125 N. C. 588, 34 S. E. 552; Davenport v. Grissom, 113 N. C. 38, 18 S. E. 78; Sondley v. Asheville, supra.

[3, 4] The superior court has no power to permit the docketing of an appeal at a term subsequent to the one to which it should have been returned, though if the appeal is docketed it can allow for cause the notice of appeal to be entered nunc pro tunc. Davenport v. Grissom, supra; Abell v. Power Co., 159 N. C. 348, 74 S. E. 881. The fact that the judge did not attend the January term did not relieve the appellant of the duty of seeing that his appeal was properly docketed at the "next ensuing term." All matters pending at the January term were, by operation of Revisal, § 1510, carried over to the next term in the same plight and condition. State v. Horton, 123 N. C. 695, 31 S. E. 218.

[5, 6] If the defendant had filed his motion for a recordari during the week commencing January 13th, as it was his duty to do, then the motion would have gone over to the February term, and the rights of the defendant would have been preserved. Besides no merits were shown to justify the application for a recordari. It is true the appellee could

have docketed the appeal at the January term of the superior court and have moved to dismiss (Revisal, § 608), but this was optional and not a requirement, and failure to do this was not an estoppel upon the appellee. *Davenport v. Grissom*, supra.

In the third paragraph of the defendant's answer to the petition filed in this court for a dismissal of the appeal, the defendant attempts to justify his holding over after the expiration of the term, and uses the following words:

"In 1916, long before the expiration of his lease, the respondent, desiring to retain possession of said premises, so expressed himself, with interest and earnestness, to the petitioner, who, in the conversation referred to above, and upon several occasions, both prior and subsequent to that time, assured respondent that he had improved the property, had paid his rents promptly, and had, in every way, made an entirely satisfactory tenant, and that he would not rent the property while it was occupied by respondent, without first giving the respondent the refusal thereof, and an opportunity to renew his lease."

[7, 8] This was denied by the plaintiff, and, being on its face a verbal contract to lease for an indefinite period, is void; moreover, it is not enforceable because without consideration.

[9, 10] The allegation, if it were admitted, that, the defendant having made some improvements on the land, the plaintiff verbally promised to renew the lease, would not avoid the statute of frauds when pleaded. *Product Co. v. Dunn*, 142 N. C. 474, 55 S. E. 299. Even partial payment of the purchase money, or of lease money, would not validate a verbal contract rendered void by the statute of frauds.

[11, 12] "As between a landlord and his tenant, the latter, in the absence of an agreement therefor, has neither a legal nor an equitable right to a renewal of his lease, and, in the case of a written lease, evidence of an oral contemporaneous agreement to renew or extend the lease is not admissible to add to the written lease, in accordance with the general rule that evidence of oral contemporaneous agreements are inadmissible to add to or vary written contracts." 16 R. C. L. 883, and cases there cited. The promise here alleged to have been made during the term is void because not in writing and of uncertain duration.

[13] Even where the agreement is in writing, and in the lease itself, giving the lessee the "privilege of occupying the premises till such further time as he may wish on the same terms, the right to renewal has been denied upon the ground that the duration of the proposed new lease was uncertain." 16 R. C. L. 886. A fortiori is this true where the alleged agreement is oral, and is without any consideration to support it. An option in the

original lease to renew would not be without consideration, but "a promise during the lease to give the tenant such option is without consideration, besides being void if not in writing." 16 L. R. A. 886.

[14, 15] The plaintiff's motion to dismiss in this court should be allowed. Wherever it appears upon the record, as in this case, that no serious assignment of error is made, the appeal will be dismissed. *Blount v. Jones*, 175 N. C. 708, 95 S. E. 541; *Ludwick v. Mining Co.*, 171 N. C. 61, 85 S. E. 949. It is true that the defendant has given bond for the rent during the delay, but this does not deprive the plaintiff of his right to the custody of his own property. He may have leased the property to his coplaintiffs at a higher rent, or it may be that he has objection to the continuance of the defendant as his renter. Otherwise, he would doubtless have renewed the lease. It is not incumbent upon the plaintiff to show why he did not renew the lease to the defendant.

The defendant was offered opportunity in the court below at the February term to try his case, and did not choose to avail himself of it. In the court below, and here, the ground asserted by the defendant for retaining the plaintiff's property after the expiration of the lease is on its face invalid and frivolous.

There was no error in the dismissal of the appeal below, and the motion to docket and dismiss in this court is allowed. The plaintiffs should not longer be kept out of possession, without legal cause.

Appeal dismissed.

HOKE and ALLEN, JJ., concur in result.

(177 N. C. 251)

KEARNEY v. SEABOARD AIR LINE RY. CO. (No. 251.)

(Supreme Court of North Carolina. March 26, 1919.)

1. TRIAL ¶165—MOTION TO NONSUIT—CONSIDERATION OF EVIDENCE.

In passing upon a motion to nonsuit, the evidence in support of plaintiff's claim must be accepted as true and construed in the light most favorable to him.

2. RAILROADS ¶484(3)—FIRES—QUESTION FOR JURY.

Whether a train which passed at 3 p. m. caused the fire, which burned plaintiff's building at 2:30 a. m. the next morning, *held* for the jury.

3. NEGLIGENCE ¶117—CONTRIBUTORY NEGLIGENCE—IMPUTATION—PLEADING.

In action against railroad for negligent setting out of fire, the court properly refused to charge that, if an employé of plaintiff failed to put out the fire when by the exercise of the care of a prudent man he should have done so, the plaintiff

could not recover, where there was no averment in the answer as to contributory negligence, as required by Revisal 1905, § 483.

4. NEGLIGENCE §122(1) — CONTRIBUTORY NEGLIGENCE OF SERVANT—BURDEN OF PROOF.

In a negligence case, where defendant sets up contributory negligence of an employe of plaintiff, such defense must be proven by the defendant by the greater weight of the evidence.

5. NEGLIGENCE §90—CONTRIBUTORY NEGLIGENCE OF EMPLOYE—SCOPE OF EMPLOYMENT.

In an action against a railroad for damages caused by fire, plaintiff is not responsible for the negligence of an employe in failing to put out a fire, where putting out fires was not within the scope of the employe's employment.

6. APPEAL AND ERROR §216(2)—MATTERS REVIEWABLE—INSTRUCTIONS.

Where the court instructed clearly upon an issue, a party cannot complain that the instruction should have been fuller, where he asked no instruction upon such point.

Appeal from Superior Court, Franklin County; Stacy, Judge.

Action by I. H. Kearney against the Seaboard Air Line Railway Company.

This action is to recover damages for property alleged to have been burned by the negligence of the defendant. From a verdict and judgment for \$10,000, the defendant appealed. No error.

Murray Allen, of Raleigh, and B. T. Holden, of Louisburg, for appellant.

White & Malone, W. H. Yarborough, and W. M. Person, all of Louisburg, for appellee.

CLARK, O. J. [1] Owing to the amount involved, this case has required very full consideration of all the exceptions, but it really turned almost entirely upon controverted facts of which the jury were the arbiters. The plaintiff contended that the fire was due to the negligence of the defendant in permitting its right of way to become foul and its engine emitting sparks, which set fire to the right of way and thus destroyed his property. The defendant contended that the fire originated in the plaintiff's boiler room. The train alleged to have set out the fire passed about 3 p. m., and the fire was discovered raging about 2:30 next morning. There was evidence that there was a fire on the defendant's right of way after the train passed. There was evidence that this fire was put out by a clerk of the plaintiff, and circumstantial evidence that, though he attempted to put it out, he failed to do so. There was conflict in the testimony of the witnesses of plaintiff and of defendant as to what was the first building to burn. The plaintiff's witnesses testified that the building nearest the railroad burn-

ed first, while defendant's witnesses said the fire originated in plaintiff's boiler room, which was about the center of the lot. These were matters for the consideration of the jury, and there was sufficient evidence to be submitted to them tending to show that the fire resulted from the negligence of the defendant. It has been uniformly held by us that, in passing upon the motion to nonsuit, the evidence in support of plaintiff's claim must be accepted as true, and construed in the light most favorable to him. *Boney v. Railroad*, 175 N. C. 354, 97 S. E. 560. There is no need to review the evidence. The motion to nonsuit was properly denied.

[2] The defendant relies strongly upon the lapse of time between the passage of the train at 3 p. m. and the outbreak of the fire burning the buildings; but this was a matter for the consideration of the jury. In *Hardy v. Lumber Co.*, 160 N. C. 118, 75 S. E. 855, 42 L. R. A. (N. S.) 759, there was a lapse of 12 days, during which the fire seems to have smoldered. The question of proximate cause in this case was submitted to the jury in accordance with the principles and authorities in that well-considered case.

[3, 4] The other exceptions are settled by *Hardy v. Lumber Co.*, supra, and the cases therein cited. We need only to consider at more detail exceptions 18, 31, and 32, that the court refused to charge the jury that—

"If the jury shall find from the evidence that Emmett Edwards, as an employe of the plaintiff, failed to put out the fire when by the exercise of a prudent man he should have done so, the plaintiff could not recover."

There is no averment in the answer to support such a plea, which would be an allegation of contributory negligence. Revisal, § 483, specifically requires that such plea should have been set up in the answer. See *Hardy v. Lumber Co.*, supra. If this defense had been set up in the answer, and if there had been evidence tending to show that it was within the scope of Edwards' duty, still the prayer would have been defective, because such defense must be proven by the defendant by the greater weight of the evidence.

[5] Besides, though Edwards was an employe of the plaintiff, there is no allegation, and no evidence which tends to show, that it was within the scope of his duty to put out fires. He was a clerk or manager of the store. An employer is not responsible for the negligence of his employe outside the scope of his employment. Especially in respect to preventing damages from fire the rule is thus stated in 83 Cyc. 1346, note 56:

"An employe of the owner in another business not connected with the property is under no legal obligation to protect it, and his omission

to do so is not contributory negligence on the part of the owner."

[6] We do not think that the other exceptions require discussion. The court instructed clearly upon the question of proximate cause, and, though the defendant expects that the charge should have been fuller in that regard, the defendant asked no instructions upon that point. *Hardy v. Lumber Co.*, supra.

The charge of the court seems sufficiently clear and full. The defendant was charged in the complaint with negligence in two respects, and the plaintiff put on evidence to sustain both allegations, yet the defendant put on no evidence in denial of either the foul right of way or of negligence in putting out fire on such right of way. The controversy, as submitted to the jury upon the facts, was whether fire was set out by the negligence of the defendant, and whether the fire thus set out spread to and destroyed the plaintiff's property.

The amount involved justified the very thorough discussion in the argument and briefs here, and the facts were doubtless fully presented to, and thoroughly understood by, the jury, who have found their verdict in favor of the contentions of the plaintiff.

Upon the questions of law presented to us by the exceptions of the defendant we find—
No error.

(177 N. C. 279)

THOMPSON v. STANDARD OIL CO.
(No. 323.)

(Supreme Court of North Carolina. April 2, 1919.)

1. MASTER AND SERVANT §101, 102(1) — DUTY OF EMPLOYER—SAFE PLACE TO WORK.

Employer in exercise of reasonable care is required to furnish employes a safe place in which to work.

2. MASTER AND SERVANT §101, 102(1) — DUTY OF EMPLOYER—SAFE APPLIANCES.

Employer in the exercise of reasonable care is required to furnish employes implements, tools, and appliances suitable for the work in which they are engaged.

3. MASTER AND SERVANT §230(1)—INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—INEXPERIENCE.

The extent of injured employe's experience is not always necessarily controlling upon question of the employe's contributory negligence.

4. MASTER AND SERVANT §289(37)—JURY QUESTION—NEGLIGENCE OF MASTER.

Where employe was ordered to scotch moving car, and the only implement he had for such purpose was a pinch bar, which was inadequate, and the order given the employe was one calling for instant obedience, and one which was nat-

urally obeyed with the only implement the employe had, the submission to jury of the question of employer's negligence was not prejudicial to employer.

5. MASTER AND SERVANT §288(16) — ASSUMPTION OF RISK — OBEDIENCE OF COMMAND—USE OF INADEQUATE TOOL.

Where employe used pinch bar, the only tool furnished him, in effort to scotch moving car in obedience to order, and was injured because of inadequacy of pinch bar for such purpose, the submission to jury of question of assumption of risk was not prejudicial to employer; such order being one calling for instant obedience, and was naturally obeyed with the only implement the employe then had.

Appeal from Superior Court, Alamance County; Devin, Judge.

Action by Samuel Thompson against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. No error.

The action is to recover damages for injuries caused by the negligence of defendant company, the employer, in supplying plaintiff, an employe, with an improper tool or implement with which to do his work, to wit, placing a car on a railroad track in proper position, and by a negligent order as to the present use of said implement, given by a Mr. Fowler, who was there in personal charge of the work and who stood towards plaintiff and his coemployes in the position of vice principal. On denial of liability and pleas of contributory negligence and assumption of risk, the jury rendered a verdict for plaintiff, assessing substantial damages. Judgment on the verdict for plaintiff, and defendant excepted and appealed. There was no evidence offered by defendant, and the errors assigned are that, at close of plaintiff's testimony, his honor failed to instruct the jury as requested that, if they should find the facts to be as testified to by the witnesses, they must answer the issue of negligence and of contributory negligence and assumption of risk for defendant.

Parker & Long, of Graham, and Jas. H. Pou, of Raleigh, for appellant.

R. C. Strudwick, of Greensboro, and T. C. Carter, of Mebane, for appellee.

HOKE, J. From the admissions in the pleadings and the facts in evidence, it appears that, in July, 1917, plaintiff and one or two others, co-workers in the employment of the defendant company for the purpose, were engaged in placing a tank car of the company, then on the railroad track, in a proper position in reference to one of its subsidiary tanks, to the end that its contents might be emptied into the stationary tank by means of a hose, etc.; that the work was being done in the presence and under the personal supervision and direction of one

J. O. Fowler, also an employé of the company, and who stood towards plaintiff and his co-workers in the position of vice principal; that, the tank car being a short distance out of position and downgrade, plaintiff and his coemployés were "pinching" it upgrade using for the purpose a pinch bar supplied by said Fowler from the company's toolhouse on the premises. This pinch bar is not described in the record, but it is evidently an implement or a tool made of wood and iron, designed for pushing a car upgrade and affording a leverage, in part, by means of a long handle, fitted in some way into the contrivance or annexed as a part of it. It is sometimes spoken of, by the witnesses, as a crowbar, and it is evidently similar to some extent, though it is, as stated, in some way so constructed as to fit it for the purpose in which it was then being used. Speaking more directly to the occurrence, the plaintiff, testifying in his own behalf, said, among other things:

"The car was on the side track, south of the main track, and when we got there the car was not at the right place, and Mr. Fowler said, 'Boys, it has got to be pinched up a little; it is not at the place.' We pinched it up, and pinched a little too far ahead, and he applied the brakes and said, 'Boys, this car is a little too far ahead now.' He took a plough point and put in where he wanted the car to come; and he got back on the car to let the brakes off, so the car would come down, but the car stood still, and he said, 'Boys, get behind there and give it a little start.' I had the pinch bar, and I went behind and pinched it, and it started to rolling, and I made right back for the front, and I looked up, and Fowler was putting the brakes on, and he said, 'Scotch it! Scotch it!' And I put the bar under it, and that is all I know. Fowler called, 'Scotch it! Scotch it!' And I attempted to scotch it with the pinch bar. That was all I had to scotch it with. There were brakes on both ends of the car, and Fowler was on front, or west end of car. When we commenced to pinch he was on the car at the brakes, and he said, 'Boys, it is a little bit too far ahead now.' Me and Sam and Hoskins were pinching the car, and we pinched it too far east. Fowler put on brakes, and they held the car. The grade there slopes west. He told us to go behind, to the east end of the car, and give it a start. He had released the brake, and we pinched the car, and it began to roll west, and I came around on the south side of car and had pinch bar in my hand, and had gotten about middleways of car when Fowler said, 'Scotch it! Scotch it!' and I put pinch bar under front end of the car, and that is all I remember."

Other witnesses confirmed this statement, saying also: That just before getting on the car to manage the brakes Fowler put a plough point on the track to indicate where it should be stopped and, having directed his helpers to give the car a start, it rolled down the track, crushing the plough point, and he called to plaintiff, who had walked

forward with the bar in his hand, "Scotch it, Sam, scotch it!" That plaintiff in the endeavor to obey his order, put the end of the pinch bar before one of the wheels, when it was knocked up, the end striking plaintiff under the chin and knocking him onto the track and causing him to receive permanent and painful physical injuries. Further, Sam Caine, testifying for plaintiff, said:

"Mr. Fowler got on top of car and took off brakes, and it would not start, and he told us to give him a little start. Mr. Fowler had put plow point on track where he wanted car to stop. Me, Sam Thompson, and Hoskins went to east end of car and pinched it, and it started to roll west, and we started back to west end of car on south side, and Mr. Fowler said 'Scotch it,' and I don't know whether he said Sam or not, but Sam Thompson ran with the crowbar and put it under the wheel, and the crowbar hit him under the chin, and that knocked him into the middle of the track. I had started to get a stick of wood at the brickkiln, which was not far, when I saw Sam Thompson was struck. I went back to him and did not get the wood. Thompson was lying in middle of track, and his foot was mashed, and his head and tongue cut. When the car rolled on the plow point, it mashed it all to pieces. Sam Thompson had crowbar when Mr. Fowler said 'Scotch it,' and neither of the other two had anything. Mr. Fowler had provided nothing to scotch it with except plow point."

[1, 2] It is the accepted principle in this state that an employer of labor, in the exercise of reasonable care, is required to furnish his employes a safe place to work and provide them with implements, tools, and appliances suitable for the work in which they are engaged. *Kiger v. Scales Co.*, 162 N. C. 133, 78 S. E. 76; *Mincey v. Coast Line*, 161 N. C. 467, 77 S. E. 673; *Reid v. Rees Co.*, 155 N. C. 231, 71 S. E. 315; *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703. And it has been repeatedly held that the position may be recognized in the case of simple, ordinary tools, where the defect "is of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and it is further shown that the employer knew of such defect, or should have found it out under the duty of inspection ordinarily incumbent upon him in tools of that kind, etc. *King v. Atlantic Coast Line*, 174 N. C. 89, 93 S. E. 378; *Rogerson v. Hontz, etc.*, 174 N. C. 27, 93 S. E. 376; *Wright v. Thompson*, 171 N. C. 88, 87 S. E. 963; *Reid v. Rees*, 155 N. C. 231, 71 S. E. 315; *Mercer v. Railroad*, 154 N. C. 399, 70 S. E. 742, Ann. Cas. 1912A, 1002. And, in this connection, there are numerous decisions to the effect that the general directions or present and special orders of a boss or higher employé, one who represents the employer and stands towards the workmen in the position of vice principal, may be considered as a relevant fact when it is one from which in itself or in connec-

tion with the attendant circumstances the fact of negligence may be reasonably inferred. *Atkins v. Madry*, 174 N. C. 187, 93 S. E. 744; *Howard v. Oil Co.*, 174 N. C. 651, 94 S. E. 412; *Howard v. Wright*, 173 N. C. 339, 91 S. E. 1032; *Wade v. Contracting Co.*, 149 N. C. 177, 62 S. E. 919; *Holton v. Lumber Co.*, 152 N. C. 68, 67 S. E. 54; *Noble v. Lumber Co.*, 151 N. C. 76, 65 S. E. 622, 134 Am. St. Rep. 974; *Allison v. Railway*, 129 N. C. 336, 40 S. E. 91; *Patton v. Railway*, 96 N. C. 455, 1 S. E. 863.

Not only is an employer supposed, as a rule, to control the conditions under which the work is done and to have a more extended and accurate knowledge of such work and the tools and appliances fitted for same, but the order itself given by the employer or his vice principal directing the work, and the natural impulse of present obedience on the part of the employé, are additional and relevant facts to be considered in passing upon the latter's conduct in reference to the issue. Accordingly, several of the cases just cited are in illustration and support of the position that there is or may be a distinction in weighing the conduct of the employer and employé even when the principal objective facts are open to the observation of both. Thus, in *Patton v. Railroad*, supra, defendant was held liable for a negligent order which caused an employé to jump from a moving car, while the employé, obeying the order, was relieved of responsibility. The ruling apposite was stated as follows:

"One who is injured by jumping from a moving train is generally barred of a recovery by reason of his contributory negligence, but where a servant was ordered by his superior to do so in order to perform a duty for the company, it not appearing to the servant at the time that obedience would certainly cause injury, it was held, that there was no such contributory negligence as would prevent a recovery."

A similar position is approved in *Noble v. Lumber Co.*, supra, and in *Allison v. Railroad*, it was held:

"Where a section master fails to use reasonable care for the protection of persons working under him and one of them is injured, the * * * company is liable for the negligence of its servant."

And further:

"Where a section master orders a person under him to throw a hand car off the track to prevent a collision with a freight train and the employé is injured in the execution of the act, he is not guilty of contributory negligence."

[3] True, in several of these cases, it is made to appear, and weight is given to the fact, that the employé in question was inexperienced but this is not always or necessarily controlling, and, furthermore, in this instance it is not shown that these subordinates were regular employés of the company,

or that they had been doing work of this kind. On the contrary, it would seem from the record that they were engaged in other work and under another employer, and were called in and hired by Fowler, the vice principal, to do this particular job, and it is the natural, certainly the permissible, inference that they were inexperienced in the work they were then doing. And, in reference to the issue as to assumption of risk, the court, in *Wallace v. Power Co.*, 176 N. C. at page 561, 97 S. E. at page 612, speaking to the question, said:

"In the recent case of *Howard v. Wright*, 173 N. C. 339, 91 S. E. 1032, the position as it obtains here is stated as follows: 'The defense of assumption of risk is one growing out of the contract of employment, and extends only to the ordinary risks naturally and usually incident to the work that the employé has undertaken to perform, and does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties'—the opinion citing in approval *Yarborough v. Geer*, 171 N. C. 335, 88 S. E. 474; *Norris v. Holt-Morgan Mills*, 154 N. C. 474-485, 70 S. E. 912; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69; *Hicks v. Mfg. Co.*, 138 N. C. 319-327, 50 S. E. 703.

"Even in those jurisdictions where a different concept of assumption of risk prevails, as exemplified in the decisions of the federal courts construing the Employers' Liability Act [Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. §§ 8657-8665)], it is held that the position does not obtain in cases attributable to the employer's own negligent breach of duty, unless the conditions thereby created are of an enduring kind or under circumstances that afford to the injured employé a fair opportunity to know of these conditions and appreciate the risks and dangers which they present. *Gila Valley Ry. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; *Jones v. Railroad*, 97 S. E. 48, present term; *King v. Railroad*, 97 S. E. 29, present term."

[4, 5] Under the principles stated and upheld in these and other like authorities, there was no error, to the defendant's prejudice, certainly, in referring to the jury the questions of negligence, contributory negligence, or assumption of risk. It was admitted on the argument for the defendant that the pinch bar, the implement supplied by company, was not fitted for stopping the car, and that its use for that purpose threatened injury. The latter fact would seem to stand revealed from the evidence, and, the injury having undoubtedly resulted, defendant's liability on the first issue was practically conceded, and on the second and third issues the facts, showing that the car rolling down-grade had already run over and crushed the plow point, which Fowler, the boss, had placed to stop the car at the proper position, presented a case of emergency, and the order of Fowler to plaintiff, standing by in position with the bar in his hand and nothing else offered or available, "Scotch it, Sam,

scotch it!" was one calling for instant obedience, and was not unnaturally or unreasonably obeyed with the implement he then had. And these conditions having been presently created and, in part, influenced by the negligent order of the vice principal, affording to plaintiff no fair and reasonable opportunity to weigh or appreciate the danger attendant upon his act, there seems to be very little, if any, ground to support the defense either of contributory negligence or assumption of risk.

We find no reversible error in the record, and the judgment for plaintiff is affirmed.

No error.

(177 N. C. 243)

NOBLES v. NOBLES et al. (No. 170.)

(Supreme Court of North Carolina. March 28, 1919.)

1. QUIETING TITLE §6—ADVERSE CLAIM TO REMAINDER.

One claiming to own land in fee may maintain suit to quiet title against his children, asserting that he has only a life estate, with remainder in them.

2. WILLS §608(3)—ESTATE DEVISED—RULE IN SHELLEY'S CASE—"LEGAL REPRESENTATIVES."

Devise to O. for life, and then to his legal representatives, gives him a fee simple, under the rule in Shelley's Case; "legal representatives" being used as synonymous with "heirs of the body."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legal Representative.]

3. JUDGMENT §736—ESTOPPEL—JUDGMENT IN PARTITION.

A partition proceeding between O. S. & J., devisees of undivided interests, only contemplating a severance of the possession between them, and an affirmation of the division they had made by deed, judgment awarding O.'s share to him "and his legal representatives" did not estop him to claim, as against his children, that he had been devised a fee simple.

Appeal from Superior Court, Pitt County; Allen, Judge.

Action by Osborne C. Nobles, Sr., against Stephen F. Nobles and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The action was to remove a cloud on the title of plaintiff, claiming to own the land in fee simple under a devise in his mother's will as follows:

"Item 1. I give and devise to my son, Osborne C. Nobles, the home in which I now live, together with all the buildings and one-half of the tract of land on which they are situated, during his lifetime, then to his legal representatives;"

the other half of the land having been devised, one-fourth each to Stephen F. and

John C. Nobles. That, in 1910, Stephen F. and John C. Nobles, and plaintiff, Osborne C. Nobles, made an attempt to divide same, and executed deeds to each other in pursuance of their agreement, and on the theory that Osborne C. had a fee-simple interest in the portion of land divided to him. Question having been raised as to the fee-simple title of O. C. Nobles, with a view of perfecting the division and mutually assuring the title, a proceeding was instituted, and partition was made by commissioners duly appointed by the court, and in which the share of O. C. Nobles was allotted to "him and his legal representatives." It was contended and claimed by defendants, children of O. C. Nobles, that their father, under the devise, only had a life estate in the property, and that said defendants owned the remainder in fee.

There was judgment for plaintiff, and defendants excepted and appealed.

F. C. Harding, of Greenville, for appellee.

HOKE, J. [1] In *Setterwhite v. Gallagher*, 173 N. C. 528, 92 S. E. 370, speaking to the proper interpretation and effect of our statutes now controlling in actions of this character to remove a cloud from the title, the court said:

"Having reference to the board and inclusive language of the statute, the mischief complained of, and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner, and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all the plaintiff shall pay the costs."

And in same volume, *Smith v. Smith*, 173 N. C. 124, 91 S. E. 721, the principles so stated were applied to a case like the present, where the father, claiming to own the land in fee, was allowed to maintain a suit against the children, who asserted that he only had a life estate in the property, with the remainder to his said children.

[2] Coming, then, to the principal question, we concur in his honor's view that the devise in his mother's will, "to my son Os-

borne C. Nobles the home and buildings and one-half the land for his lifetime, and then to his legal representatives," confers upon the devisee a fee-simple estate in the property under the rule in Shelley's Case. The principles of this notable case have been discussed and applied in several of our later decisions, and the rule appearing in Coke's Reports and Preston on Estates is given, respectively, as follows:

"That, when an ancestor by any gift of conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word 'heirs' is a word of limitation of the estate, and not a word of purchase." 1 Coke, 104.

And in Preston on Estates:

"When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs or the heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

So stated, the rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that, when the terms of the instrument, by correct interpretation, convey the estate in remainder to the heirs of the first taker as a class "to take in succession from generation to generation," to the same persons as those who would take as inheritors under our canons of descent, and in the same quantity, the principle prevails as a rule of property, both in deeds and wills, and regardless of any particular intent to the contrary otherwise appearing in the instrument. *Crisp v. Biggs*, 176 N. C. 1, 96 S. E. 662; *Cohoon v. Upton*, 174 N. C. 88, 93 S. E. 446; *Ford v. McBrayer*, 171 N. C. 421, 88 S. E. 736; *Robeson v. Moore*, 168 N. C. 389, 84 S. E. 351, L. R. A. 1915D, 496; *Jones v. Whichard*, 163 N. C. 241, 79 S. E. 503; *Price v. Griffin*, 150 N. C. 523, 64 S. E. 372, 29 L. R. A. (N. S.) 935; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459. It will be noted that in both Coke and Preston, supra, the words "heirs or heirs of the body" are used in defining the estate in remainder; but in the case of wills, and in courts and instruments which permit and recognize other words as their equivalent and as descriptive of all those who will take in succession by reason of their hereditary blood, such words are not essential, and the rule is effective where the equivalent of heirs or heirs of the body are used in defining the estate in remainder. In the very full discussion of the subject by my Lord Macnachten, appearing in *Gruen v. Foxwell*, Appeal Cases, L. R. 1897, 658 (case

of a will), after stating the rule as given in Coke's Rep., on pages 667-669, he proceeds as follows:

"Every part of that statement is, I think, deserving of attention from the opening words, which declare the rule to be 'a rule of law,' to the last clause, which says, 'the heirs can never take by purchase in a case where the rule applies.' It is hardly necessary to observe that any expression which imports the whole succession of hereditary blood has the same effect in bringing the rule into operation as to the word 'heirs,' though perhaps it was not always so."

And again, at page 676:

"The authority of *Jesson v. Wright* was restored, and its supremacy finally established, in *Roddy v. Fitzgerald*, and the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression having like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of successors capable of inheriting."

And in the same case my Lord Davy expresses himself as follows:

"In my opinion the rule in Shelley's Case is a rule of law, and not a mere rule of construction; i. e., one laid down for the purpose of giving effect to the testator's expressed or presumed intention. The rule is this: that wherever an estate for life is given to the ancestor or propositus, and a subsequent gift is made to take effect after his death, in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs, or heirs of his body, or heirs male of his body, or whole inheritable issue, taking in a course of succession, the law requires that the heirs, or heirs male of the body, or issue, shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary."

In *Yarnall's Appeal*, 70 Pa. 335, interpreting a will, it was held, among other things:

"If the testator intends the estate to go to the whole line of descent, lineal and collateral, he means 'heirs.' * * *

"The rule in Shelley's Case is not a real exception to the rule that the intention of the testator must guide in interpreting a will; it sacrifices a particular to a general intent. * * *

"'Heirs,' 'heirs of the body,' 'issue,' 'children,' 'sons,' and similar expressions are words of limitation or purchase, according to the intent of the testator in each particular will."

In the extended and valuable note on several decisions discussing the rule in Shelley's Case, among others *Price v. Griffin*, 150 N. C. 523, 64 S. E. 372, which appears in 29 L. R. A. (N. S.) at page 1014, the author says:

"In the statement of the rule in the argument in Shelley's Case the words of limitation used are 'heirs' or 'heirs of the body.' To bring the rule into operation, however, it is not necessary always to use such words. Equivalent expres-

sions will do. When the statement is made that the word 'heirs' must be used, what is meant is that the word 'heirs' or equivalent words are necessary."

In the case of wills the same position is approved by the standard text-books on the subject, uniformly, so far as examined. 3 Jarmon on Wills, p. 116; 2 Underhill on the Law of Wills, p. 890; Powell on Devises, 22 L. Library, vol. 2, pt. 2, p. 435; Tiedeman on Real Property, § 434; Burdick on Real Property, pp. 370, 371. In the citation to Jarmon the author says:

"In respect to the limitation to 'heirs,' we have before suggested that it is immaterial whether they are described under that or any other denomination, since it is clear that, in any case in which the word 'issue' or son has been construed as a word of limitation, and follows a devise to the parent for life or for any other state of freehold, he becomes tenant in tail by the operation of the rule in Shelley's Case. The words in question are used as synonymous with 'heirs of the body,' and consequently the effect is the same as if those words had been actually used; and upon the same principle, in the converse case, where the words 'heirs of the body' are explained to mean some other class of persons, the rule does not apply."

In *Handy et al. v. McKim*, 64 Md. 561, 4 Atl. 125, the court was construing a deed, and the application of the rule was denied on the ground that in that jurisdiction, and as to a common-law deed, only the word "heirs," or "heirs of the body," would suffice to describe all of those who could take by inheritance.

And in *Zane v. Weintz*, 65 N. J. Eq. 216, 55 Atl. 641, in a bill for specific performance, relief was denied on the ground chiefly that the construction of the particular instrument was attended with so much doubt that defendant would not be compelled to accept the title; but, both in this case and the one preceding, it seems to have been conceded that at common law, and unaffected by statute controlling the question, in case of a will the word "heirs" or "heirs of the body" were not necessarily required for the operation of the rule in Shelley's Case, but that equivalent words would suffice. This being the established position, it is very generally held here and elsewhere that, in construing a will which makes disposition of real estate to one and his legal representatives, with nothing in the instrument to qualify or restrict their import, the words "legal representatives" should be considered as the equivalent of heirs, and the quality and quantity of the estate determined in reference to that interpretation. *Little et al. v. Brown*, 126 N. C. 752, 36 S. E. 175; *Moore v. Quince*, 109 N. C. 85-90, 13 S. E. 872; *Ewing v. Jones*, 130 Ind. 247, 29 N. E. 1057, 15 L. R. A. 75; *Olney v. Lovering*, 167 Mass. 446; 2 Underhill on

Wills, p. 852, § 638. And a correct deduction from these principles is in full support of his honor's ruling that under the will of his mother, and by operation of the rule in Shelley's Case the plaintiff becomes the owner of the land in fee simple.

[3] The objection that the plaintiff is estopped from asserting such ownership by reason of the proceedings for partition is without merit. The record of that proceeding is not sent up, but it is very apparent that the partition in question only contemplated a severance of the possession between the tenants, and in affirmance of the division that the owners had already made by their deeds. As a general rule, a judgment does not work an estoppel of record as between parties supposed to represent the same interest, unless their rights and interests have been made the subject of inquiry and decision, nor, in any event, does an adversary judgment constitute an estoppel as to matters beyond the scope of the issues as presented and embraced in the pleadings. *Weston v. Roper Lumber Co.*, 162 N. C. 165, 77 S. E. 430, Ann. Cas. 1915A, 931; *Holloway v. Durham*, 176 N. C. 550, 97 S. E. 486; *Hobgood v. Hobgood*, 169 N. C. 485, 86 S. E. 189.

We find no error in the record, and the judgment for plaintiff must be affirmed.

Affirmed.

(177 N. C. 271)

In re GORHAM. (No. 287.)

(Supreme Court of North Carolina. April 2, 1919.)

1. WITNESSES ⇨140(2, 19) — TRANSACTIONS WITH DECEASED PERSONS — "INTEREST" OF WITNESS.

The interest which disqualifies one from testifying under Revisal 1905, § 1631, relating to transactions with deceased persons, is a direct, legal, or pecuniary interest in event of the action, and such statute did not apply to testimony of one to whom an administrator paid a claim in a controversy between administrator and widow of deceased in which widow was seeking to have administrator account for amount so paid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

2. JUDGMENT ⇨747(2)—RES JUDICATA—PARTITION—DOWER.

A decree in a petition to sell land for assets, not purporting to finally adjudicate the rights of a widow as to dower in the proceeds of sale, providing that after payment of \$2,600 to a bank, not a party to the proceeding, entire funds should be subject to the further order of the court, cannot operate as an estoppel to prevent administrator in a controversy involving amount of dower from showing that amount really due bank was a much greater sum.

3. DOWER \Leftrightarrow 88, 107—ACCOUNTING—RENTS AND INTEREST.

A widow is entitled to an accounting of the rents and profits from lands in which she is entitled to dower from the death of her husband up to the time of sales of the land, and, after the sales, to interest upon the value of her dower in the proceeds.

4. DOWER \Leftrightarrow 107—LIABILITY OF HEIR—RENTS AND PROFITS.

Under rule that a widow is entitled to an accounting as to rents and profits in lands in which she is entitled to dower, heir is not chargeable as a trustee, but only with rents received while dealing with property in good faith, or for the reasonable value of premises if occupied by himself.

5. DOWER \Leftrightarrow 100—PURCHASE OF LANDS BY WIDOW—ACCOUNTING.

Where lands subject to dower rights are sold and are bid in by widow, who does not then pay the amount of the bid, she is on final settlement entitled at her election to take one-third of the rents collected after the sale or interest on the amount of her dower, but she is chargeable with interest on purchase price.

Appeal from Superior Court, Cumberland County; Lynn, Judge.

In the matter of the estate of John C. Gorham, deceased. Submission of controversy between E. E. Gorham, administrator, and Mrs. Georgia Chedester. From an adverse decree, the latter appeals. Modified and affirmed.

A controversy having arisen between E. E. Gorham, administrator of the estate of John C. Gorham, and the commissioner appointed to sell the lands of his intestate to create assets for the payment of the debts of the estate, on the one hand, and Mrs. Georgia Chedester, the intestate's widow, who has since married H. C. Chedester, on the other, and wishing the same to be determined without action, they submitted a case the material parts of which are as follows:

(1) That John C. Gorham died intestate, February 28, 1910, leaving him surviving the aforesaid widow, a brother, and sisters.

(2) That E. E. Gorham qualified as administrator upon his estate March 10, 1910; the widow renouncing in his favor.

(3) That in May, 1911, said administrator filed a petition to sell intestate's lands, to make assets to pay his debts, to which ex parte proceeding the widow and heirs at law of the intestate and F. H. Cotton and wife, Ila H. Cotton, as well as E. E. Gorham as an individual, were parties, which petition and all of the orders, reports, judgments, and decrees therein are hereby made a part hereof, and asked to be so considered.

(4) That at a public sale of some of the lands on December 16, 1912, the intestate's widow became the successful bidder for the

first or residence tract, at the price of \$9,200, and upon report thereof the same was confirmed on May 12, 1913.

(7) That by agreement the \$9,200 was not paid, but was to await the determination of her claims against the estate, and she and the administrator have been constantly endeavoring to ascertain the exact amount due her by him so that she could pay the difference, if any, between such sum and the amount of her said bid.

That the administrator rented the said residence from July 10, 1912, until October 10, 1917, the amount of rent (\$1,890) being used by him as assets in his hands, for the payment of debts of the estate, and his annual accounts are made a part thereof, and asked to be so considered.

(13) That prior to the filing of the aforesaid petition in May, 1911, there was another special proceeding in said court, to which the administrator of John C. Gorham and the intestate's widow and heirs at law were parties, and also F. H. Cotton and his wife, numbered 2,066 and 2,214 on the special proceeding docket, in which E. E. Gorham was appointed commissioner to sell the McKethan lots Nos. 5, 6, 7, and 9, alleged and adjudged to have been owned by intestate and F. H. Cotton, under authority of which the said commissioner sold lots 5, 6, and 7 for \$2,900 on December 1, 1910, and lot No. 9, February 8, 1912, for \$1,600.

It was further alleged in the petition and adjudged by the court that the indebtedness due the bank on the purchase price of said lots was about \$2,600. The aforesaid proceeding is made a part hereof, and asked to be so considered. The administrator now contends that his intestate and F. H. Cotton were not in fact the owners of the said McKethan lots, but were the selling agents for the Bank of Fayetteville, who were the owners, and that they had taken title thereto to facilitate a conveyance of the same; that under the terms of the selling agreement with the bank the administrator turned over all proceeds of sale to the bank and received \$275 as full payment of the amount due the estate of John C. Gorham on the sale of all the said lots; and that the allegations of the petition and the judgment rendered thereon were based upon such information as the administrator then had as to the ownership of said lots and the indebtedness due thereon, and which information he believed to be true at the time said petition was filed and judgment rendered, but which information he afterwards found to be incorrect and the facts to be as hereinbefore stated. Mrs. Chedester pleads the said proceeding as an estoppel against such claim and contention. She denies that John C. Gorham and F. H. Cotton were not the owners of said lots. Subject to her denial and plea of estoppel as aforesaid, it is agreed that the judge to

whom this controversy is submitted may hear competent evidence on this point and find the facts in regard thereto.

It was also agreed that the administrator was due Mrs. Chedester certain amounts from the proceeds of sales of certain lands as the value of her dower interest, but the parties could not agree as to the dates from which these amounts would bear interest.

The special proceedings referred to in the findings 8 and 13 were ex parte and were for the purpose of selling the McKethan lots for assets.

It was alleged in the petition in these proceedings that F. H. Cotton was owner of an undivided one-half interest in said lots, and that the heirs of John O. Gorham were the owners of the other one-half subject to the dower, and that all of said interests were subject to the claim of the Fourth National Bank of Fayetteville for \$2,600, the balance of purchase money, and the decrees of confirmation in the proceedings were in accordance with the allegations in the petition and recited the several interests as therein set forth.

The decree further required the administrator to collect the purchase money, total of the McKethan lots \$4,500, pay off the bank debt, and hold one-half of the balance for distribution under the orders of the court.

The bank was not a party to the proceeding.

The McKethan lots were conveyed by the Bank of Fayetteville to the Southern Real Estate Company and then by the Southern Real Estate Company to Frank H. Cotton and John C. Gorham.

At the hearing of the agreed case, the administrator was permitted to prove by John O. Ellington and Dr. Lilly, officers and stockholders of the bank, that at the time Cotton and Gorham took the title to said lots there was a written agreement, which was lost, that they would hold the title to the lots, as selling agent for the bank to repay a larger sum than \$2,600, and that, after the sales were made and upon a settlement in accordance with the agreement, there was only \$275 which went into the hands of the administrator from the McKethan lots, and this was paid as commissions for making the sales.

Mrs. Chedester objected to this evidence:

(1) Because Ellington and Lilly were incompetent to testify under section 1631 of the Revisal. (2) Because the administrator was estopped by the special proceedings to show that more than \$2,600 was due to the bank.

His honor found upon this evidence:

"That Gorham, administrator and commissioner as aforesaid, is not estopped by the proceedings for the sale of said property, and that Cotton and Gorham held the same as selling agents for the bank, and that intestate's estate was entitled to \$275 as commissions, and that Mrs. Chedester is not entitled to dower in said property."

Mrs. Chedester again excepted.

His honor entered judgment upon the agreed case from which Mrs. Chedester appealed, assigning as error, in addition to the exceptions before stated, the following:

(1) "For that the court did not find and adjudge that Mrs. Chedester is entitled to interest on the value of her dower from February 28, 1910, the date of the death of her former husband John Gorham, and that, if she is not entitled to it from that date, then from the filing of the petition for the sale of the McKethan lots as to them, to wit, November 19, 1910, and from the filing of the petition as to all the other lands, to wit, May, 1911, and that in no event should the interest be calculated for a less period of time than from March 10, 1912, which is two years after the qualification of E. E. Gorham as administrator, as claimed and contended for in the case agreed, paragraphs 15 (a) and (b)."

(2) "For that the court did not find and adjudge that she is entitled to interest on the value of her dower in the home place in accordance with her contentions as above set forth in the twenty-second assignment, instead of from September 18, 1916, the date of Judge Winston's judgment in the former action between the parties concerning her claim for lien on said property, during which time the administrator received the rents therefor."

The facts and rulings thereon entering into the judgment of Judge Winston will be found in 173 N. C. 272, 91 S. E. 950.

Sinclair & Dye, of Fayetteville, for appellant Mrs. Chedester.

Q. K. Nimocks, of Fayetteville, for appellee administrator.

ALLEN, J. The appeal presents three questions for decision:

1. Were the witnesses Ellington and Lilly competent, under section 1631 of the Revisal, to testify that Cotton and Gorham held the title to the McKethan lots as selling agents for the bank of which they were stockholders?

2. If competent to testify, is the administrator estopped by the special proceedings to sell lands for assets?

3. What are the rights of the widow of John C. Gorham as to interest on the value of her dower in the proceeds of lands sold and as to rents?

[1] 1. The interest, which disqualifies one from testifying under section 1631 of the Revisal, is a direct, legal, or pecuniary interest in the event of the action (*Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241, L. R. A. 1917A, 1), and as the bank has been paid in full, and there is no effort to make it refund any part of the money collected, and it is in no way interested in the result of this action, there is nothing which disqualifies the witnesses Ellington and Lilly to testify.

Besides, they were not necessarily testifying to a conversation or transaction with the deceased, but as to the contents of a lost

paper, and their testimony was in behalf of the administrator and not against him.

[2] 2. The decree in the petition to sell land for assets did not purport to finally adjudicate the rights of the widow as to dower in the proceeds of sale, and, on the contrary, it only gave her a dower right in the interest of John C. Gorham after payment of the amount due the bank, stated to be \$2,600, and left the entire funds subject to the further order of the court.

The bank was not a party to the proceeding, and its debt was not in issue, nor was it litigated, and the amount was stated simply as one of the reasons for asking for a sale of the lands, and the proceeding therefore cannot operate as an estoppel to prevent the parties from showing the true amount due to the bank.

The case of *Latta v. Russ*, 53 N. C. 111, which is approved in *Austin v. Austin*, 132 N. C. 265, 43 S. E. 827, 95 Am. St. Rep. 637, and in *Trust Co. v. Stone*, 176 N. C. 272, 97 S. E. 8, is in point.

There a petition was filed to sell land for assets, in which the several debts were stated and decrees of sale and confirmation entered, the lands sold, and the proceeds applied to the payment of debts. The administrator then died, and an action was commenced for an accounting of the estate, in which a referee found that, allowing credits for vouchers, there remained in the hands of the administrator \$882.22; but, if the debts be allowed as stated in the decrees, there would be in hand only \$252.45.

The judge of the superior court held that the decrees were binding on the parties as to the amount of the debts as stated in the petition, but this was reversed on appeal; the court saying:

"We do not concur with his honor, in the view taken by him of the question reserved, in respect to the effect of the decree giving the administratrix license to sell the land. That decree was an adjudication that it was necessary to sell, and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question of debt or no debt, as against or in favor of creditors, or as against or in favor of the heirs."

As the evidence was competent, and as there is no estoppel, the finding thereon by his honor is binding on us and concludes the claim of the widow to dower in the McKethan lots.

3. The claim of the widow for dower, while paramount to that of the heir, is not an estate but a right until allotment. *Spencer v. Weston's Heirs*, 18 N. C. 214.

"It is true, indeed, that she cannot enter until assignment made; and that in point of tenure, for feudal reasons, she holds of the heir or of the person in whom is the reversion of the land assigned for dower. But, in point of title, her estate does not arise or take effect out of the ownership of the heir or other person making the assignment, but is considered a continua-

tion of that of the husband; and, although between the death of the husband and the assignment of dower a seizin of the heir or another person intervenes, yet upon the assignment she is in by relation from the death of the husband; for 'the law adjudgeth no mesne seizin between the husband and wife.' Perkins, § 414; Co. Lit. 241." *Norwood v. Marrow*, 20 N. C. 584, approved in *Love v. McClure*, 99 N. C. 295, 6 S. E. 247, 250, and in other cases.

This being the nature of the estate, it was held at common law to be the duty of the heir to allot dower to the widow immediately upon the death of the husband, and under *Magna Charta* she could remain in the mansion house 40 days until the allotment was made, called her right of quarantine, and, upon default on the part of the heir, she could sue out her writ of dower, but, although establishing her right, she could not recover damages, nor was she entitled to an accounting of the rents and profits. This remained the law until the Statute of Merton, 20 Henry III, which not only perfected the process for the assignment of the dower, but also stimulated the heir to activity by permitting the recovery of damages for the detention of the dower.

The proceeding was at first in the courts of the common law; but, the broader and more generous rules of equity being better adapted to adjust the rights between the heir and the widow, it soon became recognized as within the jurisdiction of courts of equity (9 R. C. L. 608 et seq.), and in this state, while a statutory remedy, by proceeding before the clerk, is afforded, the jurisdiction of the courts of equity has not been disturbed, although usually some equitable element, such as the necessity for an accounting, must be alleged. *Efland v. Efland*, 96 N. C. 488, 1 S. E. 858, and cases cited.

The recovery under the Statute of Merton, and under our statutory remedy, was "not rents (which suppose a privity of estate), but damages for the detention of her dower; in assessing which, the value of the rents is the proper guide to the jury" (*Sutton v. Burrows*, 6 N. C. 81), and it was held, with some hesitation, that at law the damages could only be recovered from demand (*Spencer v. Weston's Heirs*, 18 N. C. 216, approved *Brown v. Morisey*, 126 N. C. 772, 36 S. E. 284).

"But it has been long settled that, in equity, a widow is entitled to an account of the mesne profits, from the death of the husband up to the assignment of dower. Indeed, this was one of the grounds upon which that court assumed jurisdiction." *Pearson, J.*, in *Campbell v. Murphy*, 55 N. C. 364.

[3] Applying these principles, this proceeding being in equity, we are of opinion that the widow, Mrs. Chedester, is entitled to an accounting of the rents and profits from the death of her husband up to the time of the sales of the several lots of land in which she

was entitled to dower, and after the sales to the interest upon the value of her dower in the proceeds of the sales, and the case of *Campbell v. Murphy*, supra, is a direct authority upon both questions.

In that case Marsden Campbell, the husband, died in 1841, and his heirs rented the property until the buildings were destroyed by fire in 1843. In 1844 the land was sold under order of court for \$4,000, and the court held that the widow was entitled to recover the rents from 1841, the time of the death of the husband, until 1843, this being the time when the heirs rented the property, and that she was entitled to interest upon one-third of \$4,000 for which the land was sold under order of court.

The court says:

"It must be declared to be the opinion of the court that the plaintiff is entitled to recover from the defendant Murphy the interest upon one-third of the sum for which the lot was sold at the sale, made by the clerk and master mentioned in the pleadings, to wit, \$4,000, from the date of that sale up to the taking of the account; and also interest upon such third part of the purchase money, to be paid annually, up to the time of her death, for which the plaintiff will have a lien upon the premises as security, unless she elects to take the bond of the said Murphy, with approved sureties, in lieu thereof; or the plaintiff may elect to take a decree for such part of the purchase money aforesaid, absolutely, with interest from the date of the sale, as is equal to the value of her life estate in one-third part thereof; as to which there may be a reference."

And again:

"These defendants insist that they are not chargeable with the rent received by them for the house, from the death of the husband up to the time it was burnt.

"There was no judgment for damages in a writ of right, or a writ of entry, or a writ of dower at common law, on the ground that the terre-tenant during the time he was seized, had performed the feudal services. Damages were given against a disseisor by statute in an assize of novel disseisin; and damages are given to the widow by the Statute of Merton in a writ of dower unde nihil; but it has been long settled that in equity a widow is entitled to an account of the meane profits, from the death of the husband up to the assignment of dower. Indeed, this was one of the grounds upon which that court assumed jurisdiction."

[4] It will be observed that under this doctrine the heir is not chargeable as a trustee, but only with the rents received while dealing with the property in good faith, or for the reasonable value of the premises if occupied by himself.

[5] These principles also cover the claim of the widow in the proceeds of the sale of the lot bought by her, except that she may, at her election, take one-third of the rents collected after the sale in lieu of interest for

the period covered by the rents, and she will be chargeable with interest on the purchase price.

The judgment will be modified in accordance with this opinion after the parties have agreed upon the amounts allowed the widow or after the facts have been ascertained by a reference.

Modified and affirmed.

(177 N. C. 609)

BRYANT MFG. CO. v. HESTER et al.
(No. 284.)

(Supreme Court of North Carolina. April 2, 1919.)

1. REGISTER OF DEEDS ⇐6—MORTGAGES—FAILURE TO INDEX AND CROSS-INDEX—LIABILITY.

Failure of a register of deeds to properly index and cross-index a mortgage on timber, as required by Revisal 1905, §§ 2658, 2665, does not render him liable to one subsequently lending money and taking a mortgage, where latter's negligence was proximate cause of his losses.

2. ATTORNEY AND CLIENT ⇐104—NOTICE TO ATTORNEY.

Knowledge of an attorney and opportunity to know, in making an examination of the records to find whether timber was unincumbered, will be imputed to his client.

3. REGISTER OF DEEDS ⇐6—IMPROPER REGISTRATION OF MORTGAGE—DAMAGES.

In an action against a register of deeds for a failure to index and cross-index a mortgage on timber, as required by Revisal 1905, §§ 2658, 2665, one lending money on the security of the timber cannot recover more than nominal damages, unless he shows that the timber is not of sufficient value to satisfy the prior incumbrance and also to reimburse him; it being incumbent on him to establish the amount of his loss.

Appeal from Superior Court, Bladen County; Calvert, Judge.

Action by the State, on the relation of the Bryant Manufacturing Company, against R. J. Hester and others. Judgment for plaintiff, and defendants appeal. New trial.

The action is against the register of deeds of Bladen county and the surety on his official bond to recover damages alleged to have been caused by the register's negligence in failing to properly index and cross-index a prior mortgage, whereby the relator of plaintiff, holding a record mortgage and contract, suffered substantial damage. The court ruled that liability on the part of defendant was admitted in the pleadings, and the issue was only on the question of damages. The cause was then submitted to the jury on the following issues, defendant excepting:

"(1) Did the plaintiff advance money to Moore & Moore upon the execution of the mortgage by Moore & Moore to the plaintiff to secure the same, and, if so, what amount?

"(2) Were Moore & Moore entitled to any credits on the amount so advanced by the plaintiff, and, if so, what was the amount of such credit?

"(3) What amount is the plaintiff entitled to recover?"

The court then charged the jury, if they found the facts to be as testified to by the witnesses, they would answer the first issue, Yes; \$2,000; second issue, Yes; \$758.85; third issue, \$1,241.15, with \$15 accrued interest.

Judgment for plaintiff, and defendant excepted and appealed.

Bayard Clark, E. F. McCulloch, Jr., and R. S. White, all of Elizabethtown, for appellants.

McClammy & Burgwin, of Wilmington, for appellee.

HOKE, J. It may be well to note that the recent decisions to the contrary, *Ely v. Norman*, 175 N. C. 298, 95 S. E. 543, and *Fowle & Son v. O'Ham*, 176 N. C. 12, 96 S. E. 639, being prospective in operation and the rights of these parties having been acquired and held under our registry laws as they were construed and applied in *Davis v. Whitaker*, 114 N. C. 279, 19 S. E. 699, 41 Am. St. Rep. 793, to the effect that indexing and cross-indexing were not essential to a valid registration, notwithstanding the defects alleged in this instance, the prior incumbrance was properly registered, and constituted a valid lien on the property. And, again, that this is not a case where the title to the timber is directly involved, and in which case no notice, however full and formal, will supply the place of a valid registration (*Robertson v. Willoughby*, 70 N. C. 358; *Todd v. Outlaw*, 79 N. C. 235), but the suit is an action to recover damages for the negligent breach of duty on the part of the register of deeds in failing to index and cross-index an instrument by means of which plaintiff suffered pecuniary loss. Considering the record in view of these positions and on the question whether liability was admitted in the pleadings, it is alleged in the complaint, in effect, that, in 1914, Moore & Moore, as owners of certain timber on a designated tract of land in Bladen county, contracted with relator of plaintiff to cut the timber on said land and deliver the same to relator in rafts at their landing within bounds of the property, at the rate of \$7 per thousand feet and at the rate of not less than 60,000 feet per week till same was all cut and delivered, and relator, the Bryant Manufacturing Company, hereafter spoken of as plaintiff, was to retain as much as \$2 per thousand feet to reimburse

plaintiff on advancements to be made under the contract, to the amount of \$2,000, to enable Moore & Moore to begin operations; that these advancements were to be made in case title was ascertained to be good by plaintiff's attorney, and before same was made Moore & Moore were to give a mortgage on the timber to secure repayment to plaintiff of sums advanced; that, plaintiff's attorney having informed plaintiff that there were no incumbrances on the property, the mortgage was given, recorded, and plaintiff advanced the \$2,000 to Moore & Moore as agreed upon; that Moore & Moore entered on the work of cutting and rafting the timber, and, having delivered sufficient timber to make a repayment thereof of \$758.85, this from the \$2 per thousand, authorized to be retained, and having failed to deliver further, on inquiry, told plaintiff they could not go on without more pecuniary help; that plaintiff declined to advance more except under its own supervision; and himself entered on the work, when he was stopped by court injunction, in a suit by N. H. Carter and B. F. Keith, who held a prior mortgage on the timber, duly registered and executed to them by Blackburn and Jackson, from whom Moore & Moore had bought the same, said mortgage purporting to secure Carter & Keith, the original owners of the timber, in the sum of \$6,000, the original purchase price; that plaintiff had frequently endeavored to obtain repayment of the balance due on the advancements from Moore & Moore, to wit, the \$1,241.15, with said accrued interest, and had failed to do so. The defendants, alleging that the register had duly recorded the prior mortgage and indexed the same, showing the names of the grantees, admitted that the same had not been fully indexed and cross-indexed as the statute required. The answer then, having put in issue the other allegations of the complaint tending to fix liability, made further averments, to the effect that the condition and records appearing in the register's office were such as to put the plaintiff on full notice of the existence of the prior mortgage; that it was referred to and fully described in the bill of sale by which Blackburn and Jackson conveyed the timber to Moore & Moore; that the paper containing such recital was on record, and was read by counsel for plaintiff when making an examination of the title and a copy thereof taken, and for this the index and cross-index would have fully disclosed the page and book, etc., showing the existence and proper registry of the prior mortgage complained of, and the answer denies, further, that the plaintiff's attorneys ever reported to him that the title to the timber was unincumbered, but that plaintiff knew or had every reason and opportunity to know of the existence of this prior mortgage, and that his loss, if any was suffered by him, should

be properly attributed to his own negligence and not otherwise.

[1, 2] On these, the averments chiefly relevant, we are of opinion that there was error in the ruling and liability for this alleged default was admitted in the pleadings. Our statutes on this subject (Revisal, §§ 2658, 2665) impose on the register of deeds the duty of diligently and promptly registering instruments filed with him for the purpose and of indexing and cross-indexing the same within 24 hours after registry, and action lies by the person injured for default in this respect. *State ex rel. Daniel v. Grizzard*, 117 N. C. 105, 23 S. E. 93. In section 301 he is required to give a bond not to exceed \$10,000 for the safe-keeping of the books of his office and otherwise for the faithful performance of his duties. By section 3600 he is made indictable for a misdemeanor for failure to index and cross-index instruments as required by the law, and within 24 hours after registry. While the proper performance of the official duties of this officer are thus rigidly insisted upon and have taken on even greater significance since our court has held that the indexing and cross-indexing are essentials of a valid registration, a liability does not arise to individuals unless the default of the register in these particulars has been the cause and the proximate cause of pecuniary injury to the claimant. Unless otherwise provided by the statute itself or arising as it may do in certain instances from its very nature and characteristics, this prerequisite to the maintenance of an action for breach of a statutory duty that it should be the proximate cause of the injury complained of is very well illustrated in several of our more recent decisions, as in *Paul v. Railroad*, 170 N. C. 230, 87 S. E. 66, L. R. A. 1916B, 1079, *McNeill v. Railroad*, 167 N. C. 390, 83 S. E. 704, and *Ledbetter v. English*, 166 N. C. 125, 81 S. E. 1066. And in this connection, it is held, in well-considered cases, that liability will not be imputed to the officer when a given duty has been imposed with more especial reference to the protection of individuals, and the negligence of the individual claimant or his employé or agent, charged with the duty of looking after the matter, has caused or concurred in causing the injury. *Burris v. Austin*, 85 S. C. 60, 67 S. E. 17, 20 Ann. Cas. 1806, and authorities cited; *Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175; 23 Amer. & Eng. (2d Ed.) p. 379. See, also, 34 Cyc. p. 1021. And the general principle has been recognized in a case at the present term, in *Rice v. Ins. Co.*, 98 S. E. 283, citing for the position, among other cases, *Dare v. Constr. Co.*, 152 N. C. 23, 67 S. E. 87. In this last case, it was held:

"While a person cannot take advantage of his own wrong, the court will not furnish a person a remedy for a wrong when he cannot prove a legal claim for damages without show-

ing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, which was the real and efficient cause of the injury."

Recurring to the answer, there are allegations to the effect that the prior mortgage was indexed, in the name of the grantees therein, showing also the book and page of the registry. In the deed or written bargain and sale, conveying the timber to Moore & Moore, the immediate grantors of plaintiff, there was distinct reference to the prior mortgage to Carter & Keith from Jackson & Blackburn, vendors to Moore & Moore; that plaintiff's attorneys, in making their examination and whose knowledge and opportunity to know will be imputed to plaintiff, took a copy of the bill of sale, and included same in their report on the title, and that "any sums of money advanced to Moore & Moore was done with full knowledge of said paper writing, and in face of the recitations that Carter & Son & Keith held a mortgage on the timber for \$6,000, and, further, that if plaintiff did not have actual notice of said mortgage, it was due to his own negligence and carelessness, and not to any act of conduct of this defendant" (the register of deeds); and, under the principles heretofore stated, the issue of liability is, in our opinion, distinctly raised, and must be determined on the question whether the default, charged and admitted by the register of not fully indexing and cross-indexing the prior incumbrance, was the proximate cause of pecuniary loss to plaintiff, or was the same due to his own negligent default on the facts known to him, or which he should have known if reasonably attentive to his own interest.

[3] And, on the question of damages it does not necessarily follow that plaintiff is entitled to recover the sum of \$1,241.15, with some accrued interest, the difference between the amount advanced and that paid back by the debtor, as his honor ruled. The jury may award that sum, but it does not follow as a conclusion of law from the facts in evidence. On a breach of duty of this kind, causing injury, the plaintiff may recover the damages that were probable under the facts as they existed, and which can be ascertained with a reasonable degree of certainty. The default complained of here was the failure to index and cross-index a prior mortgage, by reason of which plaintiff was misled and induced to take a second contract and mortgage, to his injury, and the damages would properly be referred to the existence of such prior mortgage and its effect on plaintiff's security.

The only witness examined on the trial was J. N. Bryant, one of the plaintiffs; and, while his evidence tended to show that the Moores, plaintiff's debtors for their outlay,

were insolvent, it is not an inference that the court can draw from his testimony, and, while there is allegation that the prior mortgage had been foreclosed, leaving nothing subject to plaintiff's claim on the timber, that allegation is denied in the answer, and we do not recall any evidence tending to show such a foreclosure.

In addition to this, it is admitted that plaintiff held the second mortgage on this timber to reimburse him for the \$2,000, and it is nowhere shown in the evidence that the timber is not of sufficient value both to satisfy the prior incumbrance and also to reimburse the plaintiff. In an action of this character, it is incumbent on plaintiff to establish both the injury and the amount of the loss, and, though liability be established, the damage will be only nominal, unless the loss be shown or facts presented from which it can be reasonably ascertained. *Johnson v. Brice et al.*, 102 Wis. 575, 78 N. W. 1086; *Gordon v. Stanley*, 108 La. 182, 32 South. 531; *Title Guar. Co. v. Commonwealth*, 141 Ky. 570, 133 S. W. 577; *Appleby v. State of New Jersey*, 45 N. J. Law, 161; *State ex rel. Phillips v. Greene et al.*, 112 Mo. App. 108, 90 S. W. 403; 2 *Sutherland on Damages* (3d Ed.) § 488; 1 *Sedgwick* (9th Ed.) §§ 107, 107a.

On the record, we are of opinion that the cause must be referred to the jury both on the question of liability and the amount of damages, and to that end a new trial is awarded.

New trial.

(177 N. C. 229)

GRANTHAM et al. v. JINETTE et al.
(No. 104.)

(Supreme Court of North Carolina. March 26, 1919.)

1. WILLS §489(2)—PAROL EVIDENCE—CONTRADICTION WILL—DEVISE TO LEGAL HEIRS.

There being no ambiguity, parol evidence is not admissible to show that by "legal heirs," to whom devise was made, was meant testator's next of kin, he being illegitimate.

2. WILLS §491—QUESTION FOR JURY—LEGAL HEIRS.

Who are "my legal heirs," to whom devise was made, is not a question for jury, but of law.

3. WILLS §489(1)—DESIGNATION OF BENEFICIARIES—EVIDENCE.

Evidence, even were it competent, held insufficient to show that by "my legal heirs," to whom an illegitimate devised, he meant certain blood relatives.

4. DESCENT AND DISTRIBUTION §52(2)—WIDOW AS HEIR—STATUTE.

Revisal 1905, § 1556, providing that, when any person shall die leaving none who can claim as heir to him, his widow shall be deemed heir

and as such shall inherit his estate, applies only in case of no will or a will not disposing of the entire estate.

5. ESCHEAT §4—WILLS §524(6)—CONTINGENT REMAINDER.

Under a will giving all the property, with an exception, to testator's wife for life, and providing, "after her death," all such property "left by" her shall be sold and the proceeds divided among "my legal heirs" subject to certain bequests, the class designated as "legal heirs" is to be ascertained as of the date of the wife's death, so that she does not take the remainder, but it escheats; testator then having no legal heirs.

Allen, J., dissenting.

Appeal from Superior Court, Wayne County; Daniels, Judge.

Action by D. C. Grantham and others against Ezra Jinnette and others to recover property in defendant's possession, the University of North Carolina intervening and being made a party by order of the court. From a judgment for plaintiffs, defendants and intervenor appeal. Reversed.

W. S. O'B. Robinson, A. C. Davis, and Teague & Dees, all of Goldsboro, Leon G. Stevens, of Smithfield, and D. H. Bland, of Goldsboro, for appellants Jinnette and others.

Bryant & Brogden, of Durham, Hood & Hood, of Goldsboro, and Murray Allen, of Raleigh, for appellant University of North Carolina.

Langston, Allen & Taylor, J. L. Barham, Dickinson & Land, and J. F. Thomson, all of Goldsboro, W. W. Cole, of Smithfield, and D. C. Humphrey, of Goldsboro, for appellees.

CLARK, C. J. The case turns upon the construction of the following clauses of the will of Haywood Bizzell:

"Item 3. I give and bequeath to my beloved wife, Elizabeth, for the term of her life, all the balance of my real estate, all personal property of every kind of which I shall die seized or possessed."

"Item 5. After her death I desire that all property, real and personal left by her under item 3 of this will, shall be sold publicly or privately, as he (the executor) shall think best, and the proceeds shall be divided among my legal heirs subject to the following bequests."

The following admissions were made on the trial and entered in the record:

(1) That the testator was an illegitimate son, born in 1833; that his mother was never married, and died in 1862, and that the testator was her only child; that the testator married in 1856, but no children were born of said marriage; that he died in December, 1896, leaving his widow and the will in question; that at the time of his death he was seized in fee and possession of the

lands in question which were all acquired by purchase.

The plaintiffs do not claim that they are the heirs at law of the testator, nor that they are entitled to any part of his estate under the statute of descents. *Bettis v. Avery*, 140 N. C. 184, 52 S. E. 584. But they contend that they are the persons referred to and intended by the testator in the use of the words "my legal heirs," and that by parol testimony they can show that by the devise of his property, after the life estate given his wife, to "my legal heirs," he intended Mack McCullen and Frank McCullen. Cal (or Mack) McCullen and Frank McCullen were the sons of Ann Bizzell, the sister of the testator's mother who married a McCullen. Mack McCullen and Frank McCullen are dead, and the plaintiffs are their heirs at law. The language on which the plaintiffs rely is the testimony of one Odum that on one occasion his father said to the testator, "Haywood, what are you going to do with your property?" to which he replied: "Well, I don't know. I have never decided exactly what I will do with it." And when further asked, "Haven't you got no kin people?" to which he said: "Yes, I have got some kin people. Mack McCullen and Frank McCullen are kin to me." He said that that was about 25 years ago and about 3 or 4 years before testator died.

R. A. Whitfield, witness for the plaintiff, testified that he heard the testator say that Mack McCullen was the nearest kin he had. John White testified that he had seen the testator a few times; that a year or a year and a half before he died, when he went to pay him some rent, the testator "got to talking with him, and he said he had no children and no kin folks, but the McCullens were kin to him and would be his heirs, he reckoned." Davis Wiggins testified that the testator "took dinner with him on one occasion, and stated in conversation that his mother was a Bizzell, that Annie McCullen was her sister, and spoke of his mother and Cal's mother being sisters; that he does not remember hearing him speak of any one else."

[1-3] This evidence taken to be true cannot vary the expression in the will that the property, after the life estate given to his wife, should go to his "legal heirs." There is no ambiguity. The devise is to a class—"my legal heirs"—and who they were is a matter of law, even if the testator had erroneously supposed that under the law illegitimates could inherit as heirs (but the evidence and the will show that he did not).

Upon the evidence the motion for nonsuit as to the plaintiffs should have been granted. This is not the case where there is a latent ambiguity as to the person intended and evidence is admitted which shows that the testator was in the habit of calling the person by the name set out in the will, though

it was not the true name of the person. It often happens that the person is known by a nickname or some other name in common use, and such designation is shown by parol testimony to point out the devisee who was intended; but in all those cases the person was clearly intended, and the question is only of identification.

But here the class is clearly and definitely stated in terms that admit of only one construction, "my legal heirs," and admittedly Mack McCullen and Frank McCullen did not come within that designation.

Besides, the will was written several years before the death of the testator, when his wife was some 40 years old. It was by no means improbable that he might have children by her, or that she might die and he might have children by a second marriage. If the loose words used were sufficient to substitute Mack McCullen and Frank McCullen in lieu of the words "my legal heirs," it would not only contradict the terms of the will which is unambiguous, but if there had been the subsequent birth of children by his then wife, or by any subsequent wife, they would have been incapable of inheriting as against the two McCullens. This construction is therefore not to be entertained, and it would be useless to cite the numerous cases which are to be found in all the books to the effect that, when an unambiguous expression is used in a will, such as "my legal heirs," it cannot be contradicted by verbal statements put in evidence 25 years later, or at any other time showing that the testator recognized as related to him persons who were not his legal heirs and that he intended that the property should go to him in spite of his devising his estate not to them but to "his legal heirs." Who are the "heirs" is not a matter for the jury, but a matter of law for the court. *Bradford v. Erwin*, 34 N. C. 291; *Morrison v. McLaughlin*, 88 N. C. 255; *Patterson v. Wilson*, 101 N. C. 597, 8 S. E. 341. Besides, the testimony, if competent, was not sufficient to be presented to the jury.

[4] The defendants who are in no wise related to the testator claim as heirs of the wife, and insist that she was entitled under Rev. § 1556, which provides:

"When any person shall die leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate."

This would apply only if there had been no will or a will not disposing of the entire estate. In such case, this property would have gone to the wife and then to the defendants as her heirs. But here the testator disposed of all his property by his will, and intended to dispose of it fully, which conclusively appears from the will itself; and, this being the case, when there is a default in the "legal heirs" to whom a part of the

remainder of the estate is devised, it does not go to the wife, but to those who fill the designation of legal heirs at the time the remainder should fall in.

[6] The testator devised and bequeathed to his "wife, Elizabeth, for the term of her life, all the balance of my real estate, all personal property of any kind of which I shall die seized and possessed." She elected to take under the will and never dissented.

In item 2 of the will, the testator had given to Preston Thornton 106 acres of land described in the will, and the balance of the estate to his wife for life.

Item 4 of the will provides:

"After the death of my said wife I devise and bequeath to the Oxford Orphan Asylum \$1,000 to be collected from the sale of the property, real or personal, left at my said wife's death."

Item 5 provides:

"After her death, I desire that all property real and personal, left by her under item 3 of this will shall be sold publicly or privately, as the executor shall think best, and the proceeds thereof shall be divided among my legal heirs, subject to the following bequests, to wit:

"Item 6. I give to D. A. Bizzell, son of Albert Bizzell, five hundred (\$500) dollars, after my wife's death.

"Item 7. I give to Ann Eliza Cox, daughter of W. E. Cox, two hundred dollars, to be paid after my said wife's death.

"Item 8. I give to Selah Church built by my wife, namely, two hundred dollars to be paid after my wife's death.

"Item 9. I hereby appoint John S. Bizzell, executor of this will."

The questions presented are:

(1) As of what time is the class designated by the testator as his "legal heirs" to be ascertained—at the time of his decease, or at the decease of his widow?

(2) What was the effect of the widow's failure to dissent? This last need not be determined, unless we were of opinion that the class was to be ascertained as of the time of the testator's decease.

Although in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described by the testator as his legal heirs, etc., to whom a remainder or executory interest is given by the will, is to be ascertained at the death of the testator, the fact that the property is to be converted into personalty and distributed as such at the death of the first taker is indicative of an intention that the class shall be ascertained at the termination of the life estate. The fact that, at the time of the making of the will, the person to whom a particular estate was given will presumably be at the testator's death the sole member of the class to whom the same property is

limited, and the use of terms importing plurality in the membership of the class, and requiring a division among them, while not conclusive of an intent to postpone the ascertaining of the membership of the class, are other indications of such an intention properly to be taken into consideration.

The fact that the widow seems to have been given by implication power to use so much of the principal as she might see fit for her own benefit tends to negative the supposition that she was intended to take under the ultimate limitation. *Hardy v. Gage*, 66 N. H. 552, 22 Atl. 557; *Bisson v. R. R.*, 143 N. Y. 125, 38 N. E. 104.

Under this will, all the property was given to the wife for life (except the devise to Preston Thornton), and there was no devolution over till after her death. At that time, the provision that the property should all be sold, and after the payment of the bequests to the orphan asylum, to D. A. Bizzell, to Eliza Ann Cox, and to Selah Church, and the provision that the remainder should be divided among his "legal heirs" by his executor, show, not only that the remainder was not devised to the wife nor intended to go to her heirs, but that it was devised and should go to his "legal heirs" in existence after his wife's death. The devise of the remainder speaks of that date.

There was no defect in the will. The property was fully devised, and the wife acquiesced therein. The defect is that at the time the division was to be made there were no "legal heirs." If there had been any legal heirs at that time, they would have taken the property, and only those who were his legal heirs after his wife's death could have taken, for the provision is that the property should be sold and divided "among the legal heirs" at that time.

If, at the testator's death, there had been legal heirs other than his wife, they could not have taken if they had predeceased the wife. His "legal heirs" could be those only who were in existence and entitled to receive the legacy at the time of her death. Those only could share in the division "among my legal heirs," for they alone could answer to the description.

It may well be that the testator expected that he would leave legal heirs by his then wife, who was 40 years of age at the time the will was made, or he may have contemplated the possibility of legal heirs by a future marriage.

In *Bowen v. Hackney*, 136 N. C. 187, 48 S. E. 633, 67 L. R. A. 440, the will provided for a division of the property between the children of the testator "at the expiration of the life estate," and it is said in the opinion by Walker, J., that—

"The division is not to be made until the death of the life tenant, and that is the time fixed by the terms of the will when it shall be

definitely and finally determined who shall take."

The language of this will brings it within the principle of the decision in *Bowen v. Hackney*, and it follows that the legal heirs of M. H. Bizzell, the testator, are to be determined as of the time of the death of his wife, the devisee of the life estate.

The language of the will in our case is not only sufficient to bring it within the authority of *Bowen v. Hackney*, but is much stronger than in that case in expressing the intention of the testator to annex the time fixed, i. e., the death of the life tenant, to the substance of the gift as a condition precedent, as well as to the time of enjoyment, which Mr. Justice Walker says creates a contingent remainder. Though similar to *Bowen v. Hackney*, it is stronger than that case, because there the will did not provide for a sale of the property by the executor and a division of the proceeds, but provided only for the division of the specific property devised to the wife for life.

The contention of the defendants that the legal heirs of testator must be determined at the time of testator's death is based upon assumption that this "is a devise to E. for life, and after her death to the heirs of devisor," and that the will of M. H. Bizzell devised to his legal heirs a remainder which vested at the time of his death, and that, the testator's wife being his sole heir at law at that time, the life estate and the remainder merged in her as a fee-simple estate.

At common law, the widow was not her husband's heir. She is made so by statute (Revisal, § 1556, rule 8), but the very statute creating the status limits its application to undivided property of the husband. Section 1556 of the Revisal provides that—

"When any person shall die, seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend" as set forth in the several rules of descent.

This language, when considered in connection with rule 8, cannot have the effect of making the wife the husband's heir where the property is devised by the husband to his heirs, and certainly not where the wife is devised a life estate with remainder to the heirs of the husband. The language of the will in this case precludes any intention on the part of the testator to devise to his wife a life estate and also a fee-simple estate in his property. It directs the sale of the property "left by" his wife and to divide the proceeds among his legal heirs.

The property to be sold was not simply all of the property which had been devised to the wife for life, but "all property, real and personal, left by her under item 3 of this will." How could the property be "left by her," if the life estate and the fee merged in the

wife at the death of the testator, as contended by appellants? By item 4 of the will the testator bequeaths \$1,000 to the Oxford Orphan Asylum, to be collected from the sales of property, real or personal, "left at my wife's death"; again demonstrating the fact that it was not the intention of the testator to devise to his wife the life estate and the remainder.

The testator devised to his "heirs at law" a contingent remainder, and that such heirs should be determined at the time of the death of the wife. This is supported by the decisions of this court and the courts of other states.

In *Latham v. Lumber Co.*, 139 N. C. 9, 51 S. E. 780, 111 Am. St. Rep. 764, it is held that a contingent and not a vested remainder was created by the provisions of a will devising a life estate to the testator's daughter, "and after her death the said land and negroes are to go to the children of my said daughter and the children of such as are dead."

"Where a testator devises and bequeaths the whole of his estate, real and personal, to his wife during her natural life, except certain amounts to equalize gifts among his children, and then without any express or implied legacy, except as contained in the direction to his executor to convert into personalty and distribute, makes the following dispositive clause, viz., 'After the death of my wife I desire that the whole of my property, both real and personal, be sold by my executor and after expenses are paid to distribute equally to my legal heirs,' the rule that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately, if the payment be postponed for the convenience of the fund or estate, or merely to let in some other interest, does not apply. * * * In such case the direction to the executor to pay or to distribute to the testator's 'legal heirs' confers a contingent interest, which does not vest until the period of distribution; and the direction 'to distribute equally to my legal heirs' is equivalent to a direction to make distribution in accordance with the statutes providing for descent and distribution." *Barr v. Denney*, 79 Ohio St. 358, 87 N. E. 267.

"A devise to the widow for life, and 'at her death' to testator's 'heirs at law,' creates a contingent remainder, and the estate goes in fee to such persons only as, at the widow's death, answer to the description of 'heirs at law' of the testator." *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. 676.

"A testator bequeathed to his wife 'the use of thirty shares in the Oxford Bank; said shares, at her decease, to be equally divided between his heirs'—and died leaving several children. It was held that the reversionary interest of any one of the children in these shares was contingent, and consequently not liable to be attached as his property in the hands of the executor." *Rich v. Waters*, 39 Mass. (22 Pick.) 563.

"Though the heirs of the testator were determinable at his death, yet the gift to them was not, by the terms of the will, to vest in possession until after the termination of the

life estate given to the widow. That was the time fixed for the gift to take effect, and then was the time when the persons would be ascertained, who, coming under the description of heirs of the testator, would be entitled to share with the heirs of his widow in the distribution of the estate. Within that time the number of his heirs might be diminished by death, or increased by birth." *Bisson v. R. R.*, 143 N. Y. 130, 38 N. E. 105.

In construing a will containing language very similar to that used by the testator in our case, the Supreme Court of New York says:

"The widow received a life estate. There was no gift in terms of remainder. But the will contained a direction to sell the land after the termination of the particular estate, and divide the proceeds among the objects of the testator's bounty. The rule is well settled that where there is no gift, but by a direction to pay or divide at a future time, the vesting in the beneficiary will not take place until the time arrives. * * * As futurity is annexed to the substance of the gift, none can take except those designated by the will as qualified to take at the time of the division." *Bryer v. Finnen*, 178 App. Div. 671, 165 N. Y. Supp. 805.

"Where the only words of gift are found in the direction to divide or pay at a future time, the gift is future, not immediate; contingent, and not vested." *Hirsch v. Gillespie*, 167 N. Y. Supp. 855; *Matter of Crane*, 164 N. Y. 76, 58 N. E. 47.

In *Read v. Fogg*, 60 Me. 479, a father by deed of warranty conveyed certain land to his daughter "for her use and benefit during her lifetime, and after her decease to her legal heirs, to them and their heirs and assigns forever," and it was held that the deed created a remainder that was contingent until the daughter's death, when it vested in those who were then her heirs at law.

The terms of the will indicate plainly:

(1) That the wife was restricted as devisee to her life estate, and was to receive nothing more.

(2) That after the wife's death—which was repeated five times in the will—the property was to be sold, and, after the payment of the four legacies named, the remainder was not to go to the wife, and certainly the testator did not intend that it should go to her heirs, nor was it left undevise. It was devised to those who should be his "legal heirs" after her death. There is a specific devise, clearly and unmistakably made, of the remainder after her death to be "divided among my legal heirs," which could not contemplate that the remainder was undevise. There being no legal heirs at that time, our statute directs that it shall go to the university, as the representative of the general public, who take in default of "legal heirs" in such cases.

This would have been the case if the

wife had predeceased the husband, and this could not be changed by the fact that she took and enjoyed the unrestricted life estate which he gave her. At her death the property was devised to his legal heirs, existing at that time, and there were none other than as designated by the statute in such cases as this, i. e., the University of North Carolina.

The clear and unmistakable intent of the testator was to dispose of all his property after his wife's death, and that such property should go to those who should be after her death his "legal heirs." He had a right to so direct, and, having so directed, the property can go to no others than those who fill such description "after her death." There being none under the provisions of the state Constitution, the judgment should direct that after payment of the legacies the residue of the estate shall be paid over to the trustees of the University of North Carolina, the interveners.

The sale and division of all the property devised to the wife was specifically directed to take place "after her death." She could not possibly then be his heir. The decision is fully supported by *Mr. Justice Hoke in Jenkins v. Lambeth*, 172 N. C. 466, 469, 90 S. E. 513.

The judgment will be entered accordingly. Reversed.

ALLEN, J. (dissenting). I think I may assert with confidence that this is the first instance on record in which it has been held that property escheated when the owner left a will undertaking to dispose of it, and when, if he had died intestate, there was one who could take as his heir.

That the owner intended to dispose of his entire estate appears from the will in the record, and that one survived him, his widow, who could take as heir in case of intestacy, is shown by rule 8 of descents, which is as follows:

"When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate."

We should not, I submit with deference, reach such a conclusion unless forced to do so by imperative legal rules, as it thwarts the will of the testator, and is at variance with the spirit of the statute of descent, which in this instance names an heir, and with the law of escheats, which substitutes "the university in the place of the public in regard to all such real property as fell to the state for want of heirs capable to take." *University v. Gilmour*, 3 N. C. 130.

In determining the rights of the parties, I attach no importance to the words in the will "left at my said wife's death" and "left by her," which are emphasized in the opinion of

the court, because in item 3 the testator gave to his wife for life personal as well as real property, and knowing that she could not dispose of the land, and that much of the personal property would be consumed, the words naturally refer to the personal property left by her.

The controversy depends on the legal effect to be given to the devise to the "legal heirs" of the testator in the fifth item.

When one "has made a will, the presumption is that he thereby intended to dispose of his entire property," and "the instrument must be construed in reference to that presumption" (*McCallum v. McCallum*, 167 N. C. 311, 83 S. E. 251); and in this case we not only have the legal presumption, but the will shows unmistakably the purpose to dispose of all his property.

"The intention must be gathered from the will itself, as read, in view of all the facts and surrounding circumstances." *Wooten v. Hobbs*, 170 N. C. 214, 86 S. E. 813.

"The meaning attributed by him [the testator] to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator, whose will may be under consideration, intended." *Gray v. West*, 93 N. C. 444, 53 Am. Rep. 462.

If there is "no defect in the description of either the person or thing on the face of the instrument, it becomes necessary to fit the description to the person or thing; in other words, to identify it. Here, as a matter of course, evidence dehors is admissible." *Institute v. Norwood*, 45 N. C. 69, approved *McLeod v. Jones*, 159 N. C. 76, 74 S. E. 733.

"Words of every kind, technical as well as others, and particularly when used in last wills, are liable to be varied in their meaning, to meet the intention of those who use them. When shown in an authentic manner the word 'heir' may mean some other person than him on whom the law casts the inheritance in a real estate." *Croom v. Herring*, 11 N. C. 396.

It is true in the *Croom Case* the word "heir" was used in connection with personal property, and there was other language in the will indicating that it was not used in its technical sense; but the case is authority for the position that "heir" "may mean some other person than him on whom the law casts the inheritance in a real estate."

Applying these principles, it appears that there is no defect on the face of the will, as the term "legal heirs" has a known signification; but, when construed technically, there is no one to answer the description, and, as it is presumed the testator intended to dispose of his whole estate and had some one in mind who could take, it is necessary to look at the situation of the testator and the surrounding circumstances in order that the persons called "legal heirs" may be identified and it was for this purpose the parol

evidence was admitted, and it shows that the plaintiffs are the children of Frank and Cal McCullen, and are the lineal descendants of the sister of the mother of the testator; that the testator spoke of Frank and Cal McCullen as "first cousins," as "kin to me," as "the nearest kin he had," and said "he had no children and no kin folks but the McCullens and that the McCullens was kin to him and would be his heirs, he reckon." Webster defines "reckon" "to conclude, as on an enumeration and balancing of chances; hence to think; suppose." And, as so understood at the time the will was made, the testator concluded, thought, or supposed the McCullens were his legal heirs, and so devised his property to them. He was thinking of some one, and, if not of the McCullens, of whom, since he had declared they were not only his nearest kin, but that he had no other kin, and he thought they were his heirs.

The suggestion that the testator may have had in mind the birth of a child by a second marriage, or by his wife then living, has nothing to support it. Wills speak as of the death of the testator (Rev. § 3140), and the possibility of a second marriage died with him, and it is not within the bounds of probability that he had even a remote idea that the wife with whom he had lived 39 years, and who had given birth to no child, would bear him a child and "legal heir" within 9 months after his death.

I therefore think the verdict of the jury, finding that the testator meant, by the use of the words "my legal heirs," Frank and Cal McCullen, ought to stand, and the judgment be affirmed and the same conclusion would be reached if the property devised is treated as personalty.

But if this is not so, it does not follow that the university takes by escheat; and, on the contrary, if the plaintiffs have no title, it seems to me clear the defendants are the owners, as devisees of the widow of the testator.

The court says:

"There is no ambiguity. The devise is to a class—my legal heirs—and who they were is a matter of law."

Granted, for the purpose of the discussion, and the law says:

"When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed as heir to him, and as such shall inherit his estate."

In other words, the opinion of the court, as I understand it, proceeds upon the idea that the testator had no person in mind when he said "my legal heirs," and that he intended those to take who could answer the roll call, without regard to person, and, if so, the widow must be held to have the title, as she was the only legal heir under the stat-

ute when the will was made, when the testator died, and when she died.

Everett v. Griffin, 174 N. C. 107, 93 S. E. 474, is an instance of the word "heir" in a will being held to include a widow, and in Freeman v. Knight, 37 N. C. 75, the same effect was given to "my legal heirs."

The first case is also authority for holding that the proceeds of sale should be dealt with as personalty upon the ground of equitable conversion; but I do not think this affects the rights of the parties, as the widow would take the same, whether as heir or distributee.

The phrase "after her death" is no stronger than "at the expiration of my wife's interest," and it was held, in Taylor v. Taylor, 174 N. C. 538, 94 S. E. 8, that in a devise to the wife during widowhood "and at the expiration of my wife's interest in land and property, divide it equally among my living children," that the children, who were to take, must be ascertained as of the death of the testator, and the same rule would give this property to the widow.

The objection is made that this view cannot prevail because a life estate is given to the widow, and that this demonstrates that the testator did not intend for her to have more; but I respectfully submit that this is answered by the court, when it is held that the testator had no one in mind when he wrote "my legal heirs," and that his purpose was to give the remainder to those upon whom the law cast the inheritance, without regard to person, and if this is true, and the widow falls within the class, she must take.

Again, it is urged that the widow cannot take under the rule of descent, except when the husband dies "not having devised the same," and that the devise to "my legal heirs" prevents the operation of the rule; but the court has held that the property has not been devised, because there was no one to take.

If, however, the widow is not within the term "my legal heirs" and cannot take under the will, there is no one who can, no one has ever been in existence who could, and no one can now come into being to answer the description; and, if so, the devise in remainder lapsed and was void, and this upon the death of the testator left the life estate in the widow under the will, and the remainder in fee undisposed of, which the widow inherited under the rule of descent before referred to.

There is one other position in favor of the widow, which is amply supported by authority, and which was approved in a unanimous opinion of this court in Thompson v. Batts, 168 N. C. 334, 84 S. E. 347, and that is that the devise to "my legal heirs" was void as a remainder, and left the reversion in fee in the testator at his death, and, if so, it passed to the widow under the rule of descent.

Ferne says (page 51):

"A limitation to the right heirs of the grantor will continue in himself as a reversion in fee.

As where a fine was levied to the use of the wife of the co-user for life, remainder to the use of B. in tail, remainder to the use of the right heirs of the co-user, it was adjudged that the limitation of the use to the right heirs of the co-user was void, for that the old use of the fee continued in him as a reversion."

In Read & Morpeth v. Evington, Moor, K. B., 284, it was ruled that—

"If a man seized in fee makes a feoffment to the use of A. in tail or for life, remainder to the use of his own right heirs, the land upon the death of A. without issue returns to the feoffor as his ancient reversion, and does not rest in his right heir as a remainder by purchase."

Sir Edward Coke says:

"If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void and he hath the reversion in him, for the ancestor during his life beareth in his body (in the judgment of law) all his heirs." Co. Litt. 22.

In Hargrave and Butler's notes (1 Am. Ed. from 19 London Ed. of 1853), one of the notes to this section states the following case, being note 3:

"Feoffment to the use of a feoffee for forty years, remainder to B. in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor."

See, also, 2 Wash. Real Property, 692; Robinson v. Blankenship, 116 Tenn. 394, 92 S. W. 854; 24 A. & E. Enc. L. 396.

Referring to remainders limited to heirs of grantor, Chief Justice Parson, in Law Lectures (page 142, note) says:

"A grant to Z. for life, remainder to heirs of grantor, the limitation is not a remainder, but the grantor takes his old reversion."

Again on page 147, note:

"The test by which the applicability of the doctrine may be determined in any particular case is to strike out the devise to the heir, and if he would still take the same interest as the will gives him, the devise is void."

"An instance of this sort of remainder is exhibited in a grant to Z. for life, remainder to the heirs of grantor. This limitation, although denominated a remainder in the grant, really is not such. It does not devolve on the heirs of the grantor as purchasers, as it would do if a remainder, but remains in the grantor himself, as his old reversion in fee." Minor's Institutes, vol. 2, pp. 399, 400.

"It is a settled maxim of common law that a person cannot make a conveyance of realty to 'his own right heirs'; and a remainder thus limited is void, and will remain in the grantor as his old reversion, and his heirs at his death will take by descent, and not by purchase." Harris v. McLaran, 30 Miss. 533.

The same principle is recognized in *King v. Scoggin*, 92 N. C. 99, 53 Am. Rep. 410, where the court says:

"It is true, remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder is, in effect, only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the grantor (2 Washburn on Real Property, 692; Burton on Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him."

"An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. It is a present vested estate, although to take effect in possession and profit in futuro." 16 Cyc. 661.

"A reversion descends like the old inheritance." *King v. Scoggin*, 92 N. C. 102, 53 Am. Rep. 410.

Under this principle, twice approved unanimously by our court, so much of the estate as the testator attempted to devise to his legal heirs did not pass by the will, but remained in him as a present vested interest, and upon his death descended to his heirs, and at the time of his death his widow was his only heir.

If this is sound, it can make no difference that the devise to "my legal heirs" is after the death of the wife, because, the devise being to the heirs of the testator, it can never take effect as a remainder vested or contingent, and operates only as a reversion, which left in the testator at his death the interest attempted to be devised to his heirs, and, as "a reversion descends like the old inheritance," it would belong to the widow, who was the only heir at the death of the testator.

In other words, it never has been nor can be necessary to ascertain the legal heirs of the testator after the death of his wife, because the attempt to devise an interest to his heirs after the life estate of his wife is inoperative and has the legal effect of leaving that interest in the testator at his death, and it would descend to him who was then his heir.

It seems that a sale of the property will not be necessary, as all of the parties to the record have elected to treat the property involved in this litigation as land.

Why, then, is she not entitled to the property in preference to the university?

If it be said the testator did not intend for her to have more than a life estate, it is certain he had no intention of giving his estate to the university, and, as the university has abandoned the domain of intent and is relying upon technical legal rules, she may do likewise.

I have therefore come to the conclusion that the plaintiffs are entitled to recover, and,

if not, that the defendants are the owners of the land, and that the university has no standing in court.

(83 W. Va. 569)

ARMENTROUT et al. v. LAMBERT.
(No. 3707.)

(Supreme Court of Appeals of West Virginia.
March 11, 1919.)

(Syllabus by the Court.)

1. COSTS — 282 — INDEPENDENT ACTION TO RECOVER COSTS.

The successful party in a suit cannot maintain a subsequent independent action to recover the costs of litigation incurred in the necessary prosecution or defense of such suit, where the same were not adjudged to him therein.

2. JUDGMENT — 590(1) — OMITTING RECOVERY FOR COSTS — RES JUDICATA.

All costs properly recoverable by a successful litigant must be recovered in the suit in which they are incurred; otherwise, they are barred by the rule of res adjudicata.

Error from Circuit Court, Randolph County.

Action in assumpsit by O. L. and O. S. Armentrout against L. D. Lambert. Judgment for defendant, and plaintiffs bring error. Affirmed.

A. M. Cunningham, of Parsons, and Neil Cunningham, of Charleston, for plaintiffs in error.

J. W. Harman, of Parsons, for defendant in error.

RITZ, J. The original suit out of which this litigation grew began before a justice. The judgment of the justice was appealed to the circuit court of Randolph county, and from a judgment of that court a writ of error was prosecuted to this court, which resulted in the judgment of the circuit court being reversed and the cause remanded for a new trial. *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556. After the case went back to the circuit court, the defendants Armentrout enjoined further proceeding in the action at law. This suit in equity was heard and resulted in a denial of the relief to the plaintiffs therein, and in a recovery over in favor of the defendant therein, Lambert, for the amount involved in the law suit. Upon appeal from that decree to this court the same was affirmed so far as it denied the plaintiffs relief, and was reversed in so far as it decreed over in favor of Lambert, and further provided that the dismissal of the equity suit should be without prejudice to either party upon the trial of the action at law, which had been enjoined in said equity

suit. *Armentrout v. Armentrout*, 70 W. Va. 661, 74 S. E. 907. In the meantime, an order had been entered in the action at law reciting that, inasmuch as the matters in controversy therein had been determined by the decree entered in the above-mentioned equity suit, said law suit was dismissed satisfied. When the equity suit was disposed of, as above mentioned, Lambert, instead of reopening the law suit, which had been dismissed, brought a suit to recover upon his original claim. It appears that in the action at law originally brought before the justice, and which had been dismissed, satisfied as aforesaid, each party had incurred considerable costs, for the payment of which no provision was made in the order of dismissal. The amount of such costs incurred by the Armentrouts was \$321.42. They thereupon brought this suit in assumpsit to recover from Lambert the costs incurred by them in the action at law, originally brought before the justice, and disposed of by the order of dismissal above mentioned. The declaration contained the common counts in assumpsit and two special counts setting up the facts as above shown. Upon a demurrer being interposed to said declaration, and to each count thereof, the court sustained the demurrer to the special counts, but overruled it as to the common counts, and entered an order of dismissal, which was construed on a former appeal as not being such a final judgment as would sustain a writ of error. *Armentrout v. Lambert*, 79 W. Va. 602, 91 S. E. 452. The writ of error was dismissed, and the cause remanded to the circuit court of Randolph county, and the plaintiff then withdrew the common counts in his declaration, and, declining to amend upon leave given for that purpose, the demurrer to the special counts was sustained, and judgment rendered in favor of the defendant, from which judgment this writ of error is prosecuted.

[1, 2] The sole question presented is: Can this suit be maintained having for its purpose the recovery of costs incurred in former litigation, in which no judgment or order was made allowing the same? The allowance of costs depends entirely on statute. At common law they were unknown. By our statute the party prevailing in a suit recovers his costs in that suit. This recovery is part of the final judgment. The question presented here is: In case no recovery is taken in such suit for such costs, can an independent suit be maintained therefor? The recovery of costs becomes one of the matters involved in the litigation. While it is only incidental, still their recovery is as much involved in the suit as is the main controversy, and it is familiar doctrine that every question fairly arising in a case is adjudicated by the judgment in that case, and that no other or further suit will be permitted to recover on account of a matter which should have been

settled therein. No reason is perceived why this doctrine does not apply to recoveries for costs, as well as to the recovery of any other matter of substance involved in the litigation. In 15 C. J. P. 298, it is held that in the absence of a special statute authorizing it costs cannot be recovered in an independent action, but are only recoverable in the cause in which they are incurred. In *Perlus v. Silver*, 71 Wash. 338, 128 Pac. 661, it was held that a successful litigant cannot maintain a subsequent action to recover from his losing adversary the costs and expenses of litigation, but must resort to the statutory right to have the items thereof taxed as costs in the first action, and this holding is based upon the ground that a recovery for costs is a matter involved in the litigation, and all questions in regard thereto are res adjudicata. In *Leslie v. Carter*, 268 Mo. 420, 187 S. W. 1196, it is held that the successful plaintiff in a suit cannot maintain a subsequent independent action to recover the costs of litigation incurred in the necessary prosecution of that suit—the holding being that this question could only be determined in the suit in which the costs were incurred; that, inasmuch as they were properly recoverable in that suit, a failure to obtain a recovery therein would not justify the bringing of an independent suit therefor, but judgment rendered in that suit would be conclusive of all the matters which could be properly determined therein. In Massachusetts, in the case of *Knight v. Hurley*, 155 Mass. 486, 29 N. E. 1149, it is held that an interlocutory order entered in a cause allowing costs on a motion, such as a motion for a continuance or other like proceeding, would not sustain an independent proceeding brought to recover such costs, but that they could only be recovered by proper process in the suit in which they were incurred. This conclusion is supported by the English cases of *Emerson v. Lashley*, 2 H. Bl. 248, 126 English Reprint, 533, *Fry v. Malcolm*, 4 Taunt. 706, 128 English Reprint, 508, and *Sheehy v. Assurance Co.*, 2 C. B. (N. S.) 211, 140 English Reprint, 395. Those cases have a very much stronger basis for recovery than the case presented here. In each of them, including the Massachusetts case, an interlocutory order was made allowing costs to a party to the suit, and the independent suit was brought upon the theory that such an interlocutory order was in effect a judgment in favor of the party claiming the benefit of it, but the court held that such was not the case, and denied the right to maintain the suit. We are clearly of the opinion that this suit cannot be maintained for the recovery of costs as such. If a final judgment had been rendered in the case in which was included a recovery for costs, then, of course, a suit could be maintained thereon having such judgment for its basis in the same manner as a suit may be maintain-

ed upon any other final judgment, but no suit can be maintained to recover an item of costs which was properly recoverable in the suit in which it was incurred. The judgment in such suit is res adjudicata.

Finding no error in the judgment complained of, the same is affirmed.

(83 W. Va. 600)

ROOT v. CLOSE et al. (No. 3623.)

(Supreme Court of Appeals of West Virginia.
March 11, 1919.)

(Syllabus by the Court.)

1. EQUITY ⇐195—CROSS-BILL—SCOPE.

A cross-bill, or an answer praying affirmative relief, must be limited in its scope to the subject-matter of the bill. It cannot introduce a new and distinct subject, even though such subject may be related in some way to that of the bill.

2. EQUITY ⇐195—CROSS-BILL—SCOPE.

The purpose of a bill being the establishment of a debt and assertion of a lien for the amount thereof against property alleged to have been fraudulently conveyed by the debtor, averments in the answer of title in the defendant, not only to the fund constituting the alleged debt, but also to a horse, notes, and a right of rescission of a deed, as ground for affirmative relief, introduce matters foreign to the subject-matter of the bill, and may properly be struck out, in so far as they are relied upon as constituting ground for cross-relief.

3. PAYMENT ⇐73(1) — GIFTS ⇐49(1) — DEFENSE—EVIDENCE.

In a suit for the recovery of money alleged to be a part of the estate of a deceased person from one with whom the decedent, a man well advanced in years, unwelcome among his relatives, but able to do a reasonable amount of work and having means of subsistence, had made his home for a comparatively short time, in whose hands he had placed the money, and who claims it as a gift, or as compensation for the care, support, and maintenance of the decedent and medical attention furnished him, while in life, and expenses of his burial, there is a right of recovery in the plaintiff, in the absence of clear and satisfactory evidence of such gift or payment. Mere loose and indefinite declarations of intention and purpose on the part of the intestate, accompanied by conduct and circumstances of equivocal import, do not sustain the defense in such a controversy.

4. APPEAL AND ERROR ⇐1009(2)—FRAUDULENT CONVEYANCES ⇐15—BADGE OF FRAUD—FINDING OF TRIAL COURT—CONCLUSIVENESS.

A trial court's finding of fraud in a conveyance of real estate from a son to his mother, made with knowledge, on the part of the latter, of an assertion of a claim of indebtedness against the former and his intention bitterly and stubbornly to resist it, and attended by disposition of all of his personal property, partici-

pated in and aided by her, leaving him without property out of which compulsory satisfaction of the debt can be obtained, in the event of the establishment thereof, cannot be disturbed by the appellate court, even though there is oral evidence tending to prove payment of the purchase money of the real estate, some months before the deed was executed.

5. FRAUDULENT CONVEYANCES ⇐314—PERSONAL LIABILITY OF GRANTEE SELLING TO BONA FIDE PURCHASER.

If a fraudulent purchaser has sold the property to a bona fide purchaser, so that it cannot be reached by the creditor, a personal decree may be entered against him for the amount of the debt; the proceeds of the sale being sufficient to pay it.

Appeal from Circuit Court, Tucker County.

Bill by John J. Root, administrator, etc., against William D. Close and others. Decree for plaintiff, and defendants appeal. Affirmed.

D. E. Cuppett, of Thomas, and Chas. D. Smith, of Parsons, for appellants.

J. W. Harman, of Parsons, for appellee.

POFFENBARGER, J. The principal inquiries in this cause are: (1) Whether the sum of \$471, placed in the hands of William D. Close, one of the defendants, by the intestate, Jonathan Root, was a mere deposit or loan, on the one hand, or, on the other, a payment to Close for the care, support, and maintenance of said Root; and (2) if so, whether a deed to Mrs. Kate Close, his mother, was made with intent to hinder, delay, and defraud the estate of the intestate in the collection of that sum of money. Having decided both issues in favor of the plaintiff, the court entered a personal decree against Mrs. Close for part of the money, \$290; she having disposed of the house and lot to Willis Evans, an innocent purchaser for value. She and William D. Close, the principal debtor, have appealed from the decree.

At the date of the inception of the transaction out of which this controversy arose, Jonathan Root, the decedent, was about 70 years old, unmarried, eccentric, and homeless, but neither destitute nor wholly unable to work. Until a comparatively short time before that date, he maintained a nominal residence with his brother at a place in Preston county, W. Va., and owned a small farm in that county, but led a sort of wandering or migratory life. A great deal of his time was spent in the woods as an employé, or in some other capacity, and at one time he seems to have held a position on the police force in the city of Baltimore. The brother says his home was Jonathan's domicile for a period of about 45 years. Shortly before he gave it up, he conveyed

his farm to T. B. Root, a son of his brother, for and in consideration of \$1,600, of which \$600 was paid in cash and the residue made payable in 10 equal annual installments, represented by notes bearing interest. This nephew says the deed provided that such of the notes as should remain unpaid, at the date of the death of the grantor, were not to be paid. After having executed the deed, Jonathan Root resided with his nephew, the grantee, in the house on the farm, for about one week. Leaving that place, he stayed with his brother, the father of the grantee, about 3 weeks, and then left, saying he intended to go in search of a job. Whether he went immediately to Leadmine, in Tucker county, the place of residence of William D. Close, does not appear.

[4] Close's location at Leadmine seems to have been substantially coincident with that of Root in point of time. In 1915 he either purchased or established a small general store at that place, and in some way, not disclosed by the record, obtained title to the house and lot in question, and resided therein. Root came there as a woodsman, and, shortly after his arrival, he became an inmate at Close's home. Before he was taken into it, he placed \$380 in the hands of Close for safe-keeping, saying he did not want to carry it with him while working in the woods. Later he put into Close's hands an additional sum of \$91. He also left in Close's hands the 10 \$100 notes executed to him by T. B. Root, on account of purchase money of the farm. His other property consisted of a small amount of money due him from a relative residing in Thomas, W. Va., and a horse which he kept at Close's. The period of his residence at Close's seems to have been something more than a year, during all of which, except the last few days, he rendered Close more or less service in and about his store business and his home, using his horse. As to the amount and value of his services, the evidence is somewhat uncertain and conflicting. Close gave him a comfortable room and bed, and permitted him to take his meals with the family. He also furnished him suitable and sufficient clothing, and provided stable room and feed for the horse. It is established by a very decided preponderance of the evidence that he was treated kindly and well provided for. Though intelligent opinions might differ as to the value of his services and the use of his horse, the evidence as to it is not such as would justify this court in disturbing the finding of the trial court, to the effect that it constituted a substantial set-off against the value of the board, lodging, stable room, and feed furnished. Near December 1, 1916, he became ill of pneumonia, and died December 11, 1916. During the period of his illness, Close furnished him medical attention and all possible care, and, after his death, paid the expenses of his funeral.

Immediately after the death of Root, his relatives made a demand upon Close for the property left in his hands. He promptly delivered to them the notes, but declined to pay over the money or give up the horse, claiming the former as compensation for the care and maintenance of the intestate, and the latter upon the theory of gift thereof to his wife by the intestate, within the period of his last illness. The horse was afterwards recovered by the administrator in an action of detinue. There is a close relation in point of time between Root's death and Close's disposition of his property. By a deed, dated December 15, 1916, and acknowledged December 30, 1916, he conveyed the house and lot to his mother. In January or February, 1917, he made a bulk sale of his groceries, some of the dry goods, the showcases, the stove, and the scales to J. G. Beringer, for something less than \$300, and removed the balance of the goods to his mother's store at St. George, a place situated a few miles from Leadmine. With the money derived from the sale of the house and lot and his stock of goods, he seems to have settled up all of his indebtedness, except what is involved in this suit.

[1, 2] As the bill aptly alleges the indebtedness claimed and fraud in the disposition of the property, conveyance of the real estate to the debtor's mother, and mingling of his store goods with hers, it is hardly necessary to observe that the demurrer thereto, on the ground of adequacy of legal remedy, was properly overruled. It is fair to counsel for the appellants to say they do not here insist upon the efficacy of the demurrer. They do complain, however, of the rejection of a portion of the answer, purporting to set up new matter constituting ground of affirmative relief. On an exception, the court partially eliminated seven paragraphs of the answer, upon the theory that the matter set up therein, as constituting ground for affirmative relief, was foreign to the purpose of the bill. The exception seems to have sought complete elimination thereof, but the court treated it as one seeking exclusion of such matters only in so far as they constituted a claim for cross-relief and only to that extent sustained it. In so far as the averments of the answer were merely defensive, they were allowed to stand, and the cause made by the bill and the answer, so restricted, was determined upon its merits. The prayer for affirmative relief in the answer was based upon averments of title in the defendant, William D. Close, to the entire estate of Jonathan Root, the amount of money left in his hands, the horse, the purchase-money notes, and right of rescission of the deed conveying the farm to T. B. Root, upon some theory not specifically stated, perhaps fraud in the procurement thereof, or nonperformance of a condition subsequent. Inasmuch as the relief sought by the cross-

bill answer was entirely outside of and beyond the subject-matter of the bill, the court properly excluded the matters upon which the prayer therefor was based. If there was right to retain the money held by the defendant, and also right to recover the other property that had been taken from him, both grew out of and rested upon the contract averred in the cross-bill answer, it is true, but the subjects were entirely different. The bill sought recovery of the money deposited, loaned, or paid, and nothing more, while the cross-bill answer sought recovery of the note, the horse, and all other personal property belonging to the intestate, and cancellation of the deed by which he had conveyed his land. These subjects are clearly foreign to that of the bill, and litigation respecting them would require new parties and might raise many new issues. Manifestly, they do not constitute proper matter for a cross-bill or ground for affirmative belief in an answer. *W. Va. O. & O. L. v. Vinal*, 14 W. Va. 637; *Hansford v. Coal Co.*, 22 W. Va. 75; *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408.

[3] The evidence relied upon to prove a contract between Root and Close, by virtue of which the latter was to have all of the property of the former, in consideration of care, maintenance, and support, lacks the definiteness and certainty that ought to characterize evidence relied upon for such purpose; and these qualities are not supplied by the situation and conduct of the parties and the surrounding facts and circumstances, relied upon for that purpose. The evidence consists largely of loose declarations of intention and purpose on the part of the intestate. Several of the witnesses say he had frequently declared himself to be well satisfied and highly pleased with the new home he had found, contrasting his treatment by Close and his wife with that which he had received at the hands of his relatives. These declarations were accompanied by others to the effect that, if Close continued to treat him well, he intended to always remain with him, and to leave him what property he might have at the time of his death. Close himself testifies that the money first received, \$380, was placed in his hands for safe-keeping, before Root became a member of his family, and he does not say what the understanding between them was when the residue \$91, was delivered to him.

Nowhere in his testimony does he say, in so many words, that Root ever told him he should have the entire \$471 for the services rendered him, but he quotes language used by Root to a little child, importing intent to bestow something on it or upon its parents. In addition to that, he says he claimed the money as his own, when it was demanded of him by the administrator. A brother of his testifies that Root had told him he had let him have \$471, and that he

intended to see that Close got all he had, not that he had given that money for services rendered and to be rendered. Close's mother testifies to the same sort of a declaration. Witnesses for the plaintiff say Close did not claim the money, when it was demanded of him, but that he did claim right of compensation for the care, support, and maintenance of Root, against his estate, sufficient in amount to cover the money in his hands. That the old man's physical condition and personal habits were such as to render him an undesirable guest anywhere is very well established. There is evidence tending to prove that he was afflicted with a loathsome disease, which rendered his person unsanitary, and, at times, disagreeably odoriferous. He had an aversion for the cleansing properties of water, and what is popularly deemed to be the comfort of clean clothes, and he seldom, if ever, had his hair or beard trimmed. His slovenly habits made him unwelcome in the homes of his relatives, but his brother says he allowed him to make his home his domicile for a period of 45 years, but made him keep himself clean. A short time before he gave up his brother's home, his niece had trouble with him, on account of his slovenliness. There is a bare suggestion in the record, by way of hearsay, that the nephew to whom he conveyed his farm caused his bed to be moved out into, or over, a hog pen, in his absence, but this is flatly denied by the nephew.

The unkindness of his relatives, if any, and his estrangement from them, do not prove a contract between him and the defendant Close. He may have been, in a sense, an outcast; but whether he gave the defendant the money in question, in consideration of support and maintenance, depends upon the understanding and agreement between them. Although perhaps an outcast, he was not helpless. His affliction did not wholly incapacitate him for work. While he remained at the home of the defendant, he was industrious and enterprising. Many witnesses say he worked constantly and early and late, in all kinds of weather. The defendant himself says the old man insisted upon his purchasing an additional horse, so he could do his hauling, and that, on one or more occasions, he protested against his going out to work in bad weather. There is no suggestion of lack of capacity for work, until he was attacked by the disease that ended his life. Besides probable capacity to earn his living, he had some property and was able to take care of it and utilize it. The facts and circumstances proved are altogether different from those established in *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527, and the evidence adduced to prove an agreement between the intestate and the defendant William D. Close lacks the definiteness and certainty found in the evidence in the case

just referred to. In view of the looseness and conflict which characterize it, this court would not be justified in disturbing the finding of the trial court as to the agreement between the parties. *White v. White*, 64 W. Va. 30, 60 S. E. 885.

Nor is it possible to disturb the trial court's finding as to the amount due. The services of the old man and the use of his horse were probably nearly equal in value to the services rendered to him. The decree, however, allowed a credit of \$225 for services rendered and burial expenses; the court being of the opinion that the services of the intestate partially discharged his obligation for lodging, board, stable room, and feed.

[5] The circumstances under which Close disposed of his property and the manner in which he did so precludes disturbance of the trial court's finding of fraud in the conveyance of the real estate. It was a transaction between mother and son and in plain view of a claim of indebtedness against the latter, depriving him of the means out of which compulsory satisfaction thereof could be obtained, in the event of its establishment. There is documentary evidence of payments or advancements from the mother to the son, dated May 24, 1916, August 7, 1916, and October 14, 1916; but these papers, two

checks and a receipt calling for \$450, the amount of the consideration recited in the deed, do not say what the money was paid for. They antedated the deed, and the oral evidence is that only the last one represented purchase money. The other two admittedly did not originally do so. Both parties to these transactions were parties to the removal of a portion of the goods and the sale of the balance. This circumstance constitutes a badge of fraud, and casts doubt and suspicion upon their explanation of the unusual circumstances attending the conveyance. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268. About two months elapsed between the date of the last alleged payment and the date of the deed, and the date of the acknowledgment approximates that of the removal of the store goods, and all these events, except the alleged payments, occurred after this controversy arose. In view of the subsequent conveyance of the real estate to an innocent purchaser for value, the personal decree against Mrs. Close was proper. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553; *Lockhart v. Beckley*, 10 W. Va. 87; *Heath v. Page*, 63 Pa. 106, 3 Am. Rep. 533.

Upon these principles and conclusions, the decree will be affirmed.

(23 Ga. App. 534)

JAMES v. STATE. (No. 10308.)(Court of Appeals of Georgia, Division No. 2.
April 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW §594(3) — MOTION FOR CONTINUANCE—ABSENT WITNESS.**

It being shown upon the hearing of the defendant's motion for a continuance, based upon the absence of a material witness for the defense, that the witness was beyond the jurisdiction of the court (in the United States army in France), and had not been subpoenaed, the court did not err in overruling the motion. Pen. Code 1910, § 987; *Boyd v. State*, 17 Ga. App. 162, 86 S. E. 411; *Minder v. State*, 113 Ga. 772, 39 S. E. 284 (1). This is true, although the defendant stated that he expected to have the witness at the next term of the court; it not being shown that the witness had promised to attend, or that there was any other ground for this expectation. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814 (4); *Owens v. State*, 110 Ga. 292, 34 S. E. 1015.

2. CRIMINAL LAW §923(8) — NEW TRIAL—DISQUALIFICATION OF JUROR—DILIGENCE.

The fact that one of the jurors had been a member of the grand jury that found the bill against the defendant is not cause for a new trial. The defendant and his counsel, by due diligence, could have discovered this fact before the jury was impaneled. *Britt v. State*, 112 Ga. 583, 37 S. E. 886.

3. SUFFICIENCY OF EVIDENCE.

The evidence amply authorized the verdict, and the court did not err in refusing a new trial.

Error from Superior Court, Houston County; H. A. Mathews, Judge.

Ben James was convicted of an offense, and from the judgment he brings error. Affirmed.

R. N. Holtzclaw, of Perry, for plaintiff in error.

John P. Ross, Sol. Gen., of Macon, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 532)

EVITT v. STATE. (No. 10254.)(Court of Appeals of Georgia, Division No. 2.
April 4, 1919.)*(Syllabus by the Court.)***1. INDICTMENT AND INFORMATION §110(35) — DEMURRER—PLEA IN ABATEMENT.**

The court did not err in overruling the general and special demurrers to the indictment, or in sustaining the motion of the solicitor gen-

eral to strike the defendant's plea in abatement.

2. REFUSAL OF INSTRUCTIONS.

The refusal of the court to give the timely written request to charge, presented by counsel for the defendant, was not error.

3. RULING ON MOTION FOR NEW TRIAL.

The overruling of the motion for a new trial was not error.

Error from Superior Court, Wilcox County; D. A. R. Crum, Judge.

A. L. Evitt was convicted of selling adulterated food, and he brings error. Affirmed.

Hal Lawson, of Abbeville, for plaintiff in error.

J. B. Wall, Sol. Gen., and J. S. Grantham, both of Fitzgerald, and Max E. Land, of Cordele, for the State.

BROYLES, P. J. The indictment under which the defendant was tried charged that, on the 11th day of May, 1918, in the county of Wilcox, he "did then and there, unlawfully and with force and arms, sell adulterated food, in that the said Evitt sold to S. A. Bowen a portion of an animal, to wit, a cow, unfit for food, not manufactured, and said portion of said cow being the product of a diseased cow, and being that of a cow that had died otherwise than by slaughter—contrary to the laws of this state, the good order, peace and dignity thereof."

The defendant interposed the following demurrer:

"(1) The facts as set forth in said indictment constitute no offense against the criminal laws of the state of Georgia.

"(2) The said indictment fails to allege that the food for the sale of which this indictment was preferred was ever examined by the state chemist, or under his direction, for the purpose of determining whether said food was adulterated within the meaning of the law, nor does it allege that any notice of the intention to have such examination was ever given the defendant, nor does it allege that as a result of such examination as aforesaid the commissioner of agriculture certified the case to the solicitor general of this court, after having determined that the provisions of the law touching the adulteration of foods had been violated by this defendant.

"(3) Defendant demurs to so much of the said indictment as alleges that the portion of an animal, to wit, a cow, which defendant was indicted for selling, was unfit for food, because it fails to show how or in what way the said portion was unfit for food.

"(4) Defendant demurs to so much of said indictment as alleges, 'said portion of said cow being the product of a diseased cow,' because said indictment fails to show what kind of product of said diseased cow defendant is indicted for selling, and further fails to allege how the said cow was diseased, and with what disease she was afflicted."

The defendant filed also the following plea in abatement:

"The food which is claimed in the said indictment to have been adulterated was not examined by the state chemist, or under his direction and supervision, for the purpose of determining from such examination whether such food was adulterated; and no notice was ever given this defendant and no opportunity to be heard was ever given him so that he could be present at any such examination; nor did the commissioner of agriculture ever determine, ascertain, or declare that any of the provisions of the pure food laws of Georgia had been violated by this defendant; nor did the said commissioner of agriculture of Georgia certify the facts and the case to the solicitor general of the Cordele judicial circuit. Of all this the defendant puts himself upon the country, and prays that said indictment do abate."

[1] In our judgment the indictment (which charged the offense substantially in the language of the statute) was not subject to any ground of the demurrer; and the facts stated in the plea in abatement were insufficient in law to require the abatement of the prosecution.

[2, 3] The verdict was authorized by the evidence, and has been approved by the trial judge; and, as no error of law appears, this court is without authority to interfere.

Judgment affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 522)

CITY COUNCIL OF AUGUSTA v. CLEVELAND. (No. 8996.)

(Court of Appeals of Georgia, Division No. 2, April 4, 1919.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §747(4)—NEGLECT OF EMPLOYE—LIABILITY—GOVERNMENTAL DUTY.

While ordinarily a municipality is not liable to a private citizen for injuries caused by the negligence of employes of its board of health while engaged in work connected with the preservation of the public health, an exception to this rule occurs where there is negligence on the part of such employes, who are paid directly by the city and not by the board of health, in cleaning out a part of a sewer, and leaving a heavy iron lid to an opening in the sewer in such a position upon a sidewalk as to create a dangerous defect or obstruction in the sidewalk, in consequence of which one not chargeable with negligence is injured.

2. CHARGE OF COURT.

There is no reversible error in any of the excerpts from the charge of the court, as complained of in the special grounds of the motion for a new trial, when considered in the light of the charge as a whole.

3. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by Leroy Cleveland, by next friend, against the City Council of Augusta. Judgment for plaintiff, and defendant brings error. Affirmed in conformity to answer of the Supreme Court (148 Ga. 734, 98 S. E. 345) to certified question.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error.

Alexander & Lee, of Augusta, for defendant in error.

BROYLES, P. J. [1-3] The first headnote alone needs elaboration. The ruling therein stated is in accord with the decision of the Supreme Court in this case, rendered February 13, 1919, in answer to questions certified by this court. 148 Ga. 734, 98 S. E. 345. That decision follows:

1. "The duty of a city to maintain its sewerage drainage system in a good working and sanitary condition is a governmental function."

2. "Such maintenance of a sewerage system has reference to the preservation of the public health."

3. "This court will take judicial notice of that fact."

4. "This court will also take judicial cognizance of the fact that the cleaning out of an essential part of a city's sewerage drainage system for the purpose of keeping it open and unclogged by dirt, sand, or other foreign substances, so that it can properly perform its functions as a part of the system, is a necessary work in a proper maintenance of the system, and is a work connected with the preservation of the public health."

5. "Negligence on the part of employes of the board of health of a city, who were paid by the city, in cleaning out a part of the sewer and leaving a heavy iron lid to an opening into the sewer in such a position as to create a dangerous defect or obstruction in the sidewalk, in consequence of which one not chargeable with negligence was injured, would render the city liable to the injured party."

"The Court of Appeals has certified the following questions upon which it desires instruction:

"(1) Is the duty of a city to maintain its sewerage drainage system in a good working and sanitary condition, so as to prevent it from becoming or causing a nuisance, a governmental or a ministerial function?

"(a) Is such maintenance connected with, or has it reference to, the preservation of the public health?

"(b) Is the fact that such maintenance is connected with or has reference to the preservation of the public health so well known that this court can take judicial cognizance of it?

"(c) Can this court take judicial cognizance of the well-known fact that the cleaning out of

a "sand trap"—an essential part of a city's sewerage drainage system—for the purpose of keeping it open and unclogged by dirt, sand, or other foreign substances, so that it can properly perform its functions as a part of the system, is a necessary work in the proper maintenance of the system, and is a work connected with the preservation of the public health?

"(2) A "sand trap" forming a part of the sewerage drainage system of the city of Augusta was being cleaned out by the employés of the board of health of the city by removing therefrom sand and dirt. The powers and duties of the board of health and its employés, and their relations to the city, are fixed by the act of the General Assembly of Georgia creating the board. Acts 1880-81, p. 365. While the men cleaning out this sand trap were employés of the board of health of the city of Augusta, it is inferable from the evidence that they were paid by the city of Augusta. The sand trap was on the edge of a sidewalk near the curbing, and the employés of the board of health, for the purpose of cleaning out the sand trap, removed its iron lid (which was about $3\frac{1}{2}$ or 4 feet square and weighed 200 or 250 pounds, and which, when the trap was closed, formed a part of the surface of the sidewalk used by pedestrians), and propped the lid up at an angle on the edge of the sidewalk by means of a steel bar some $2\frac{1}{2}$ or 3 feet long, while they were engaged in cleaning out the trap. While this work was being done, a boy 7 years old, who was upon the sidewalk, walked up to the trap to see what was going on, and accidentally struck with his foot the steel bar which supported the lid, thereby knocking the prop down and causing the lid to fall upon and break his leg. Under these circumstances, was the city in the performance of a governmental or a ministerial function, and was it liable for the negligence of the employés of the board of health (if they were negligent under the facts of the case) in improperly and insecurely propping up the lid, and in failing to warn the boy of his danger when approaching it?

"1-3. We are of the opinion that the duty of a city to maintain its sewerage drainage system in a good working and sanitary condition is a governmental function. That such maintenance is connected with, and has reference to, the preservation of the public health is so well known and so generally recognized that courts will take judicial cognizance thereof. It is unnecessary to cite authorities, either decisions of courts or text-books, to show what facts or classes of facts courts will take judicial notice of, in order to demonstrate that judicial notice will be taken of the fact that the sewerage system has a direct connection with and relation to the health of the inhabitants of the municipality. We will, however, call attention to the case of *Townsend v. Smith*, 144 Ga. 792, 87 S. E. 1039, in which it appears that this court took judicial cognizance of the fact that 'the prevention of an infectious malady which, unless checked, would become general among the cattle of a given county, and thereby render the flesh of such cattle and the milk of cows diseased, unwholesome, and unfit for food, was a matter affecting the health of the people of the community where this disease appeared.' The removal of garbage of all kinds, the prevention of the escape of noxious vapors and odors, the clean-

liness of the persons residing in a city, are all to a large extent dependent upon the maintenance of a sewerage drainage system. It follows from what is here said, under the authority of several of our decisions, that the maintenance of the sewerage and drainage system of a city in a good working and sanitary condition is a governmental function. This conclusion is in accordance with what was said in the case of *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, and the other cases decided by this court. *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664. See, also, 6 *McQuillin*, Mun. Corp. § 2669. In answering the question in regard to the sewers and drainage system of a city, we have assumed that the system referred to is not one operated for profit, and that no substantial charges are made for the ordinary use, enjoyment, and benefits of the system.

"4. It will be seen from what we have said above that an affirmative answer should be given to subdivision (c) of the first question, in the form in which that question is submitted. If the question had been propounded as to whether a court would take judicial cognizance of what a sand trap is, a different question would have been presented. But, where the sand trap is defined as an essential part of the sewerage system, then it follows from what we have previously stated that the keeping of it open and unclogged by dirt, sand, or other foreign substance, so that it could properly perform its functions as a part of the system, is a necessary part of the proper maintenance of the system, and has therefore a natural connection with the preservation of the public health.

"5. While it is one of the governmental functions and duties of a city to effectively maintain its sewerage system, and while, under the authority of the decision in *Love v. Atlanta*, supra, and the cases laying down the same doctrine as there stated, it follows that if, in the exercise of such functions and the discharge of the duties devolving upon the department of the city government having charge of the matters relating to the public health, a private citizen is injured by the negligence of one of the city's servants in and about such work, no right of action arises against the city, nevertheless that doctrine must not be allowed to destroy the other equally well-established doctrine that, if a city negligently and tortiously allows obstructions to remain in its streets or sidewalks, or negligently fails to repair defects in a sidewalk or street, and a citizen in the exercise of due care is injured in consequence of such act of negligence upon the part of the city, there can be a recovery therefor against the city. Each of these two doctrines must be given effect, and have been given effect. In the case of *Mayor, etc., of Savannah v. Waldner*, 49 Ga. 316, it was said: 'It is the duty of a municipal corporation, vested by law with authority over the streets, whilst dangerous works, such as sewers, etc., are being constructed across a street, to have proper precautionary measures taken to prevent accidents to passengers during such construction, whether the same is being done by the corporation through its own servants, or by contract, or by subcontractors under a primary contractor.' The defect in the street which is charged to be negligent and tortious conduct in the case just cited consisted in

leaving open 'a ditch or sewer across the street.' See, also, *Mayor, etc., of Savannah v. Spears*, 66 Ga. 304. In the case of *Kea v. Dublin*, 145 Ga. 511, 89 S. E. 484, it was said: 'Although municipal authorities may have plenary power in the matter of collection, removal, and disposition of garbage, yet they cannot lawfully create, in connection therewith, a nuisance dangerous to health or life; and where such a nuisance is created and its effect is specially injurious to an individual by reason of its proximity to his home, he has a cause of action for damages.' *Bell v. Mayor, etc., of Savannah*, 139 Ga. 298, 77 S. E. 165. See, also, *Mayor, etc., of Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577; *Williams v. Washington*, 142 Ga. 281, 82 S. E. 656, L. R. A. 1915A, 325, Ann. Cas. 1916B, 196; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Mayor, etc., of Americus v. Chapman*, 94 Ga. 711, 20 S. E. 3; *Cornelisen v. Atlanta*, 146 Ga. 416, 91 S. E. 415. Consequently the last question propounded should be answered in the affirmative."

The evidence in this case authorized a finding that the employes of the board of health of the city of Augusta were paid directly by the city and not by the board of health, and that they were negligent in propping up, on the sidewalk, a heavy iron lid of a sand trap of a sewer, in such a way that it fell upon the sidewalk when the prop was accidentally struck by the foot of a child, and that they thereby created a dangerous obstruction upon the sidewalk, in consequence of which the injuries sued for were sustained; and that the plaintiff, a boy seven years old, had exercised the "due care" required of a child of such tender years under the circumstances.

Under these facts, and the foregoing decision of the Supreme Court, the city of Augusta was liable in damages to the plaintiff for the injuries sued for.

Judgment affirmed.

BLOODWORTH and STEPHENS, JJ.,
concur.

(23 Ga. App. 532)

STRICKLAND v. HAMILTON. (No. 9726.)

(Court of Appeals of Georgia, Division No. 2,
April 4, 1919.)

(Syllabus by the Court.)

1. **BASTARDS & ERRORS OF JUSTICE OF THE PEACE—CERTIORARI.**

"The writ of certiorari will not lie to correct errors committed by a justice of the peace in proceedings under Pen. Code 1910, § 1331 et seq., against the putative father of a bastard child, where judgment is rendered requiring the defendant to give security for the support of the child, and binding him over to the superior court upon his failure to give such security. Such is the ruling in the case of *Hyden v. State*, 40 Ga. 476, and upon formal review of that de-

cision this court declines to overrule it." *Strickland v. Hamilton*, 148 Ga. 820, 98 S. E. 471.

2. **REFUSAL OF CERTIORARI.**

The foregoing ruling was made by the Supreme Court upon a question certified by this court in this case, and it follows therefrom that the judge of the superior court did not err in refusing to sanction the certiorari.

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Bastardy proceeding by Lettie Hamilton against Henry Strickland. Judgment for plaintiff, and defendant brings error. Affirmed in conformity to answer of Supreme Court (148 Ga. 820, 98 S. E. 471) to certified question.

David S. Atkinson, of Savannah, for plaintiff in error.

H. Roy Lang, of Waverly, and F. M. Scarlett, Jr., of Brunswick, for defendant in error.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH and STEPHENS, JJ.,
concur.

(23 Ga. App. 528)

VOLUNTEER STATE LIFE INS. CO. v. SPRATLING.

SPRATLING v. VOLUNTEER STATE LIFE INS. CO.

(Nos. 9472, 9445.)

(Court of Appeals of Georgia, Division No. 2,
April 4, 1919.)

(Syllabus by the Court.)

1. **GENERAL DEMURRER.**

The court did not err in sustaining the general demurrer to the second count of the plaintiff's petition.

2. **GENERAL DEMURRER—DISMISSAL OF PETITION.**

The court erred in overruling the general demurrer to the first count of the petition, and in refusing to dismiss the entire petition.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by C. F. Spratling against the Volunteer State Life Insurance Company. Judgment for defendant, and plaintiff brings error, and defendant takes cross-exceptions. Judgment on the main bill of exceptions reversed, and on cross-bill affirmed in conformity to answer of the Supreme Court (148 Ga. 687, 98 S. E. 464) to certified questions.

Little, Powell, Smith & Goldstein, of Atlanta, and W. B. Miller, of Chattanooga, Tenn., for plaintiff in error.

Jones & Chambers and Samuel Barnett, all of Atlanta, for defendant in error.

BROYLES, P. J. In answer to questions certified by this court, the Supreme Court, on November 16, 1918, rendered the following opinion (the decision was held up, however, by a motion for a rehearing until February 24, 1919, when the motion was denied by the Supreme Court):

"A limited payment (20-pay) life insurance policy was issued on May 25, 1913. The insured paid the first premium on the date of issue, the second premium on May 25, 1914, and the third on May 25, 1915. The premium due on May 25, 1916, was not paid. The insured died on August 25, 1916. The insured had borrowed on the policy \$337.11, and the interest on the amount had been paid up to May 25, 1916. The premium, as stated in the face of the policy, was \$316.89, payable annually. The policy provided: 'The company will, at any time after three full years' premiums have been paid, advance upon the sole security of this policy, when legally assigned, a sum equal to the amount specified in the table below, less any indebtedness to the company on account of this policy. The interest on such loan shall not exceed 6 per cent. per annum, and shall be payable annually in advance.' The loan or surrender value of the policy, as stated in the table referred to, was \$396 after the policy had been in force three years; \$621 after four years. The policy further provided: 'In the event the insured should, at any premium date or within the days of grace thereafter, after three full years' premiums have been paid hereon, fail to pay or cause to be paid the then current premium, if the policy be not surrendered by the insured with a choice of one of the options herein guaranteed, and if at the time of the nonpayment of premium there is a loan value hereon in excess of all indebtedness that may then exist against the policy, together with interest, the company will apply such available loan value towards the payment of the premium then due, with interest thereon at a rate not exceeding six per cent. (6%) per annum, chargeable annually in advance, and will continue to carry said policy in force, in the form as written and at the rate of premium as provided for in the face hereof, subject to its terms and such indebtedness, the same as if the premium had been paid in cash, and will continue to so apply such loan value as long as such value, at the rate of premium provided in the face hereof, will suffice to pay for even one day's premium. At any time while this policy is thus in force the insured may resume payment of premiums thereon without medical re-examination, and in that event any indebtedness against the policy may either be paid in cash or allowed to remain as a loan hereon. All such indebtedness shall be a first lien on the policy, and the policy will lapse unless premium payments are resumed by the insured within the actual period of extension.' The nonforfeiture provisions of the policy, other than the automatic premium loan clause last above quoted, gave to the insured the option to surrender the policy to the company, after the policy has been in force three full years, and at any time prior to default in premium payment, or within the days of grace (one month) thereafter, and to take: (1) The cash surrender value, as indicated by the table set out in the policy, less any indebt-

edness to the company on account of the policy; or (2) a nonparticipating paid-up life policy for a reduced amount, as indicated by the table; or (3) a nonparticipating paid-up term policy for the full amount insured by the policy, as indicated by the table, with a provision in (2) and (3) as to any indebtedness to the company on account of the policy. The insured did not surrender the policy, and did not elect to take any of the options last above referred to.

"On June 26, 1916, the fourth annual premium having become due on May 25, 1916, the company offered to loan to the insured the full amount available after the policy had been in force four years, to wit, \$621, at the time tendering the insured a loan agreement to be executed by himself and his wife; the latter being the beneficiary named in the policy. Along with the loan agreement the company furnished to the insured a statement of his indebtedness to it, showing former loan, \$337.11, premium due on May 25, 1916, \$316.89, and interest to May 25, 1917, \$37.26, making a total of \$691.26, and required the insured to pay the additional sum of \$70.26 to cover the total of his indebtedness to the company. On June 27, 1916, the insured signed the agreement and forwarded it from Macon, Ga., to the beneficiary at Atlanta, Ga., with the request that she also execute the agreement and deliver it to the company together with the sum of \$70.26. At the time of the receipt of the agreement by the beneficiary, she was 'ill and bedridden, and remained in this condition for several days, at which time she became wholly unconscious, and remained in this condition until after the death of the insured, and for said reasons was unable to execute said loan agreement prior to the death of the insured.' The insured died without knowing that the beneficiary had not complied with the 'wrongful' demands of the company. After the death of the insured, the beneficiary completed the agreement and tendered it, together with \$70.26, to the company. One clause of the policy provided: 'This policy is issued with the express understanding that the insured may, without the consent of the beneficiary, receive every benefit, exercise every right, and enjoy every privilege conferred upon him by this policy.' Held:

"1. Under the foregoing facts, the available loan value on the policy, to wit, \$58.89 (conceding, without deciding, that interest at 6 per cent. per annum in advance on the existing loan and on the amount appropriated to the payment of the premium due should not be first deducted), was, under the automatic premium loan clause quoted above, insufficient to 'carry the policy in force, in the form as written,' to the date of the insured's death, August 25, 1916.

"(a) The obligation of the company, under the automatic premium loan clause quoted above, was to apply such available loan value toward the payment of the premium due, and to carry the policy in force 'in the form as written and at the rate of premium as provided for in the face' of the policy. In a strict technical sense no 'rate of premium' is provided in the face of the policy. The reference is, however, to the contract as written, and the words quoted above are to be given their usual and ordinary signification. The parties were dealing with this contract of insurance, to wit, a limited payment life policy as distinguished from a

purely protective policy or other form of contract."

2. "The insurance company was not estopped from declaring a forfeiture of the policy (conceding, without deciding that its demand that the loan agreement be executed by the beneficiary was wrongful and unauthorized); it affirmatively appearing that the sum of money necessary to pay the past-due premium, interest in advance upon the loan, and the existing loan upon the policy was neither paid nor tendered the company until after the death of the insured." 148 Ga. 687, 98 S. E. 464.

[1, 2] Under the foregoing decision, neither count of the petition set forth a cause of action; and the court properly sustained the general demurrer to the second count of the petition, but erred in overruling the general demurrer to the first count thereof, and in refusing to dismiss the entire petition.

Judgment on the main bill of exceptions reversed; on the cross-bill affirmed.

BLOODWORTH and STEPHENS, JJ., concur.

(124 Va. 736)

BROOKS v. CLINTSMAN.

(Supreme Court of Appeals of Virginia. March 20, 1919.)

1. DEEDS ⚡181—ALTERATION BY PARTIES.

No erasure or alteration in a conveyance, or cancellation thereof by mutual consent of the parties, can divest an estate already vested by operation of deed, in view of Code 1904, § 2413, providing that no estate in lands for a term of more than five years shall be conveyed unless by deed or will.

2. ESTOPPEL ⚡70(1)—EQUITABLE ESTOPPEL—CHANGE OF POSITION.

In suit by plaintiff to have herself declared grantee in a deed from which her son, now deceased, erased her name and inserted his own as grantee, the doctrine of equitable estoppel cannot be invoked against plaintiff simply because she permitted the son and his family to occupy the farm covered by the deed free from rent for several years.

3. ESTOPPEL ⚡60—EQUITABLE ESTOPPEL—CERTAINTY.

An equitable estoppel relied on to conclude another's known right of property must be certain to every intent, and is not to be taken by argument or inference.

4. EQUITY ⚡73—LACHES—LOSS OF EVIDENCE.

Contention that plaintiff's right to maintain suit to have herself declared grantee in a deed from which her son, now deceased, erased her name and inserted his own as grantee, is barred in consequence of her laches by which defendant, son's wife, is deprived of the benefit of the testimony of son, cannot be sustained; the

son having died within less than one year after inserting his own name in the deed.

5. GIFTS ⚡49(4)—PAROL GIFT OF LAND—EVIDENCE.

Evidence held insufficient to establish a parol gift of land from plaintiff mother to her son, now deceased, which gift could have been enforced either by him or those claiming under him in a suit for specific performance.

6. GIFTS ⚡25—PAROL GIFT OF LAND—VALIDITY.

Since Code 1904, § 2413, took effect, no parol gift of land is enforceable.

Sims, J., dissenting.

Appeal from Circuit Court, King and Queen County.

Suit by M. L. Clintsman against Ida R. Brooks. Decree for plaintiff, and defendant appeals. Affirmed.

Isaac Diggs and C. R. Sands, both of Richmond, for appellant.

J. D. Mitchell, of Walkerton, and Herbert I. Lewis, of West Point, for appellee.

WHITTLE, P. This is an appeal from a decree of the circuit court of King and Queen county in a suit in which appellee was plaintiff and appellant defendant. The history of the case is this:

On January 3, 1902, appellee, Mrs. M. L. Clintsman, who lived at Grand Forks, N. D., by her son, Leslie L. Clintsman (husband of appellant), who resided with his family in King and Queen county, negotiated the purchase of a farm containing 132¼ acres of land located in that county for \$700. The deed conveying the land to appellee was duly executed and acknowledged by the grantor, Alfred Bagby, and deposited with his brother-in-law and agent, R. N. Pollard, with instruction to deliver the deed upon payment of the purchase money. Payment was made with the personal check of appellee and passed by her son to Pollard, who in turn delivered the deed to him. The deed was not put to record until November 7, 1903, nearly two years after its execution and delivery. Shortly before it was admitted to record, Leslie L. Clintsman, in the presence of Mr. Pollard, erased the name of his mother from the deed and inserted his own name as grantee therein, and then had the deed in its altered condition recorded.

By permission of the mother the land was occupied by the son and his wife and children from the time of the purchase until his death (the exact date of which does not appear, but some time between the making of his will, July 2, 1903, and February 2, 1904, when the will was admitted to probate). Testator by his will bequeathed to his wife "all of my possessions and things now in my posses-

sion and name, * * * hoping if she outlives me, that she will look after my aged father and also if she can in any way assist my mother, that she will do so." The will does not in terms undertake to devise the land, nor is it shown whether his name was substituted for that of his mother in the deed before or after he made his will. Leslie L. Clintsman's father and mother had been divorced, and the father lived with the son on the land from the date of the purchase until the son's death. Afterwards, upon the alleged ground that the father was not a suitable person for her children to be associated with, appellant refused to permit him to remain in the home; and, a year or two after the death of her husband, she married a second time.

Mr. Pollard gave his deposition in the case about twelve years after the alteration of the deed, and says he thinks the son at that time produced a letter from his mother authorizing him to make the change. Appellant in her answer to the bill also states that there was such a letter, but that it had been lost. She and others likewise testified to alleged admissions by appellee that she intended the property for her son. Mr. Pollard, as a mutual friend, seems to have endeavored to adjust the differences between appellant and appellee; and in letters written by appellee to him about that period she manifested the tenderest devotion for the memory of her son, and absolved him from any intentional impropriety in the alteration of the deed. It is not clearly shown when Mrs. Clintsman first learned of the alteration.

Upon the case thus made the circuit court was of opinion that the substitution by the son of his name for that of appellee as grantee in the deed was a void act and invested him with no right or title to the land in controversy, and decreed accordingly. From that decree this appeal was allowed.

[1] The controlling principle in cases of this class is succinctly stated in 2 Minor on Real Property, § 1190:

"No erasure or alteration in a conveyance, nor even the cancellation thereof by mutual consent of the parties, can divest an estate already vested by operation of the deed; for that would be in conflict with the statute of conveyances, which declares that no estate of inheritance or freehold, or for a term of more than five years in lands, shall be conveyed unless by deed or will." 1 Va. Code, 1904, § 2413; 2 Min. Inst. 738.

The same doctrine was announced by this court in *Suttle v. R. F. & P. R. Co.*, 76 Va. 284, 286, as follows:

"It has been long settled in this state that the disclaimer of a freehold can only be by deed or in a court of record. See the case of *Bryan v. Hyre*, etc., 1 Rob. R. [40 Va.] 101 [39 Am. Dec. 246]—a conclusive authority on this subject."

[2] Appellant also invokes the doctrine of equitable estoppel to reverse the decree. It is true that appellee permitted her son and his family to occupy her farm free of rent for a number of years; yet the doctrine of equitable estoppel cannot be rested alone upon that foundation. The son was fully advised of the state of the title to the land and the limitations upon his possession, and was induced by no declaration on her part to alter his position injuriously to himself. It may be that he was disappointed of the hope that some day his mother would bestow the property upon him; but the doctrine is not founded upon expectation; ordinarily it rests upon past or present considerations, and not on possible future events based upon opinion as to the supposed intention of another.

In the case of *Newport News, etc., Co. v. Lake*, 101 Va. 334, 343, 344, 43 S. E. 566, 569, it was said:

"Experience has shown that in controversies involving title to real estate it is far safer to rely on written muniments of title than 'the slippery memory of man.' Hence parol defeasances * * * are not favored; a mere equitable estoppel constitutes no defense to an action of ejectment (*Haney v. Breeden*, 100 Va. 781, 42 S. E. 916); and when such defense is set up on the equity side of the court, it must be distinctly charged and clearly proved."

[3] It is a familiar rule that an equitable estoppel relied on to conclude another's known right of property must be certain to every intent, and is not to be taken by argument or inference.

It is quite apparent that the claim of appellant to the land in controversy falls far short of the requirement of the equitable doctrine relied on, and cannot be maintained.

[4] The point likewise is stressed that Mrs. Clintsman has lost her right to maintain this suit in consequence of her laches in bringing it, by which appellant has been deprived of the benefit of the testimony of her late husband, Leslie L. Clintsman; that he had acted for his mother and himself throughout the transaction, and, if living, his evidence would be of the utmost importance upon the question involved.

This contention is demonstrably without merit. The record shows that Leslie L. Clintsman died within less than a year after inserting his own name in place of his mother's as the grantee in the deed. Appellant, of course, had no cause of action until after the alteration had been made; and therefore the loss of his evidence by death a few months later can neither be imputed to lapse of time nor to the laches of appellee in bringing her suit. As we have seen, she lived in a distant state, and the bill charges that "complainant instructed her son, the said Leslie L. Clintsman, to have the tract of land

conveyed to her, and she gave him \$700 to pay for the same, and, having explicit confidence in her son, * * * believed that he had obeyed her instructions until several months ago, * * * when she was reliably informed of the alteration of the deed. It is true that this allegation is controverted by the answer of appellant and by her testimony; but, however that may be, she suffered no loss of evidence from delay in bringing the suit.

[5, 6] Finally, in the absence of the statutory provision on the subject, upon elementary principles, the evidence falls far short of establishing a parol gift of the land from the mother to the son which could have been enforced either by him or those claiming under him in a suit for specific performance. But, since the Code of 1887 took effect, no parol gift of land is enforceable. Section 2413 provides:

"Nor shall any right to a conveyance of any such estate or term in land" (an estate of inheritance or freehold, or term of more than five years) "accrue to the donee of the land or those claiming under him, under a gift or a promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him."

The latest case on this subject is *Wohlford v. Wohlford*, 121 Va. 699, 93 S. E. 629.

We find no error in the decree of the circuit court, and it must be affirmed.

Affirmed.

SIMS, J. (dissenting). This is a suit in equity brought by the appellee in October, 1915, to have herself declared to be the grantee in a deed which had been recorded over 12 years as a deed to her son as the grantee thereof, and under which the exclusive adverse possession of the real estate conveyed thereby had been taken by the son and held for such period before such suit by the son, the appellant, his devisee, claiming title to the same in fee, and so occupying and using such real estate during the whole of such time, and to have such deed set aside, and to have a parol trust declared to exist under such deed in favor of the appellee over 12 years after the death of the son.

The appellee in her bill seeks to explain her long acquiescence in the status aforesaid by the allegation that she was the grantee named in said deed as it was originally executed and delivered to her son for her, and that before it was recorded the son, without the knowledge or consent of the appellee, had his name substituted in the deed as grantee and then recorded it, and that the appellee had no knowledge that the son was named as grantee in the deed until a short time before the suit was instituted. The proof in the case is very clear that the real estate

was purchased by the son and was paid for by the mother, the appellee, as a gift to her son; that the deed was dated January 3, 1902; that, as the grantor in the deed, from whom the real estate was purchased, understood, the deed was to be made, however, to the mother; that the grantor accordingly inserted the name of *L. M. Clintsman* in the deed as grantee, whom he thought to be the appellee, and delivered the deed to the son in Virginia in 1902, the appellee being in and a resident of North Dakota; that as a matter of fact *L. M. Clintsman* was not the name of appellee, *M. L. Clintsman* being her correct name. Whether this error in the deed was noticed at the time by the son or reported to the mother, or whether the deed in that form was acceptable to the mother, or was accepted by her, is not disclosed by the evidence. The original direction that the deed be made to the appellee as grantee came to the grantor through the son. Just when and why the appellee decided to change this plan and make the son the grantee is a subject of conflict in the evidence in the record, upon which the testimony of the son, if he were living, would throw valuable light. But, at any rate, the preponderance of the evidence in the record clearly and distinctly shows that the erasure of the name of *L. M. Clintsman* from said deed and the insertion therein of the name of the son as grantee was done by the son shortly before the deed was recorded by him; that the son at that time had in his possession a letter from his mother, the appellee, with a message or direction to Mr. Pollard authorizing him to do this; that this letter was presented to Mr. Pollard, the person acting as attorney or agent for the grantor in said deed, as evidencing the authority of the son to make this change; and that the grantor assented to such change through Mr. Pollard (as must be assumed from the record in this case), and the deed was accordingly recorded by the son in 1903 as a deed to himself.

A few months thereafter the son died leaving a will, which was probated on February 2, 1904, which devised "all of my possessions, and things now in my possession and name to *Ida R. Clintsman*" (the appellant). The will also continued with the following provisions: "Hoping that if she outlives me that she will look after my aged father and also if she can in any way assist my mother, that she will do so." This will is dated July 2, 1903, but, of course, spoke as of the death of the son, and said real estate, being in the possession of the son at the time the will was executed and both in his possession and name when he died, was intended by him to pass to appellant thereunder. The son, from the time he received the letter aforesaid from his mother until his death in 1904, believed, and was induced by the mother to believe, that it would so pass. He thus died, feeling ac-

cure in the belief, induced by the mother, that the provisions of his will for his widow, the appellant, would stand. The mother did not question the sufficiency or the validity of the authority of said letter in the lifetime of her son. If she had done so, he might have established the validity of his action under such authority by his testimony. Upon his death the appellant thought that the authority of the letter had been validly exercised, and that the real estate passed under the will. Following the death of the son the appellee knew of this will and acquiesced in the exclusive adverse possession and enjoyment of said real estate by appellant under the will from the death of the son for over 12 years before this suit was brought, and for nearly 12 years before any question was raised by appellee in the premises. And while there is no express proof in the record of the precise fact that appellee knew that her son had acted on her letter authorizing him to change the name of the grantee in said deed as aforesaid, her knowledge of said will and subsequent acquiescence in the holding of the possession aforesaid by the appellant thereunder raises a strong inference that she had knowledge that such change of names had been so made prior to the death of her son.

And the question which was finally raised by appellee, about a year before the suit was brought, was due to the fact that appellant had refused to allow the father of her deceased husband to continue to live on said real estate.

The evidence makes it clear that this was the moving cause of the suit, and that but for that occurrence the appellee would have continued to have acquiesced in said status of said property.

Where the merits may be of the controversy over the right of said father to live on said real estate is a problem not involved in this suit; and it would serve no useful purpose to set forth here the details of that controversy. It is sufficient to say that the evidence discloses that prior to such controversy the appellee had acquiesced in the status quo ante aforesaid, and would have continued to so acquiesce in future but for such controversy. The record shows that the latter is the real controversy between the parties to this suit, although the bill asserts a wholly different cause of action.

Now, I have no difference with the majority opinion on the subject of the law therein laid down. If the deed in question was ever delivered, so as to have become an executed contract prior to the change of name of the grantee therein, then the legal title to the real estate thereby conveyed would have become vested in the grantee first named in the deed, if such grantee had been correctly named therein. 2 Minor on Real Property, § 1190; 2 Pollard's Code 1904, §

2413; 2 Minor's Inst. 738; Suttle v. R., F. & P. R. R. Co., 76 Va. 284, 286; Nelson v. Triplett, 81 Va. 237; Bryan v. Hyre, 40 Va. (1 Rob.) 101, 39 Am. Dec. 246. And at law the grantee could not be subsequently divested of the legal title except by matter of record or by deed or will. In equity, indeed, the situation might be different. I agree with the majority opinion, however, in the view that in the instant case the facts as disclosed by the record are not such as to make the doctrine of estoppel applicable so as to produce a different situation. But in the case before us the name in the deed was not the name of the appellee. Hence at law the legal title did not thus pass to her, even if the deed had been delivered. In equity, it is true, she would be held to be entitled to claim such title, as she was the person intended to be the grantee, if the fact was that the deed was delivered in the legal sense of that term. But the appellee in such case would have to seek the aid of a court of equity in order to obtain the benefit of such title. Should that court grant her such relief in view of her laches, under the circumstances of this case? I think not, for the reasons presently to be more particularly pointed out.

But suppose the case were regarded as if the name of the appellee had been correctly written in the deed so that by the operation of the deed the appellee would have become vested with the legal title to the real estate upon its delivery; still the question of fact would remain: Was it ever delivered in that form? If not, and if it remained undelivered when the alteration above named was made, it was still an executory contract, and the alteration aforesaid, if made with the consent of the appellee as well as of the grantor in the deed, was valid, and the deed took effect as a new execution of it as of the time of such alteration and delivery of the deed to the grantee then named therein, the son aforesaid. Cleaton v. Chambliss, 27 Va. (6 Rand) 92; Speake v. United States, 9 Cranch, 27, 37, 3 L. Ed. 645; 2 Rob. (New) Pr. p. 26. In such case the gift of the mother to the son of the real estate aforesaid would have become a gift completely executed, and hence as binding upon the mother, the appellee, as if it had been a purchase from her by the son for valuable consideration. Now, since the son was acting for the mother, the appellee, as well as for himself throughout this transaction, it is manifest that his testimony would be of the utmost importance upon the question of fact involved, namely, upon the question of whether the deed was ever delivered in its first form. By the laches and acquiescence aforesaid of the appellee the appellant has lost the evidence of said son by reason of his death. Further, the testimony of Mr. Pollard, a witness for the appellant, who was the attorney and

agent for the grantor in said deed in charge of the matter of the first passing of the deed to the hands of the son, and who acted for the grantor in the subsequent transaction aforesaid when the name of the grantee was changed as aforesaid, was rendered to a considerable degree vague and indefinite by the lapse of time between the original occurrences and the giving of his deposition, as is clearly shown by his testimony.

As said by this court, speaking through Judge Staples, in *Harrison v. Gibson*, 64 Va. (28 Grat.) 212, and quoted with approval by this court, speaking through Judge Lewis, P., in *Hatcher v. Hall*, 77 Va. at page 576:

"If from the delay which has taken place it is manifest * * * that the original transactions have become so obscured by time and the loss of evidence and the death of parties, as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim."

See, also, 1 Barton's Chy. Pr. 90, and cases cited.

Further, no particular lapse of time is necessary to raise in equity the bar of laches. It rests upon the principle that nothing can call courts of equity into activity "but conscience, good faith, and reasonable diligence; and, where these are wanting, the court is passive and does nothing." *Id.* p. 91. It may be that, if the appellee had instituted this suit promptly following the death of her son, which occurred some time in 1904, and she had frankly explained the situation of the title at the time of her letter, had admitted the writing of it, and had satisfactorily accounted for her delay in not bringing the suit sooner, the doctrine of laches might not have applied. But the situation before us is different. We find that, when she does, after long years of delay, bring her suit, she for one thing testifies therein positively de-

nying that she ever wrote the letter. The truth of such testimony is seriously impeached by one other letter which she had written, if not in other letters in the record.

She testifies in her deposition, given on August 10, 1916, on this subject as follows:

"Q. 4. State if you ever wrote Mr. R. N. Pollard a letter instructing him to erase your name in the deed and insert the name of Leslie L. Clintsman.

"A. I never did.

"Q. 5. State if you ever sent a message to Mr. R. N. Pollard a letter instructing him to erase your name of Leslie L. Clintsman instead.

"A. I never did."

In a letter to the appellant, however, dated November 22, 1915, appellee wrote on this subject as follows:

"Yes; I told or wrote Leslie that I didn't care, but I never asked him if it had been done; there is no blame attached to Leslie or any one. * * *"

For another thing, she is disingenuous as to her real feeling of aggrievance against the appellant. She alleges one cause of action when in truth her actual cause of action was a wholly different one. In short, she does not come into a court of equity clothed with that conscience and good faith which can alone appeal to it, and, moreover, her long delay since the death of the son has weakened the character of testimony on which alone appellant was left to rely in the premises after the death of her husband, the son of appellant aforesaid.

I think, therefore, upon the whole case, that the appellee has so long acquiesced in the status which her bill seeks to disturb, that, under the circumstances of this case, she is barred in equity by her laches; that it is now too late for her to obtain in that forum the relief which she seeks; and hence that the decree under review is erroneous, in that it granted such relief, and should be reversed.

(124 Va. 592)

KEPPLER et al. v. CITY OF RICHMOND.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. DEDICATION \Leftrightarrow 2—OF ALLEY—CITY CHARTER PROVISION.

City charter provisions that, whenever any alley shall have been opened to and used by public for five years, it shall become an alley for all purposes, city having authority and jurisdiction over it as over others, are valid as statutory law, and, where the provisions apply, they are conclusive evidence of dedication.

2. DEDICATION \Leftrightarrow 44—OF ALLEY—CHARTER PROVISIONS—EVIDENCE.

Under Richmond City Charter, § 24, providing that, whenever any alley shall have been opened to and used by public for five years, it shall become an alley for all purposes, city having authority and jurisdiction over it, same evidence of dedication is necessary to put provision in operation as law requires to raise implication of common-law dedication from mere user of way.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 648—STREETS—USE OF ALLEY—PRESCRIPTION.

Public user of alley by city, to give rise to public easement in land by prescription, must be under a claim of right, unequivocally adverse to owners.

4. EVIDENCE \Leftrightarrow 353(3)—DEED—ADMISSIBILITY AS AGAINST PLAINTIFFS NOT IN PRIVACY.

In suit by landowners to restrain city from claiming strip of land as alley, deed *held* not admissible in evidence on any ground that its recitals were binding on plaintiffs, under rule applicable to recitals or declarations in deeds to which parties to cause are parties or privies; there being no privacy of estate between plaintiffs and owners of land conveyed.

5. EVIDENCE \Leftrightarrow 372(1)—ANCIENT DEED—CONTROVERSY REGARDING ALLEY.

In suit to restrain city from claiming strip of land as alley, deed over 30 years old, declaring that rear line of lot it conveyed was on an alley, *held* admissible in evidence against plaintiffs, though they were not in privacy with property conveyed, under exception which ancient deeds afford to rule as to inadmissibility of hearsay evidence; such declarations being admissible, though going beyond description of monuments marking mere boundary lines of land conveyed.

6. EVIDENCE \Leftrightarrow 383(7) — ANCIENT DEEDS — WEIGHT.

Evidence afforded by recitals or declarations of ancient deed, over 30 years old, is not entitled to much weight, and may be repudiated by slight evidence of more definite character.

7. EVIDENCE \Leftrightarrow 372(3)—ANCIENT DEEDS—30-YEAR PERIOD.

Deeds less than 30 years old are inadmissible in evidence as ancient.

8. EVIDENCE \Leftrightarrow 372(1)—ANCIENT DEEDS.

In suit against city to restrain its claiming strip of land as public alley, deeds in chain of

title of adjacent owner *held* admissible in evidence, as containing declaration with respect to alley being a wide alley, as ancient deeds over 30 years old.

9. DEDICATION \Leftrightarrow 15 — EXPRESS AND IMPLIED.

There are two classes of dedications of a street or alley to a city, express and implied; the intent to dedicate being essential to both, though an implied dedication is founded on doctrine of estoppel in pais, so that intent to dedicate need not actually exist in mind of owner.

10. DEDICATION \Leftrightarrow 37—STREET OR ALLEY—PUBLIC USER.

Where public user is relied on to establish dedication to public of street or alley, user must be such as to indicate that public claim to way is as of right, and that owner is fully aware of extent and character of use, and does not object, though actual knowledge by owner need not be proved.

11. DEDICATION \Leftrightarrow 35(1)—ALLEY—NOTICE OF CLAIM TO EASEMENT—MAP ADOPTED BY CITY.

Adoption by council of city of map or plan of city on file in city engineer's office *held* not sufficient to give notice to owners of land shown as alley of city's claim of public easement, in order to raise against owners presumption of dedication.

12. DEDICATION \Leftrightarrow 44—PUBLIC USE OF ALLEY—SUFFICIENCY OF EVIDENCE.

In suit to restrain city of Richmond from claiming strip of land as public alley, on ground it had been dedicated to public use, unobjected to, evidence *held* to show that use by public was not unequivocally a use as of right.

Appeal from Chancery Court of Richmond.

Suit by Charles B. Keppler and others against the City of Richmond. From a decree dismissing the bill, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

This suit turns upon the question whether the appellants, or those under whom they derive title, have dedicated a narrow strip of land, approximately 8x50 feet in size, at the rear of their lot in the city of Richmond, for the use of the public as a public alleyway.

The decree complained of *held* that the plaintiffs (the appellants here) "have not sustained their bill by showing that no dedication has ever been made of the 8-foot strip of land," refused to grant the injunction prayed for in the bill, which was to enjoin and restrain the city of Richmond "from claiming that said strip of land has been dedicated and from interfering with the rights of" the appellants therein, and dismissed the bill.

The controversy is solely between the appellants and the city of Richmond. No private property owner claiming any right of easement over such strip of land is before the court in this cause.

The brick tenement aforesaid and two buildings erected subsequently to 1851 occupied the whole of the front of the Keppler lot, but did not extend back very far on such lot. The then owner of the Keppler lot, in 1858 or 1859, erected thereon, just in the rear of the Broad street buildings, two brick stores, and about a year later another brick store, all three fronting on Seventh street, whereby the entire lot was covered with buildings, except a strip of ground approximately 11 feet wide by 50 feet long at the rear of the lot; there being approximately 11 feet of such vacant portion of such lot abutting on Seventh street and 50 feet thereof abutting on said alley.

The last-mentioned brick store building, erected about the year 1860, as aforesaid, was known and designated as 210 North Seventh street, and stood until 1911, when it was torn down at the same time that the other old buildings on the Keppler lot were torn down. This building was two stories high. The room on the ground floor had its front entrance on Seventh street and a side door entrance from said 11x50-foot strip of ground; the side door entrance being located about 30 feet from Seventh street. This room was rented out by the owners from time to time as a saloon or barroom, and was occupied and used as such by tenants practically from 1860 to 1907, when liquor license was refused in that locality, the side door being much used by customers and frequenters of the bar, and it was also used for the bringing in of beer and other things, and that side entrance of the premises added considerably to its rental value.

The second story of the building last mentioned contained an assembly room or club-room, to which the same side door barroom entrance aforesaid also gave access.

There was a board walk, which extended from Seventh street to said side door entrance, which lay near the side of the building, and was used for a great number of years prior and up to about 1907 in connection with the use aforesaid of said side entrance. This walk was kept in repair by tenants of the property.

There was a large coal vault with brick walls under the front part of the building, a portion of which extended out between 5 and 6 feet from the south side thereof into said 11-foot strip of ground, into which there was a manhole opening in such strip of ground. This coal vault and the manhole opening for storing coal was used for a great many years by tenants of the premises prior and up to 1911, as appurtenant to said premises.

There was a basement under the rear part of the building, to light which there were several areas, which extended 3 feet from the south line of the building out into said 11-foot strip of ground, and occupied that much of same until 1911, when the building was torn down as aforesaid.

There was an ordinance of the city under which the privilege might have been obtained of maintaining said coal chute or manhole opening and said areas, even if they had been in a public alley; but the preponderance of the evidence is that no such permits were ever asked for or obtained by the owners or tenants of the Keppler premises aforesaid.

There is a city sewer under Seventh street, which was constructed in 1857 from the direction of Grace street to an ending at a point opposite the mouth of said alley on Seventh street. A sewer was also constructed in that year along the whole length of said alley, passing the rear of the Keppler lot, approximately in the center of said 12-foot alley width, and connecting with the Seventh street city sewer at its ending point aforesaid. The preponderance of the evidence is to the effect that this alley sewer was not a public, but a private, sewer, and was appurtenant to the lots the rear ends of which abutted thereon.

The alley at the rear of the Keppler lot was first paved some time, more probably, about 1860, as shown by a preponderance of the evidence. It was then paved with cobble stones, and at the same time, as shown by such evidence, the whole of said 11x50-foot strip of land, not occupied by the coal vault manhole and the basement areas aforesaid, was paved with the same material. The preponderance of the evidence shows, however, that none of such paving was done by the city; and we must infer from the evidence that this paving was done in the 12-foot alley by the abutting lot owners and on the 11x50-foot strip by the then owner of the Keppler lot. Nor were any repairs made to such paving by the city at any time subsequently. On the other hand, there is direct evidence that the then owner of the Keppler lot, in 1896, 1897, and in 1901, repaired certain portions of the paving on the 11-foot strip, where it had become worn from the turning of vehicles delivering coal to said coal vault.

It was the purpose of appellants in 1911, when their buildings aforesaid were taken down, to erect new buildings, so as to cover the whole of said 11x50-foot strip of land; but it then developed that the city of Richmond, through its street department, claimed that there had been a dedication of the whole of such strip by its owners to the public for the purpose of widening said alley for public travel.

This was the first actual knowledge or notice which appellants, or those under whom they derive title to said lot, had of any such claim on the part of the city or of the public; and there is no evidence that the city, prior to this time, ever made any actual specific claim that such strip of ground was, or actually exercised any acts upon it as if it were, a public way, except the sole circumstance that a map of the city of Richmond, known as the "Pleasants map," adopted by

the council of the city in 1872, and which was on file in the city engineer's office, showed the alley in question extending its whole length as of a width of approximately 17 feet, when such map is scaled; but there is no evidence that the appellants, or any of those under whom they derive title, ever had any knowledge or notice of the existence of such map prior to said claim of the city in 1911.

However, upon conference and correspondence between the parties, the city yielded any claim to 3 feet in width of said strip lying along what had been the south line of said 310 North Seventh street building, which 3-foot width of ground had been occupied by said basement areas and board walk, leaving a strip of approximately 8 feet in width by 50 feet in length at the rear of said Keppler lot, abutting 50 feet on said alley, which is the ground in controversy in this suit between the appellants and the city.

Other evidence and absence of evidence bearing on the points in controversy in the case are referred to below in the opinion of the court.

Daniel Grinnan and Coke & Pickrell, all of Richmond, for appellants.

H. R. Pollard and Jas. Lewis Anderson, both of Richmond, for appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The argument in this case has covered many subjects, and the law bearing upon the essential requisites in such a case as this, both of a dedication on the part of the landowner and an acceptance on the part of the public, whether actual, or implied in fact or in law, or dispensed with by law, has been ably discussed by learned counsel on both sides of the cause, and numerous authorities have been cited. But after all we find but little difference between counsel as to the legal principles involved. They differ for the most part as to the facts, and as to the application thereto of well-settled legal principles.

We may say, also, at the outset, that, since in our view of the case a preponderance of the evidence does not establish that there was ever a dedication of the land in question for a public use, we shall not enter in this opinion upon the question of whether there was a valid acceptance of the land for public use on the part of the city or of the public. We may assume, so far as the questions we have to decide in this cause are concerned, that its charter provisions, and its ordinances, and the city map of 1872, relied on by the city, are sufficient to have constituted a valid acceptance, if there had been a dedication of the land in question for use as a public alleyway.

Confining our consideration, therefore, to the question of dedication, with the excep-

tion of what is hereinafter said concerning the right by prescription which is also relied on by the city, and concerning certain questions of evidence, we shall consider the positions taken by the parties, and pass upon the questions raised by the assignments of error in their order as stated below.

[1, 2] 1. Does the charter provision of the city of Richmond, presently to be quoted, have the effect of concluding, in favor of the city, the question of dedication?

Section 24 of the charter of the city of Richmond (Acts 1869-70, pp. 120, 128), so far as material to the question under consideration, provides as follows:

"24. Whenever any * * * alley * * * shall have been opened to and used by the public for a period of five years, the same shall thereby become a * * * alley * * * for all purposes, and the city shall have the same authority and jurisdiction over, and right and interest therein, as they have by law over the * * * alleys * * * laid out by it. * * *"

The following authorities are cited to sustain the position of the city that such charter provision is conclusive that there was a dedication in the case before us, namely: 3 McQuillin, Mun. Corp. § 1303; Bolger v. Foss, 65 Cal. 250, 251, 3 Pac. 871; So. Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929; Ellsworth v. City of Grand Rapids, 27 Mich. 250; Campau v. City of Detroit, 104 Mich. 560, 562, 62 N. W. 718; Speir v. Town of New Utrecht, 121 N. Y. 421, 24 N. E. 692.

It is undoubtedly true that city charter provisions such as that above quoted are valid as statutory law, and where the provisions apply they are conclusive evidence of dedication.

In all of the cases cited and above named, however, the public user was unequivocally a public and an adverse public user for the statutory period before the private use in suit was sought. These authorities go no farther than the holding that such a public user, by virtue of statute giving mere public user such effect, dispenses with all need of evidence of an actual dedication, and that the defense that there was no dedication in fact is not available to the landowner in such a case.

Moreover, all of the said authorities involve charters or statutes which contain merely the provision that a user by the public for the period prescribed therein shall, in substance, confer a right of way upon the public.

In the charter provision we have under consideration something more is added, namely, that the alley must be "opened to," as well as "used by, the public," for the period named therein, before the provision becomes operative. This added provision must be given some meaning, and it differentiates the case before us from those covered by the authorities cited on the point. Such provision is similar to that of the charter of

the city of Brooklyn, which is construed in *Strong v. Brooklyn*, 68 N. Y. 1. That provision is as follows:

"That all streets and avenues in said city which have been or may be thrown out to public use, and have been or may be used as such for five years continuously, should be deemed public streets and avenues, and that the city officers should have jurisdiction and power in respect thereto, the same as if such streets and avenues have been or shall be opened by proceedings had for that purpose."

That decision holds, in substance, that such a charter provision requires the same evidence of dedication, to put it in operation, as the law requires to raise an implication of a common-law dedication from mere user of a way.

We are of opinion that the charter provision of the city of Richmond under consideration should receive the same construction.

The question under consideration must therefore be answered in the negative.

[3] 2. Has the city by public user acquired the right of a public easement in the land in controversy by prescription?

Under all of the authorities the user must be under a claim of right, and must also be unequivocally adverse, in order that the public may acquire the right in question by prescription. 22 Am. & Eng. Ency. L. 1190, 1192; Jones on Easements, § 267; 3 McQuillin, Mun. Corp. § 1299; 1 Elliott on Roads and Streets, § 194; Skeen v. Lynch, 1 Rob. (40 Va.) 186, 194; Harris' Case, 20 Grat. (61 Va.) 833; City of Richmond v. A. Y. Stokes, 31 Grat. (72 Va.) 713; City of Richmond v. Gallego Mills, 102 Va. 165, 45 S. E. 877.

As we shall see below, such adverse user did not exist in the case before us, and hence this question must be answered in the negative.

3. Are the following named deeds in the chains of title of lots abutting in the rear on said alley, other than the Keppler lot (with the owners of which appellants are not in privity), and the provisions in such deeds quoted below, admissible in evidence against appellants? And, if so, what is the effect of such evidence?

[4-6] (a) The first mention which we find in the record of an alley, the northern side line of which is so located that, if extended to Seventh street, it would include the land in controversy, is found in a deed of date November 30, 1849, to Abraham Hirsh from Wm. H. McFarland and John E. Blair, trustees under a deed of trust from one John B. Richardson, securing the payment of certain indebtedness of the latter, which deed conveyed the lot marked 627 on the plat accompanying the above statement. At this time McFarland owned individually a lot fronting on Grace street which abutted in the rear on the alley shown on said plat, across from and opposite the rear of such lot 627; that is to

say, before the Hirsh deed such alleyway ran past the rear of lot 627, and extended out to Seventh street, as shown on the above plat. The evidence which is set forth in the above statement shows that this alley, at the time of the Hirsh deed, was certainly an alley in common, if not a public alley.

It is unnecessary for us to decide in this cause whether such alley was the former or the latter character of alley. We shall hereinafter refer to it as the old alley, or alley in common. So considering it, the right of use of it was at the least an easement which was appurtenant to lot 627, as well as to the other lots on both sides of such alley and abutting thereon, including the Keppler lot.

This alley was, as aforesaid, referred to in a number of the conveyances establishing it as being a "10-foot alley"; but, as explained in the above statement, it was in fact approximately 12 feet wide as located on the ground in accordance with such conveyances. The deed of Hirsh aforesaid, however, contained the following language in its description of the metes and bounds of lot 627, viz.:

"Bounded on the south by an alley, which separates the premises hereby conveyed from the lot of said McFarland, but the southern line of the premises hereby conveyed shall be extended ten (10) feet further south to the center of said alley, *provided the said alley east of the premises hereby conveyed shall be closed, or the use thereof to the premises be withheld*, and upon the happening of these events, or either of them, the right or title to the said ten (10) feet of ground, extended as aforesaid, shall be vested in the said Hirsh, his heirs and assigns, forever." (Italics supplied.)

At the time of the Hirsh deed the Keppler lot belonged to said John B. Richardson, but was not conveyed by said deed of trust under which the deed to Hirsh was made.

At such time the situation also was that much more than 11 feet of the rear end of the Keppler lot was vacant and doubtless uninclosed. There was then an open space across the rear end of the Keppler lot much wider than 11 feet.

We are of opinion that the Hirsh deed was not admissible in evidence, on the ground that its recitals are binding on appellants, under the rule applicable to recitals or declarations in deeds to which the parties to a cause are parties or privies, since there is no privity of estate between the appellants and the owners of the property conveyed by the Hirsh deed. But—

We are of opinion that the Hirsh deed (being over 30 years old) was admissible in evidence against appellants, although they are not in privity therewith, under the exception which ancient deeds afford to the rule as to inadmissibility of hearsay evidence. It is admissible in evidence for what it may be worth, because of its declaration that the

rear line of the lot it conveyed was on an alley. This is a declaration in the nature of a general reputation, or a traditional declaration, in regard to the fact that an alley existed at an ancient time in that location; either a public alley, or one in which a number of persons had an interest, being indicated. Such declarations in ancient deeds are admissible in evidence, although they go beyond a description of monuments marking the mere boundary lines of the land conveyed by such deeds. Jones on Evidence, § 301; 1 Greenleaf on Evidence (16th Ed.) §§ 128, 139; Morris v. Callanan, 105 Mass. 132; 2 Elliott on Evidence, 1278. In the case of such declarations in such deeds, the same principle upon which the authorities hold that hearsay evidence is admissible to prove boundary lines (Carruthers v. Eldridge's Ex'r, 12 Grat. [53 Va.] 670; Nowlin v. Burwell, 75 Va. 551; Harriman v. Brown, 8 Leigh [35 Va.] 697, and many other Virginia cases on the subject) is pushed, in its application, a step farther, so as to admit traditional evidence, not only that a certain tree or other monument marked a certain boundary line, but that a public body of land, such as a manor, or parish, or highway, or the like, or even that a private body of land in which a number of persons have a common interest, marked such boundary line, where the declaration comes from one having such common interest. 1 Greenleaf on Evidence, § 138a. A public alley, or an alley in common, as marking the boundaries of abutting property owners, may be a subject upon which such traditional declarations may be admissible in evidence, as tending to prove their existence in such cases, under such extension of such principle. See, to same effect, 1 Elliott on Roads and Streets, § 198, where it is said:

"* * * A deed between third parties referring to a way has been * * * held competent upon the question of the location and existence of the way as a matter of public and general interest upon which reputation is admissible"—citing authorities.

But, as stated by 1 Greenleaf on Evidence, § 139, such evidence is "not entitled to much weight." It may therefore be rebutted by very slight evidence of a more definite character.

And we find within the clause of the Hirsh deed itself above quoted the rebuttal of any inference which might otherwise be drawn therefrom that the 10 feet in width to the north of the old alley aforesaid, to which it refers, was at that time a public alley, or an alley in common, or a part of such an alley. It is apparent from the reading of such clause that such deed contains merely a conditional dedication or appropriation of a strip of land at the rear of the lot thereby conveyed, to be added to the previously existing old alley in that location, so as to make such alley 20 feet wide, instead of 10 feet, as theretofore delimited by the con-

veyances of abutting property owners along its course as aforesaid; and the condition was that "the said alley east" of the lot 627 (which clearly meant a strip from the southern end of the Keppler lot adjacent and in addition to the old alley existing there, as aforesaid, so as to make such alley at that location and all the way out to Seventh street 20 feet wide), should not "be closed or the use thereof to the [lot 627] be withheld." And the deed provided, in substance, that "upon the happening of these events, or either of them," the proffered dedication or appropriation of the extra 10 feet in width of land to widen the old alley at the rear of the lot 627 should stand withdrawn. This recognized the right of the owner of the Keppler lot, as existing at that time, to close or withhold the strip of land now in controversy in this cause from the use of it as an alley. So that, instead of being evidence against the appellants on the subject of dedication, it is a circumstance in their favor.

Subsequently the deed of 1851, quoted from in the statement preceding this opinion, conveyed the Keppler lot by metes and bounds, which, by well-established rules of construction of deeds, extended the lot back to the old alley; and such deed furnishes convincing evidence that up to the date thereof, in 1851, there had been no dedication by the owners of the Keppler lot of the strip of land in controversy for use as a public alley, or any appropriation of it by them as an alley in common.

[7] (b) The city relies upon three other subsequent deeds in the chain of title of said lot 627, or of portions thereof (with which deeds the appellants are not in privity), two dated in 1896 and the other in 1909, the first of which deeds described the real estate conveyed as abutting on an alley "20 feet wide," and the other two of such deeds describing such alley as a "public alley, 20 feet wide." These deeds, however, being less than 30 years old, were inadmissible in evidence against appellants under the authorities aforesaid.

[8] (c) The city also relies upon two deeds in the chain of title of the Young Men's Christian Association, to that portion of its real estate shown on the plat preceding this opinion which is on the corner of Grace and Seventh streets, and extends back to said long existing old alley on the opposite side of it from the strip of land in controversy in this cause; one of such deeds being of date December 2, 1861, and the other of date January 16, 1868, which describes the lot conveyed as running back a certain distance to "a wide paved alley."

We are of opinion that these deeds were admissible in evidence as containing the declaration with respect to the alley being "a wide * * * alley," on the same ground as that above noted on the subject of the admissibility in evidence of the Hirsh deed.

But manifestly the probative value of such evidence is even less than that of the Hlrah deed, since it gives no definite width. The actual width of 12 feet of the old alley aforesaid might satisfy such description, since such width was in excess of the record width thereof aforesaid, of which the grantors in such deeds were doubtless aware, as their deeds themselves refer to the chain of title to the lot being conveyed, in which chain of title appears of record deeds which refer to such alley as a "10-foot alley." It may well be that the language, "a wide * * * alley," was used in the deeds in question, because the grantors therein knew from their chain of title that, by the encroachment above mentioned on the front, or fronts, of the lots which abutted on the old alley, the actual location of the latter had made it wider than 10 feet, but how wide they did not accurately know. And the evidence, to say the least of it, leaves it equally probable that it was for that reason that such deeds did not refer to any exact width as being the width of the alley, as the older deeds in their chain of title did, but referred to it as "a wide * * * alley," rather than that such reference was intended as a declaration that such alley was public alley. And as to the reference of the two deeds in question to an "alley," the presence there of the old alley aforesaid satisfied that description, so that any inference that such description referred to a public alley is thereby rebutted.

We come now to consider the principal question involved in this cause, and that is: [9, 10] 4. Has the user by the public of the strip of land in controversy been sufficient to raise the implication or presumption of a dedication of it to the public?

Since, as we have above seen, neither its charter provision above mentioned nor prescription has conferred upon the city of Richmond or the public the easement in question, the city must rely upon a common-law dedication. There are two classes of such dedications, express and implied. The intent to dedicate is essential to both classes in order to complete a dedication. The city in this cause must rely upon an implied dedication, since there is no evidence tending to show that there was ever any express dedication. An implied dedication is not founded upon a grant, nor does it necessarily presuppose one. It is founded on the doctrine of estoppel in pais. 1 Elliott on Roads and Streets, §§ 132-137; Benn v. Hatcher, 81 Va. 25, 29, 59 Am. Rep. 645; City of Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444; 2 Greenleaf on Evidence (2d Ed.) § 662; and many others of the authorities elsewhere cited.

It is very true that the intent to dedicate which may be implied need not have actually existed in the mind of the landowner. One is presumed to intend the usual and natural consequences of his acts. Hence, where public or private rights have been acquired upon

the faith of conduct of the landowner under such circumstances as to make the doctrine of estoppel applicable, the law will imply the intent to dedicate, even where there is an entire absence thereof in the mind of the landowner, and even against a contrary intent. 1 Elliott on Roads and Streets, §§ 142, 146; City of Richmond v. A. Y. Stokes & Co., 31 Grat. (72 Va.) 713; Gillespie v. Duling, 41 Ind. App. 217, 83 N. E. 728; Morgan v. Railroad Co., 96 U. S. 716, 723, 24 L. Ed. 743; Tise v. Whitaker-Harvey Co., 146 N. C. 374, 59 S. E. 1012; 4 McQuillin, Mun. Corp. § 1561; Champ v. Nicholas County, 72 W. Va. 475, 78 S. E. 361; City of Los Angeles v. McCollum, 156 Cal. 148, 108 Pac. 914, 23 L. R. A. (N. S.) 378.

In the cause before us we cannot inquire or decide whether the doctrine of estoppel aforesaid is applicable in favor of any private owners of lots abutting on the alley in question, since no such parties are before us. With respect to the city, the facts in evidence disclose that the city has acquired no property, nor made any expenditure, on the faith of the strip of land in controversy being a public alley, or a part of such an alley. The sole ground on which it must rely in this cause for the application of said doctrine of estoppel is the long-continued user by the public, as it claims, of said strip of land as a public alley or as a part thereof. Now it is well settled that, where public user is relied on to establish dedication, the user must be of such a character "as would indicate to prudent men that the public claim is, as of right, to the way as a street or road, and that the owner is fully aware of the extent and character of the use and makes no objection. * * *" (Italics supplied.) 1 Elliott on Roads and Streets, § 179. To the same effect, see 4 McQuillin, Mun. Corp. §§ 1563, 1564; Harris' Case, 20 Grat. (61 Va.) 833; Talbott v. Richmond & Danville R. Co., 31 Grat. (72 Va.) 685. The actual knowledge aforesaid on the part of the owner need not be proved; but the user must be of such an adverse character that it may be reasonably expected to convey such knowledge to owners of the property affected, if they are alive to their own interests.

As said in Harris' Case, supra, 61 Va. (20 Grat.) at page 840:

"Where no public or private interests have been acquired upon the faith of the supposed dedication, the mere user, by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner, unless, indeed, there be evidence of an express dedication, or unless, in connection with such long-continued user, the way has been, by the proper town authority, recognized as a street, so as to give notice that a claim to it as an easement was asserted." (Italics supplied.)

[11] In the cause before us the preponderance of the evidence is to the effect that the

city authorities never graded, paved, repaired the paving on, laid or repaired any sewer on, or did any other overt acts whatsoever upon, the strip of land in question, "so as to give notice that a claim to it as an easement was asserted." The sole act of the city authorities which could be regarded as having any tendency to give notice of such a claim was the adoption by the city council in 1872 of a map or plan of the city on file in the city engineer's office, which was on a small scale, and which upon close inspection showed an alley at the location of the 10-foot alley above referred to, which was in fact approximately a 12-foot alley as actually located on the ground as aforesaid. A careful scaling of this map discloses that such alley, as shown thereon, is approximately 17 feet wide. But, so far as the evidence goes, the appellants and those under whom they derive title had no notice of such disclosure of such map until the controversy involved in this cause arose, and if they had had prior notice of the contents of such map they might readily have taken the alley aforesaid shown thereon to have been the long-existing old alley aforesaid, which did not embrace the land in controversy. Hence such map is not of that character of evidence which is necessary in such a case to give the requisite notice aforesaid of the claim of easement in order to raise a presumption of dedication. As said by Judge E. C. Burks speaking for this court, in *Talbott v. Richmond & Danville R. Co.*, supra, 72 Va. (31 Grat.) at page 688:

"Intent is the vital principle of dedication. In a case where acts and declarations are relied upon to show such intent, to be effectual, they must be unmistakable in their purpose and decisive in their character; and in every case it must be unequivocally and satisfactorily proved [citing authorities]. And this would seem to be the right guide to judicial interpretation in such cases, for we know that the individual owners of property are not apt to transfer it to the community, or subject it to the public servitude, without compensation, and such donation is not to be readily inferred."

To the same effect, 4 McQuillin, Mun. Corp. §§ 1368, 1369; *City v. Lessee of White*, 6 Pet. 481, 8 L. Ed. 452; *Buntin v. Danville*, 93 Va. 200-204, 24 S. E. 830; *Winchester v. Carroll*, 99 Va. 789, 740, 40 S. E. 87; *Macon v. Franklin*, 12 Ga. 239; *West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

[12] As to the user by the public of the land in controversy as an alley, such use was not unequivocally a use as of right. On the contrary, the evidence is convincing that such strip was left unbuilt upon prior to 1860 merely because it was not needed for building purposes; and it was so left in 1860 as a private convenience appurtenant to the adjacent building belonging to the same owner, in order to afford a side entrance to both the first and second floors of such building. Such

use of such strip was a valuable one to the owners of it during the whole time from 1860 to 1907, and that use, even if we left out of view other uses to which they put a part of such strip, satisfactorily accounts for its having been left uninclosed and unbuilt upon up to the time the building was torn down in 1911, and negatives any presumption of dedication to public use.

Since 1911 the facts leave no room for any presumption of dedication, and no claim is made on the part of the city that any dedication occurred since that time.

And with respect to the user by the public of the land in controversy, the whole of such user is satisfactorily accounted for by the existence of the old alley aforesaid adjacent thereto, without the need for any implication of a dedication of such strip to public use. Whether that alley was a public alley, or merely an alley in common appurtenant to the abutting property, is immaterial on that subject. Indeed, to what extent public use was made of said strip itself is left vague and undetermined by the evidence. Much of the public user in question was doubtless of the old alley aforesaid; and such of it as invaded the strip of land in controversy the evidence leaves equally consistent with being a user permitted by the landowners for their own private advantage, or a user in common with their private use, as with its being an adverse user by the public. Such public user, therefore, as there may have been, was not, as aforesaid, unequivocally such, but the contrary. The act of the appellants and those under whom they derive title in assenting to such public user was therefore not unequivocal in its meaning.

There are many other facts and circumstances in evidence, not mentioned in this opinion or in the statement preceding it, which would tend to strengthen, and none of them tend to weaken, the position we have above taken; but in the view we have taken of the case they are immaterial, and hence are not stated.

We conclude, therefore, that the question under consideration must be answered in the negative.

For the foregoing reasons, we are constrained to reverse the decree complained of, and we will enter a decree to the effect that we are of opinion that a preponderance of the evidence in the cause sustains the bill, and shows that no dedication to the public has been made of the 8-foot strip of ground in the bill and proceedings mentioned; that the appellants are the owners in fee of such strip of ground, as against the city of Richmond and the public; and that such city be perpetually enjoined and restrained from interfering with the rights of the appellants therein and thereto.

Reversed.

(124 Va. 639)

NORFOLK COUNTY v. CITY OF PORTSMOUTH.

SOUTHERN RY. CO. v. SAME.

(Supreme Court of Appeals of Virginia. March 13, 1919.)

1. MUNICIPAL CORPORATIONS \S 33(8) — ANNEXATION OF TERRITORY—POWER OF TRIAL COURT—APPEAL.

Under Const. 1902, § 128, and the general statute relative to the annexation of territory to cities, trial courts, in hearing such cases, exercise a constitutionally delegated power, which, though mainly judicial, is quasi legislative and political, and their conclusions on matters of fact are not to be disturbed unless plainly wrong, despite the provision of Code 1904, § 1014a, subsec. 5, that an appeal in such cases shall be heard without reference to the principle of demurrer to the evidence, etc.

2. APPEAL AND ERROR \S 1009(1)—REVIEW—DECISION OF CHANCERY COURT ON QUESTIONS OF FACT.

When the testimony is heard by the judge ore tenus in a chancery court, his decision of questions of fact is attended with a stronger presumption of their correctness than where the testimony is in the form of depositions.

3. MUNICIPAL CORPORATIONS \S 33(8)—ANNEXATION OF TERRITORY—PROCEEDINGS—APPEAL—FINDINGS OF TRIAL JUDGE.

While the appellate court, hearing appeals from decree for annexation of territory to a city, under Code 1904, § 1014a, subsec. 5, providing such appeals shall be heard without reference to the principle of demurrer to evidence, the evidence, being considered as on appeal in chancery cases, will not disregard any evidence or inferences, a presumption of correctness attends decision of trial court on questions of fact, which is greater than would adhere to it on testimony not delivered in presence of trial judge.

4. MUNICIPAL CORPORATIONS \S 33(6) — ANNEXATION OF TERRITORY—DENSITY OF POPULATION—SUFFICIENCY OF EVIDENCE.

Evidence held to show that the normal population of a city proceeding to annex territory, exclusive of the annexation in question, might reasonably be expected to be very dense as compared with the population of other cities in the state, and much too dense for the city's welfare.

5. MUNICIPAL CORPORATIONS \S 29(3) — ANNEXATION OF TERRITORY—FINANCIAL ABILITY OF CITY—VALUE OF FERRY FRANCHISE.

In determining value of city's half interest in a ferry franchise, the question being material, in proceedings by the city to annex territory, on the issue of its ability to take care of new and old financial obligations, the court will regard, not only the present rental value of the franchise, but also its sale value, and its prospective rental value after termination of the existing lease.

6. MUNICIPAL CORPORATIONS \S 33(7) — ANNEXATION OF TERRITORY — SEWERAGE FOR OLD WARDS—ORDER.

Where it appears, in proceedings to annex territory to a city, that the interests of two wards of the city may suffer by the annexation, in that it may delay installation of an adequate sewerage system for such wards, the annexation order will be amended to require the city to install such a system after the next assessment of land, when it obligates itself to furnish sewerage to the annexed territory.

7. MUNICIPAL CORPORATIONS \S 29(3) — ANNEXATION OF TERRITORY—OBJECTIONS—UNSETTLED CONDITIONS.

The objection that an annexation to a city was improper on account of the pendency of war, with consequent unsettled conditions, or at least of the transition period from war to peace while the peace treaty was being debated, was met by provision of annexation ordinance that city should not issue bonds mentioned until after next general assessment of land, which would not occur for twenty months.

8. MUNICIPAL CORPORATIONS \S 29(3)—ANNEXATION OF TERRITORY—INCREASED CHARGES—BENEFITS.

Prospective increases in taxation charges upon property owners in territory sought to be annexed to adjacent city held not to afford reason why annexation should not be had, annexed territory being in fact an overgrowth from or adjunct to the city, and enjoying, without paying therefor, many benefits which residents of city paid for, such as fire protection, while annexation would bring about installation of many necessary improvements in way of sewerage and bringing in annexed territory.

9. MUNICIPAL CORPORATIONS \S 29(3) — ANNEXATION OF TERRITORY—OBJECTIONS—INCREASED TAXES.

Part of land sought to be annexed by a city and occupied by a railroad and other industries, whose burdens of taxation would be largely increased by the annexation, was properly annexed, in view of benefits to railroad and industries from any benefits to annexed territory, particularly where land occupied by them was necessary to form annexed territory into a reasonably compact body of land, as required by statute.

10. MUNICIPAL CORPORATIONS \S 86(2)—ANNEXATION OF TERRITORY — VALUATION OF COUNTY BUILDINGS—STATUTE.

Under Acts 1904, p. 145, Code 1904, § 1014a, subsec. 3, a city annexing territory from a county must repay to the latter the original reasonable cost of schoolhouses, etc., taken over, less a fair deduction for depreciation, and the statute does not require that the city pay the replacement value of the buildings.

11. MUNICIPAL CORPORATIONS \S 36(3)—ANNEXATION OF TERRITORY—ASSUMPTION OF PORTION OF COUNTY DEBT.

Where a city annexed territory, thus subjecting the inhabitants to greater tax burdens, and such inhabitants could not carry with them the benefit of any part of a ferry franchise, standing as security for the county's bonded debt, in which they formerly had an interest,

the court properly held the city need not assume any portion of the bonded indebtedness of the county; Code 1904, § 1014a, subsec. 3, requiring city to assume and provide for reimbursement to county only a "just" proportion of any existing indebtedness.

12. MUNICIPAL CORPORATIONS ⇐36(3) — ANNEXATION OF TERRITORY — ASSUMPTION OF COUNTY SCHOOL BONDS.

Under Code 1904, § 1014a, subsec. 3, a city annexing territory was properly required to pay the county a sum in cash and to assume an amount of the county school bonds, which, with the sum paid in cash, equaled the valuation, as properly made, of schoolhouses in the annexed territory taken over from the county.

13. MUNICIPAL CORPORATIONS ⇐36(2) — ANNEXATION OF TERRITORY—COST OF BRIDGE—REPAYMENT TO COUNTY.

A city annexing territory which included one-half of a bridge was not required to pay the county half the cost of such bridge, principle being that public improvements fully paid for go with the territory, the annexation constituting merely a change of the form of government, and Code 1904, § 1014a, subsec. 3, in so far as departing from such principle, being subject to a strict construction.

14. APPEAL AND ERROR ⇐843(1) — ASSIGNMENT RAISING MOOT QUESTION—CONSIDERATION.

An assignment of error which raises merely a moot question need not be considered.

Appeal from Circuit Court, Norfolk County.

Annexation proceedings by the City of Portsmouth. From decree of annexation, the County of Norfolk and the Southern Railway Company appeal. Amended and affirmed.

A. B. Carney, E. R. F. Wells, and Williams, Tunstall & Thom, all of Norfolk, for plaintiffs in error.

Jno. W. Happer, of Portsmouth, and S. Heth Tyler, of Norfolk, for defendant in error.

SIMS, J. The above-entitled appeals involve proceedings in the court below in one case only, being appeals taken by the respective plaintiffs in error, the county of Norfolk and the Southern Railway Company, from the same order of court. The questions raised by the assignments of error upon the appeal of the former will be first considered, and thereafter the questions so raised upon the latter appeal.

Hon. P. H. Dillard, judge of the Seventh judicial circuit, having been designated for that purpose in accordance with the statute in such case made and provided, held and presided over the trial court, and heard and determined the issues in the case, and it is the decree entered by him at the final hearing thereof which is before us for review on appeal.

[1-3] Under the Constitution of 1902, § 126, and the general statute law enacted in pursuance thereof, Code 1904, § 1014a, the trial courts in this class of cases, in passing upon the questions of what amount of territory, if any, due consideration of the interests of the state, the city, the county, and the territory sought to be annexed, may require, upon the questions of how such interests may be affected by the proposed annexation, in view of the size and crowded condition of such territory and of such city, or the contrary, and in view of the financial ability of the city, the health of the respective communities, their past growth, their needs in the reasonably near future for development and expansion, and upon other facts and circumstances shown in evidence in such a proceeding, exercise a power formerly exercised by the Legislature itself by the passing or refusing to pass special statutes for the enlargement of the limits of cities and towns. *Henrico County v. City of Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001. Hence the trial courts in such cases exercise a constitutionally delegated power, which, although mainly judicial, and not without limits, is to some extent quasi legislative and political in its character. See the case last cited, and also *Winchester, etc., Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692. And the statute law on the subject having made special and eminently fair and just provisions for the Constitution of the trial courts, and such courts having peculiar opportunities to ascertain the very right of the case, by a view of the locus in quo, and by the examination of witnesses in the presence of the court, their conclusions and decisions on matters of fact are not to be disturbed unless plainly wrong, notwithstanding the provision of the statute that an appeal in such cases "shall be heard without reference to the principles of demurrer to evidence—the evidence to be considered as on appeal in chancery cases." Pollard's Code 1904, subsec. 5, sec. 1014a. For, when the testimony is heard by the judge ore tenus in a chancery case (as for example in a divorce case), his decision of questions of fact arising thereon is attended with a stronger presumption of their correctness than where the testimony is in the form of depositions. And while the appellate court, under the statute last quoted, will not disregard any of the evidence or inferences which may properly be drawn therefrom, but will consider all of the evidence in the record, yet, in such court, a certain presumption of correctness will attend the decision by the court below of such questions of fact, which is greater than would adhere to it if based on testimony not delivered in the presence of the trial judge.

It is from this standpoint that we approach the consideration of the facts in this case.

The assignments of error are few; but, as is to be expected in such a case, the testimony is voluminous and covers a multitude of details of facts and circumstances.

The assignments of error of the county of Norfolk are the following:

"(a) The court erred in annexing any portion of said territory, because the evidence shows that it was not necessary or expedient at this time to do so.

"(b) The court erred in adjusting the rights of the city of Portsmouth and the county of Norfolk, in that it failed to allow a proper valuation for the school property included in the annexed territory, and failed to require the city of Portsmouth to assume any portion of the bonded indebtedness of the county of Norfolk."

There are also the following cross-assignments of error by the city of Portsmouth:

(c) That the court erred in requiring the city of Portsmouth to assume \$95,000 of the school bonds which were a lien on the schoolhouse property in the annexed territory.

(d) That the court erred in requiring the city of Portsmouth to pay the county of Norfolk \$13,500, being one-half of the cost of the Port Norfolk and West Norfolk bridge.

The substantive law as to the considerations which should govern the trial court in annexation proceedings is so fully defined by the statutory provisions and in the decisions in Virginia on the subject that we do not feel that any general exposition of it here would serve any useful purpose. See *Henrico County v. City of Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001; *Alexandria v. Alexandria Co.*, 117 Va. 230, 84 S. E. 630; *Warwick Co. v. Newport News*, 120 Va. 177, 90 S. E. 644.

There is, indeed, no conflict before us over what are the general considerations which should so govern. Any conflict which there may be as to the law as applicable to particular branches of the case will be considered below in this opinion.

Proceeding, therefore, to take up for decision the questions arising in the case:

1. We will consider the first assignment of error from the standpoint of the interest of the state, the city of Portsmouth, the annexed territory, and the county of Norfolk.

(a) The record does not disclose that the state has any interest which is divergent from that of the city of Portsmouth and of the inhabitants and property owners thereof, or of the annexed territory and its inhabitants and property owners.

[4] (b) Concerning the city of Portsmouth, and its inhabitants and property owners, exclusive of the annexed territory in question, the following outline of the material facts will be given:

The present area of the city of Portsmouth is only about 1,687 acres or about $2\frac{1}{2}$ square miles. Its population by the United States Census of 1910 was 33,190, of which 5,329 were in the Sixth ward and 5,699 were in the

Seventh ward, which were annexed to the city in 1909. It increased in population 90.5 per cent. during the preceding decade, according to such United States Census report, but about two-thirds of this increase was due to the annexation last mentioned of 1909, leaving such increase for such decade in the old territory about 50 per cent. The record does not disclose what is its present population. It does disclose that the latter was abnormally congested when the decree under review was entered, due to government operations in the vicinity. But the government navy yard at Portsmouth is a permanent institution, and an increase of population of Portsmouth beyond the normal may reasonably be expected to continue after normal conditions ensue following the formal proclamation of peace, which may be expected before very long to end the world war. Making every due allowance, therefore, for the abnormal congestion aforesaid and for its decrease when conditions become stabilized, it is deemed sufficient to say that a preponderance of the evidence in the record shows that the normal population of Portsmouth, exclusive of the annexation in question, may reasonably be expected to be very dense as compared with the population of other cities in the state and much too dense for the welfare of the city.

Owing to its proximity to the city of Norfolk and its physical surroundings on other sides, the city of Portsmouth can expand only in one direction, and any expansion would first embrace the territory which the city seeks to annex in the proceeding now before us.

[5] With respect to the financial ability of the city to make proper provision for the future welfare of the area annexed by the order under review, there is not so much conflict in the evidence as in the opposing views taken of it by witnesses and counsel in the case. There is but little difference in the evidence as to what are the present financial resources of the city. There is a very great difference, however, in the views taken of such resources for the near future, and this difference consists chiefly in the valuations placed on the interest which the city of Portsmouth owns in the Norfolk county ferries. That is a one-half interest in such ferries, which has been and is now under lease, yielding a rental return to the city of \$67,000 per year. The position taken in behalf of the county of Norfolk, which is to the effect that the city of Portsmouth will not be financially able to discharge both its obligations to the newly annexed territory and its inhabitants and property owners, and to the inhabitants and property owners of the old city, especially to the Sixth and Seventh wards thereof and their inhabitants and property owners is reached by regarding such ferries as available as an asset of the city only to the extent of its present annual ren-

tal return aforesaid. It ignores entirely any further realizable value to the city of such asset. We are of opinion that this is plainly a mistaken view of the subject. It appears in evidence that such asset is free from all bonded indebtedness of the city and that it could be sold without interfering with any of its municipal functions, and, if sold, the preponderance of the evidence shows that it would sell for at least some two millions of dollars. Furthermore, the existing lease of such ferries will expire next year, and the preponderance of the evidence is that it may reasonably be expected to be let for a net rental to the city thereafter of at least \$120,000 per annum. Taking such valuations to be approximately correct, we entertain no doubt of the financial ability of the city of Portsmouth in the premises, without the necessity for any increase in its current tax rate. And the power to increase the tax rate is, of course, an additional resource of the city. The present tax rate, however, is high, and doubtless no increase thereof will be resorted to, except in an unexpected and temporary emergency.

Coming now to the subject of the duty of the city of Portsmouth with respect to improving the streets and constructing a sewer system for the Sixth and Seventh wards aforesaid, about which there is much testimony in the case:

The storm center of the testimony against the annexation now in question from the standpoint of the future welfare of the city of Portsmouth and of the inhabitants of its older territory, and especially of those who live or own property in the said Sixth and Seventh wards, converges around the problem whether the city will have the financial ability to discharge its obligations to the new area and its inhabitants and property owners, without rendering it unable to discharge its existing duty to make reasonable and much needed improvements of its existing streets, especially in said wards, and to provide a long-needed improvement of constructing a sewerage system in said wards. And these are the chief questions in the case concerning the welfare of the old city and its inhabitants and property owners.

On the subject of the streets, the preponderance of the evidence in the case tends to show that their bad condition may be due in part to the fault of contractors who constructed certain improvements thereof for which they may be held responsible, and that the enforcement of that responsibility may perhaps be depended upon to solve the most serious portion of the street problem aforesaid. And the preponderance of the evidence shows that the city officials now having jurisdiction of the street improvement matters are alert to the importance of such improvements, and, the city having the financial ability to accomplish it, we must assume that all reasonable improvement of the streets in

question will be made in a reasonable time, whether or not it shall turn out that the supposed liability of the contractors aforesaid can be enforced.

[6] On the subject of providing a sewerage system for the Sixth and Seventh wards, however, there is more difficulty. The evidence is uncontradicted that the city has never even taken up for consideration when it will supply these wards with a sewerage system. Those wards are at present absolutely without any sewerage system, and the evidence shows that the sanitary conditions due to that want are much worse than exist in the annexed territory, where there are some private sewers, and where the dry closets are more efficiently attended to by the county authorities than are those in such wards under the city management. It is true that the evidence shows that a general sewerage system, to serve both the newly annexed territory and the Sixth and Seventh wards, can be more efficiently and practically planned and more economically executed, if it is all done at once and as parts of one system. But, without going further into details, we are constrained by the evidence to say that we feel that, as the order under review stands, the inhabitants and property owners of the old city are left with just grounds for reasonable apprehension that the more pressing need for the construction of a sewerage system in the said wards may be postponed until after the sewer system is constructed in the newly annexed territory. This apprehension may be removed, however, by an amendment by us of the provisions of said order which we are of opinion should be made, to the effect that the plans for the sewerage of the annexed territory shall be a part of one sewerage system making reasonable provision also for the sewerage of said wards, and that the actual construction and installation of said system in said annexed territory shall not precede in time the completion of the construction and installation of said system for said wards. The following position on this subject is taken, indeed, in argument for the city, as quoted from its reply brief in the case:

"An inspection of the maps will show that it is but reasonable to suppose that after the next assessment of land, when the city of Portsmouth obligates itself and is obligated to furnish sewerage to the territory annexed under this order, it will install a comprehensive system of sewerage, including the Sixth and Seventh wards. * * *

The amendment of the order of court which will be made, as just stated, will therefore but put into effect the existing purpose of the city on the subject as urged for it in argument.

[7] Only one further objection to the annexation from the standpoint of the interest of the city is deemed material to be specifically mentioned and passed upon. Such ob-

jection has been much pressed in the petition of and in argument for the county of Norfolk, and that is that the entry of any order of annexation was inexpedient at the time the order aforesaid was entered, when "the country was at war, conditions were unsettled and abnormal, and it was impossible to foresee what the situation would be at the end of the war"; and, as is now urged in argument, any order of annexation is still inexpedient, only in perhaps a less degree, notwithstanding the armistice, since conditions are yet far from normal. But we are of opinion that it may reasonably be expected that normal conditions will be restored within 20 months after the proclamation of peace, and hence we think that the objection under consideration is fully met by the provision in the annexation ordinance that the city shall not issue the bonds therein mentioned until after the next general assessment of land, which will not occur until 1920, and by the provisions contained in the order which postpone the execution of certain provisions thereof until the expiration of the period of twenty months after the peace proclamation.

We are of opinion, therefore, that, with the said order amended as aforesaid, the annexation will be manifestly for the best interest of the whole of the old city of Portsmouth and its inhabitants and property owners.

We come now to consider the annexation from the standpoint of the interest of the annexed territory, which includes, of course, the interest of its inhabitants, property owners, railroads, and other industries.

The opposing testimony and evidence in the record is directed against the annexation of the very large territory sought to be annexed by the ordinance. The order of court aforesaid annexed something less than one-half of the territory sought to be annexed by the city.

The territory in fact annexed by the order of court is for the most part laid out into building lots for residential purposes, and contains a population of some 10,000 people—sufficient under our laws for it to obtain a charter as a city. It is practically without any fire protection, except that which the railroads and certain other large industries provide for themselves. It has some sewers, but those have been constructed without system and are grossly inadequate. A large part of its population has been forced for many years to go 5 miles to traverse a distance of only about 1½ miles to reach a much-used ferry, on account of having no bridge across Scott's creek. There are many other circumstances appearing in evidence which tend to show conditions in the annexed territory with which a county government is inadequate, and is not expected under our laws, to deal, and which should be dealt with by municipal authority (*Henrico County v. City of Richmond*, supra, 106 Va. 282, 55 S. E. 683,

117 Am. St. Rep. 1001); but it is not thought that any useful purpose would be served by mentioning them here in further detail.

[8] The annexed territory, aside from that occupied by railroad and other industries which will be presently more particularly mentioned will be benefited by the annexation in the following especial ways which may be mentioned: All of the revenue from taxation therein must be expended therein for the period and for the purposes prescribed by statute and by the order of court aforesaid. It will receive city fire protection and consequent reduction of fire insurance rates which will aggregate a large pecuniary saving to the property owners thereof. It will be provided with a sewerage system. It will have a bridge provided across Scott's creek which will be a great public convenience to a large part of its population and one long needed. And it will be placed in position to obtain many other needed public improvements and advantages which in the nature of things a county government is unsuited to provide and which may reasonably be expected from municipal government.

On the other hand, it may be expected that an increased burden of taxation will eventually be placed upon the property owners of the annexed territory; but this is inseparable from the attainment of increased public benefits and advantages, and should not be allowed to bar the future welfare and progress toward a more advanced and higher stage of civilization of the whole community, including that contained in the older boundaries of the city as well as that within its newly enlarged boundaries.

Indeed, the population of the annexed territory above mentioned has been but an overgrowth of the old city. As is said in the opinion of this court in *Alexandria v. Alexandria County*, supra (117 Va. at page 241, 84 S. E. at page 633), of the people of such a suburban community:

"The people * * * market, shop and transact their business in the city * * * and many of them are employed in the city. They attend the churches, places of amusement, participate in the social life of the city, and are, practically, as closely connected with city life as are the people residing within the city's boundaries. They use its streets. * * * Being without * * * fire protection, * * * the fire department of the city * * * [has] always responded to calls for assistance from these outlying sections. In other words, the people in these * * * localities enjoy in a large degree many of the benefits of the city without having to bear any of its burden. * * *"

Having due regard, therefore, for the mutual rights affected, we are clearly of opinion that the expected future imposition of the added burdens, which are inseparable from and are incident to an annexation in such a case, does not afford an adequate reason why the annexation should not be had.

[9] With respect to the railroad and other industries whose plants are embraced in the annexed territory, the following should be said: It is true that these concerns will not derive as great benefit from annexation to the city as will other incorporated and individual property owners in other parts of the annexed territory; and the added burdens of taxation when the city government goes fully into effect will be much greater on the former than the latter. Yet the ultimate best interests of such concerns cannot be severed from that of the community in which they are located. What will best promote the future welfare of the latter is, when all things are considered, for the best interests of such industries also. Moreover, we are of opinion that the inclusion of the land occupied by the industries in question was necessary to conform the annexed territory into "a reasonably compact body of land," as the statute in such case requires.

It remains for us to consider the interest of the county of Norfolk as opposed to the annexation in question. On this subject nothing is interposed by the assignments of error of the county as standing in the way of the annexation. And the complaints made by its other assignments of error go, not to the necessity or expediency of the annexation, but only to certain details of the terms of the order aforesaid. These assignments of error will be presently considered.

Our conclusion at this point, therefore, is that, subject to the amendment of the order under review which we will make in our order in the case, as above indicated, there was no error in the action of the court below in annexing the territory it did as aforesaid to the city of Portsmouth.

The second assignment of error of the county of Norfolk embraces two questions. We shall consider them in their order as stated below.

[10] 2. Did the court below err in that it failed to allow a proper valuation for the schoolhouses included in the annexed territory?

The brief for the county of Norfolk and oral argument in its behalf raise no question as to the valuation of the school property, except with respect to the schoolhouses in question. Nor is there any cross-assignment of error on the part of the city of Portsmouth touching the allowance of compensation to the county for the schoolhouse lots. We must therefore confine our consideration of the first question raised by the second or "(b)" assignment of error of the county, quoted in the outset of this opinion, to the valuation of the schoolhouses included in the annexed territory.

The court below proceeded in this matter upon the following principle:

The court based its valuation of the buildings on their original reasonable cost, less their depreciation due to age and use; and

it adopted 2½ per cent. of the cost price of the buildings as the annual depreciation.

The county especially objects to such a principle being adopted by the court as the basis of the valuation of the buildings, and contends that the court should have allowed the amount for the buildings which it would have cost to rebuild them anew at the time of the court's order, less a proper percentage for depreciation.

The statute on this subject is as follows:

"In every case of annexation, such city or town shall assume and provide for the reimbursement of the county or counties of such just proportion of any existing debt of such county or counties as may be determined in said proceeding, and also for compensation to any county for any schoolhouse or other public building of such county located within the annexed territory, which shall not be reserved in the proceeding to the county." Acts 1904, p. 145, 1 Pollard's Code 1904, § 1014a, subsec. 3.

It will be observed that the statute does not use the word "value," but merely requires the municipality to provide "for compensation" to the county for any schoolhouse, etc. We are of opinion that the true intent and meaning of the statute is, not that the county shall sustain a loss or reap a profit by any depreciation or enhancement of what would be the cost of reconstruction of the buildings; but that the county shall be repaid the original reasonable cost thereof, less a fair deduction for depreciation.

We are therefore of opinion that there was no error in the action of the court in adopting the principle it did in arriving at the valuation it made of the buildings in question.

The county also objects to the figures of valuation of the buildings fixed by the court. There is not much, but some, conflict of evidence on that subject. We deem it sufficient to say that we are of opinion that the preponderance of the evidence sustains the figures adopted by the court.

The following is the other question embraced in the second, or "(b)," assignment of error of the county of Norfolk:

[11] 3. Did the court below err in that it failed to require the city of Portsmouth to assume any portion of the bonded indebtedness of the county of Norfolk, other than the school bonds hereinafter mentioned?

The county indebtedness in question, outstanding at the time of the order of annexation, amounted approximately to \$374,710. It is secured by first lien on the county's one-half interest in the Norfolk county ferries, above mentioned. The annexation takes over the territory embraced therein, and relieves the county from all future outlay on account thereof, but the county will still continue to receive its one-half of the rental return from said ferries, and will continue to own its whole one-half interest in such ferries, subject to said lien thereon, which will constitute an asset far more than suffi-

cient to pay the accruing interest and principal of said indebtedness, and the county will have a large balance remaining with which to help in bearing any burden of taxation resting on the remaining territory and people of the county, so that no burden of taxation is left on the people of the remainder of the county on account of such indebtedness. On the other hand, the burden of future taxation, inseparable from the annexed territory, accompanies it and its people into the municipality, and yet no part of the equitable share of such territory and its people in the county's share of said ferries passes to the municipality with the annexed territory or its people. That is to say, the bonded indebtedness aforesaid is secured on an asset in which all the people of the whole county of Norfolk, as it stood prior to the annexation, had a common equitable interest; and we are of opinion that it would be inequitable to hold that that portion of the county and its people embraced in the annexation aforesaid must carry with them a part of the burden of such indebtedness, when they cannot carry with them the benefit of any part of the security therefor in which they formerly had an interest.

Such being the situation, the position taken by the county of Norfolk on this point is plainly inequitable and cannot be maintained, unless the statute aforesaid (1 Pollard's Code 1904, § 1014a, subsec. 3) sustains it.

The language of the statute on such point above quoted, so far as material, is as follows:

"In every case of annexation, such city * * * shall assume and provide for the reimbursement of the county * * * of such just proportion of any existing indebtedness of such county * * * as may be determined in said proceeding. * * *"

We are of opinion that the statute does not require the assumption by the municipality of some proportion "of any existing indebtedness" mentioned, but only of such proportion thereof as may be "just," if any.

We are therefore of opinion that there was no error in the holding of the court below complained of on this point.

We will now consider the cross-assignments of error of the city of Portsmouth above mentioned, which may be again stated and will be passed upon in their order as set forth below.

[12] 4. Did the court err in requiring the city of Portsmouth to assume the \$95,000 of school bonds, which were an existing lien on the schoolhouse property in the annexed territory?

This question must be answered in the negative.

It is urged in the brief for the city of Portsmouth that the order of court under review "required the city to pay for these schoolhouses just as though they were free

from lien." In this position such brief is in error. The order requires only that—

"The city of Portsmouth shall pay to the county of Norfolk the sum of \$241.50 in cash when this order takes effect, and shall assume \$95,000 of the bonds * * * now outstanding, and shall pay the interest thereon until maturity, as compensation for the said schoolhouses and seven lots located within said annexed territory. * * *"

The \$241.50 and the \$95,000 of said bonds aggregate \$95,241.50, the total value of said schoolhouses and lots as such value was ascertained and fixed by the court below.

No complaint is made by the city of Portsmouth of its having been required to pay the \$241.50 as compensation for the said lots. Hence we cannot decree on that question.

It is a concession in the case that the school bonds in question constituted a debt of the county within the meaning of the statute next below quoted.

The requirement aforesaid of the assumption by the city of Portsmouth of said \$95,000 of existing indebtedness falls within the requirements of the aforesaid statute (1 Pollard's Code 1904, § 1014a, subsec. 3) that, "in every case of annexation, such city * * * shall assume * * * such just proportion of any existing debt of such county * * * as may be determined in said proceeding, * * *" unless, indeed, the equitable interest of the annexed territory and its people in the Norfolk county ferries aforesaid made it inequitable and unjust that this should be done.

On the latter question it must be borne in mind that these school bonds are not a lien on the said ferries; whereas, the other indebtedness of the county of Norfolk above mentioned is a lien thereon. Hence the principle upon which the conclusion was above reached, that the city of Portsmouth cannot under the statute last mentioned be required to assume any part of the indebtedness of the county of Norfolk aforesaid which is a lien on such ferries, can have no application to said \$95,000 of school bond indebtedness so as to remove it from under the requirements of such statute. That being so, the statute is applicable to such school bond indebtedness and requires the city of Portsmouth to assume the same as the said order of court provides.

[13] 5. Did the court err in requiring the city of Portsmouth to pay the county of Norfolk \$13,500, being one-half the cost of the Port Norfolk and West Norfolk bridge?

One-half of the bridge in question was included in the annexed territory.

The position taken for the city on this subject is that the statute (1 Pollard's Code 1904, § 1014a, subsec. 3) does not contemplate compensation being made to the county for territory, and that it is only because of the express provisions of the statute requiring that compensation shall be provided for

to the county "for any schoolhouse or other public building," that any compensation for territory or improvements thereon can be required.

We are of opinion that such position is well taken. On principle, annexation proceedings cannot be regarded as transactions of purchase and sale between private parties. They in truth involve merely a change of form of government of the territory affected from that of a county to that of a town or city. The county, town, or city are all alike mere political subdivisions of but one and the same government, that of the state. Whatsoever has been done by the county government in the past and paid for, in the way of public improvements in the territory in question, has been done, as a general rule, by the people and property owners of such territory by their contributions of taxes, and, if not, to the extent that such improvements have exceeded such contributions, their construction has been justified upon the consideration that their creation was for the general welfare of the whole of those upon whom the burden was placed of bearing the expense of such construction. So far as paid for, therefore, the corpus of such improvements constitutes no existing burden. The debit and credit side of the account of their construction is closed. They pass, it is true, with the territory covered by an annexation into the jurisdiction of and under a new form of government. But the new government is still a government of the same territory and of the same people and over the property therein. To require the new government to pay for the public property in the territory it receives would be the same thing in effect as to require such government to make again the same outlay which has been already made; which, of course, would have to be met in future by taxation; and which taxation, in part at least, would fall upon the former people and property owners of the annexed territory, and to that extent would result in compelling them to pay twice for the same public improvements, or to pay for what the general welfare never required that they should pay.

With respect to existing indebtedness for the improvements mentioned, indeed, the principle is different. The inhabitants and property owners of the annexed territory have never made that outlay. When they pass under the new form of government, it is but just that they should carry that indebtedness with them. But it is not just to them that they should be made to carry a greater burden than that with them.

From the foregoing considerations it will be observed that the statute under consideration, in requiring that the municipality shall assume and provide for the reimbursement of the county, not only for a just proportion of any existing indebtedness, but "also for compensation for any schoolhouse or other

public building of such county located within the annexed territory," etc., in truth departs from the true principle involved; and hence the statute will be strictly construed, upon an application for compensation for improvements upon the annexed territories, and the courts should not compel compensation such as that under consideration, which is beyond the requirements of the terms of the statute, whenever objection is properly made thereto.

Such was the view of the law, in principle, taken at circuit in the case of *Richmond v. Henrico and Chesterfield*, 20 Va. Law Reg. 268, at page 272, where the learned judge who therein presided (Judge A. A. Campbell, of the Twenty-First Judicial Circuit), said:

"* * * the policy of the act does not seem to contemplate compensation for territory to the county."

The precise point we have under consideration was not involved, however, and was not decided in that case.

The order under review will therefore be amended so as to omit any allowance of the item in question.

We have now to consider the assignments of error of the Southern Railway Company in its appeal in this case.

All the questions raised by the assignments of error of the Southern Railway Company have been disposed of by what has been said above, except that raised by the following assignment, namely:

[14] 6. That the failure to include the Southern Railway Company along with the Atlantic Coast Line Railroad Company and the two other railroad companies mentioned in the clause of the order of annexation under the heading "Terms and Conditions," Subdivision E, which provides that the City of Portsmouth will take no steps to increase the assessment of any of the property of the railroads mentioned until the expiration of a period of 20 months after peace has been declared, and which also provides that the city shall not seek to have established any additional crossings or crossing safeguards, other than those now established, until the expiration of that period, was an unwarranted and unjustifiable discrimination against the Southern Railway Company.

Of this assignment of error we deem it sufficient to say: First, that it raises merely a moot question, as it does not appear that any such action such as is referred to has been in fact taken by the city; and, secondly, it has been developed in the argument before us that no unfair discrimination against the Southern Railway Company was intended by the omission of the name of such company from such clause of the order, and, counsel for the city in argument at the bar, of this court having stated that there is no objection on the part of the city to the insertion of the name of the Southern Railway Company in

such clause by the order which will be entered by this court, this will be accordingly done.

7. It having been suggested in argument before us that some confusion may arise with regard to what fiscal year is meant by clause "c" of the "Terms and Conditions" of the order of the court below, because of the pendency of the appeal in this case and the supersedeas awarded upon the allowance of such appeal, it will be ordered that the fiscal year mentioned in said order is the year for which the levies therein mentioned were imposed in 1918, and that all county levies which were imposed in the year 1918 by the county of Norfolk on persons and property within the annexed territory shall be paid to the county of Norfolk.

Upon the whole case, we are of opinion to amend the order of the court below in the four particulars above mentioned, and, subject to such amendments, to affirm such order, with costs to the city of Portsmouth, as the party substantially prevailing.

Amended and affirmed.

(124 Va. 769)

ROSENBERG v. TURNER.

(Supreme Court of Appeals of Virginia. March 27, 1919.)

1. CUSTOMS AND USAGES §15(1, 2) — CONSTRUCTION OF WORDS—"EXCAVATE"—PAROL EVIDENCE.

Ordinary words or phrases may by usage of trade acquire a restricted or limited meaning, and when they do, that meaning may be shown by parol evidence, and hence word "excavate" as used in a building contract may be shown to be used in a certain locality to mean removal of dirt only and not stone.

[Ed. Note.—For other definitions, see Words and Phrases, Excavate.]

2. CONTRACTS §152, 175(1)—CONSTRUCTION—MEANING OF WORDS.

Words in a contract are generally construed in their usual ordinary and popular sense, unless it can be legitimately shown in some way that they were used in some other sense; the burden of showing this being always upon party alleging it.

3. CUSTOMS AND USAGES §12(1) — KNOWLEDGE OF PARTIES.

A custom of trade in using a word in other than its ordinary sense, cannot change intrinsic character of contract of parties who are ignorant of such custom.

4. APPEAL AND ERROR §237(2)—OBJECTIONS IN LOWER COURT—RECEPTION OF EVIDENCE.

Where evidence was admissible to show custom, and if followed by evidence sufficient to charge defendant with knowledge thereof would have affected contract involved, its reception will not be considered error; there being no motion to strike or instructions asked to disregard the evidence.

5. CONTRACTS §188(5)—"EXCAVATE."

The word "excavate" as ordinarily used in a construction contract covers the removal of solid rock, as well as earth and loose material.

6. CONTRACTS §285(2)—ARCHITECT'S DETERMINATION—EXTRA WORK.

In a construction contract providing "that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be done or that has been performed under it, etc., the decision of the architect shall be final and binding on all parties hereto," gave to architect power to determine whether or not extra compensation should be paid by owner for work which contractor claimed was not covered by the contract.

7. TRIAL §295(5)—INSTRUCTIONS.

Two instructions presenting the two opposing theories of the parties should be read together to determine the sufficiency of either.

8. TRIAL §267(4)—INSTRUCTIONS—REQUESTED INSTRUCTION.

The trial court may disregard all instructions tendered and give instructions of its own; and, if they correctly state the law covering all the phases of the case presented by the evidence and fairly submit the case to the jury without obscurity or ambiguity, no one can complain.

9. CONTRACTS §353(11)—INSTRUCTIONS—EXTRA WORK.

The court properly refused to instruct the jury not to find for plaintiff unless they "further believed from the evidence that defendant expressly agreed with plaintiff to pay for said excavation as an extra," the use of the word "expressly" being misleading, where one of claims of plaintiff was that a contract to pay for such work was created by implication.

Sims, J., dissenting in part.

Error to Hustings Court of Petersburg.

Action by W. R. Turner against Joseph L. Rosenberg. There was a judgment in favor of plaintiff, and the defendant brings error. Affirmed.

Lassiter & Drewery, of Petersburg, for plaintiff in error.

Charles Hall Davis and Paul Pettit, both of Petersburg, for defendant in error.

BURKS, J. Joseph L. Rosenberg let to contract the construction of a hotel in the city of Petersburg, according to plans and specifications which were made a part of the contract. Haynes Bros., general contractors, agreed to furnish all the materials and labor and do a complete job for a stated sum agreed upon with Rosenberg. The specifications, amongst others, contained the following clauses:

Under the title of "Excavating and Grading":

"The contractor shall visit the site of the building and examine for himself the condition of the lot, and satisfy himself as to the nature of the soil.

"Excavate to the depth as shown by the drawings for the cellar, areas, and outside entrance, and for trenches under all walls and piers, all trenches shall be excavated to the neat size as far as practicable, and each shall be leveled to a line on the bottom, ready to receive the foundation. The contractor must be careful not to excavate the trenches below the depth shown by the drawings; should he do so he must pay the mason for the extra mason work thereby made necessary, as under no conditions will dirt filling be allowed."

Under the title of "General Provisions," the following:

"In any and all cases of discrepancy in figures, the matter shall be immediately submitted to the architect for his decision, and without such decision, said discrepancy shall not be adjusted by the contractor, save and only at his risk; and in the settlement of any complications arising from such adjustment, the contractor shall bear all extra expense involved.

"The plans and these specifications are to be considered co-operative; and all work necessary to the completion of the design drawn on plans, and not described herein, and all works described herein and not drawn on plans, are to be considered a portion of the contract, and must be executed in a thorough manner, with the best of materials, the same as if fully specified."

The general contractors sublet to the defendant in error, Turner, the brickwork and excavating. The plans and specifications called for the excavation of a cellar of given dimensions to a depth of 10 feet. After excavating to a depth of about 2 feet, Turner struck solid rock. This was a great surprise to Turner, Rosenberg, the supervising architect, and every one connected with the work. Thereupon Turner stopped work, and notified the supervising architect, who was the same person who had drawn the plans and specifications, and Rosenberg, that he did not consider blasting within the terms of his contract, and that he would proceed no further unless he was paid for the blasting as extra work. Turner was a subcontractor, and up to this time had no contract with Rosenberg. He claims, however, that the supervising architect was the agent of Rosenberg, and as such authorized him to proceed with the blasting as extra work. He completed the work, and presented to Rosenberg an account of the actual costs thereof, which Rosenberg refused to pay, and thereupon Turner proceeded by motion for a judgment against Rosenberg, and obtained the judgment to which this writ of error was awarded.

The notice of the motion is quite vague as to the contract upon which it is founded. It simply describes it as "a certain special contract or account, a copy of which is here-

to attached," but no contract is attached, only an account for labor and materials. In the bill of particulars which the plaintiff was required to furnish, he states that the labor was rendered and the materials were furnished "under a special verbal contract made between W. R. Turner, the plaintiff, and Joseph L. Rosenberg, the defendant, acting by R. A. Munden, architect for the building and agent for the said Rosenberg." The plaintiff does not claim to have made any contract with Rosenberg directly, or that any contract was implied from anything said or done by Rosenberg directly, but that the contract was the result of the language and conduct of the supervising architect. The latter contract is denied by Rosenberg and the architect.

If the removal of solid rock as well as earth was within the meaning of the word "excavate" used in the specifications, which Turner had seen and inspected, although the presence of solid rock was a surprise to him, he had no right to demand extra pay for its removal. It was important, therefore, for him to show that it was not so included. This he attempted to do by showing that, by a local custom or usage in Petersburg, the word "excavate" in such contracts did not embrace solid rock, but referred only to earth and loose material. Turner himself apparently recognizes the fact that ordinarily "excavate" covers stone as well as earth, for he says, when examined as to the local custom, "if the parties know there is rock there, it is specified specifically." It is then and then only that the word "blasting" is used, and hence the necessity for falling back on the custom. The evidence offered on the subject consisted of the testimony of the plaintiff himself and of one other witness. On this subject, the plaintiff testified as follows:

"Q. In the custom of the trade, here, in contracting, what is the meaning, or the generally accepted meaning of the word 'excavating'?"

"A. We always figure it as meaning excavating only earth, or soil, and we took it for granted that this was soil, particularly so, all that way through, because he specified, if you dig a foot deeper, it shall not be filled up with soil, but would have to be built back up with brick—even a foot deeper than the plans showed.

"Q. According to the custom of the trade, is there any special term which is currently and ordinarily used here in reference to the removal of hard rock, solid rock?"

"A. Well, if the parties know there is rock there, it is specified specially.

"Q. Well, in speaking of removing hard rock, in what terms would you speak of it?"

"A. Blasting the rock.

"Q. So that, as I understand it, when you used the term 'excavating,' you mean the removal of earth and loose dirt, and when you are referring to the removal of hard rock, you used the term 'blasting'?"

"A. Yes, sir.

"Q. That is generally customary in the trade around here, is it?"

"A. Yes, sir."

The witness, Wilkinson, testified as follows:

"Q. Have you ever done any contracting yourself?"

"A. Yes, sir; I have. I am contracting now."

"Q. According to the custom of the trade, what is the meaning of the term 'excavate' when used in a contract?"

"A. According to the custom that we have here in Petersburg, all excavations are of dirt. When it comes to any blasting, that is stone; that is blasting strictly. It is just the removal of dirt and any other debris that may fall in from a burned building, or anything like that—any loose stuff."

"Q. And when you speak of removing solid rock, you usually use the term 'blasting'?"

"A. Yes, sir."

[1-3] This line of examination was objected to by the defendant, but his objection was overruled, and he excepted. Although the word "excavate" be not a word of art requiring explanation from those skilled in a particular branch of trade or learning, even ordinary words or phrases may by usage of trade acquire a restricted or limited meaning, and, when they do, that meaning may be shown by parol evidence, and this is no violation of what is usually termed the parol evidence rule, but the custom is deemed to be a part of the contract. 12 Cyc. 1081, and cases cited; Brown on Parol Evidence, § 57. Words, however, are generally construed in their usual, ordinary, and popular sense, unless it can be legitimately shown in some way that they were used in some other sense, and the burden of showing this is always upon the party alleging it. It would doubtless be a surprise to the public to learn that the word "excavate," as used in the case at bar, did not include solid rock, in the absence of any evidence of a local usage or a general trade usage such as is here claimed to exist. It was necessary, therefore, to establish such usage. The mere establishment of the usage, however, was not sufficient. It was also necessary to bring home to the defendant knowledge of such usage, or else to show that it was of such long continuance and so certain, general, universal, and notorious that knowledge thereof would be imputed to the defendant. A custom of trade cannot change the intrinsic character of the contract of parties who are ignorant of such custom. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879. In *Syer & Co. v. Lester*, 116 Va. 541, 82 S. E. 122, it was held that—

"Evidence of a local custom or usage will not be received to affect the terms of a contract unless the party to be affected thereby had actual knowledge of such custom, or it was so well established, notorious, and generally accepted that notice of it will be imputed to him."

See, also, on the subject of local customs or usages of trade, *Richlands v. Hildebeitel*, 92 Va. 91, 22 S. E. 806; *Southwest Va. M. Co. v. Chase*, 95 Va. 50, 27 S. E. 826; *Richmond v. Barry*, 109 Va. 274, 63 S. E. 1074; *Straus v. Fahed*, 117 Va. 633, 85 S. E. 969; *Sutherland v. Gibson*, 117 Va. 840, 86 S. E. 108.

We have not deemed it material in this case to consider whether or not it is necessary for the party relying upon a local custom or usage to set it up in his pleadings. On that question the authorities are in conflict. *Oriental L. Co. v. Blades L. Co.*, 103 Va. 730, 741, 50 S. E. 270, and authorities cited.

[4] The objection, however, was general, and did not specify any ground. It was admissible for the purpose of showing the local custom or usage, and, if followed by evidence sufficient to charge the plaintiff with knowledge thereof, would have affected the contract. It was not so followed, nor was any motion made to strike it out, nor any instruction asked to disregard it. When offered it was admissible for the purpose for which it was offered. The objection to its admissibility was general. No grounds were stated; and under the circumstances of this case the defendant will not be permitted to say that its reception may have affected the verdict.

[5, 6] While we are of the opinion, as hereinbefore stated, that the word "excavate," as used in the case at bar, covers the removal of solid rock as well as earth and loose material, yet as held in *Stokes v. Amerman*, 8 N. Y. Supp. 150, the contrary claim by Turner was not so clearly without foundation to support it as to create a suspicion of good faith in raising the question. As soon as he struck solid rock, he stopped work and notified the supervising architect that he would proceed no further unless he was paid extra therefor. The architect was the agent of the owner to see that the plans and specifications were carried out. There is some conflict in the evidence as to whether or not the architect agreed that he should be paid extra therefor, but if the architect had the right to decide whether or not he was entitled to extra compensation, the question was one for the jury, and there is sufficient evidence to support their finding. Under the terms of the contract between Rosenberg and the general contractors, it was provided:

"That in case any difference of opinion shall arise between said parties in relation to the contract, the work to be done or that has been performed under it, or in relation to the plans, drawings and specifications hereto annexed, the decision of Richard A. Munden, the architect, shall be final and binding on all parties hereto."

We are of opinion that this provision of the contract gave to the said architect the power to determine whether or not such extra compensation should be paid by the owner, and that the verdict of the jury support-

ing that view, rendered upon the conflicting evidence, is conclusive of the question.

Instructions 2 and 3, given by the trial court, of its own motion were as follows:

"(2) If the plaintiff, who, as subcontractor, was making the excavation, in prosecuting the work of excavation, struck rock which required blasting, and thereupon notified the supervising architect that blasting was not contemplated in the contract and would be extra work; and if the architect directed him to proceed with the work, but keep a separate account of the cost of the blasting, and that he would be paid therefor, then, under the contract, this decision of the architect was binding upon his principal, the defendant, and the jury should find for the plaintiff.

"(3) If, however, the architect informed the plaintiff that the blasting was covered by the contract and was not extra work, but directed him to proceed with the work, keeping a separate account of the cost of the blasting, and he would take the matter up with the defendant, and he did take it up with the defendant and the defendant refused to pay for the same as extra work, then the plaintiff is not entitled to recover."

No objection is made to instruction 3. Objection is made, however, to instruction 2, because it "fails to inform the jury that the consent of the owner was necessary before the architect could order extra work. Moreover, under the contract in this case, it was not for the subcontractor, Turner, to decide what was extra work. It was provided by the contract and specifications that the decision of the architect, Munden, should be final and binding. Munden decided that the excavation of the cellar to the depth shown in the drawings was not extra work."

[7] The two instructions should be read together, as they present the two opposing theories of the plaintiff and the defendant, and when so read, we do not think they are amenable to the objection raised. Under the contract between the defendant and the general contractors, it was the province of the architect to decide whether work was or was not extra, and the owner's consent to such decision was given when he signed the contract.

[8] The trial court committed no error in refusing instructions II, III, and IV tendered by the defendant, as the instructions already given by the court sufficiently instructed the jury on the points covered by the rejected instructions. It is said in the petition for the writ of error (and authorities are cited to support the statement) that—

"A party has a right to have his instructions given in his own language, provided there are facts in evidence to support them, that they contain a correct statement of the law, are not vague, irrelevant, obscure, ambiguous, or calculated to mislead."

This statement should always be accompanied by the further statement, "provided the jury has not already been sufficiently instructed on the subject." The trial court may discard all instructions tendered and give instructions of its own, and if they correctly state the law, cover all the phases of the case presented by the evidence, and fairly submit the case to the jury without obscurity or ambiguity, no one can complain. *E. I. Du Pont, etc., Co. v. Sneed's Adm'r*, 97 S. E. 812. This practice will often relieve the difficulties arising out of a multitude of instructions.

Instruction V, tendered by the defendant, was properly refused because it was misleading. The plaintiff was not claiming by virtue of the contract he had made with the general contractors at the time his bid was made, but by a subsequent contract alleged to have been made with the architect as the agent of the owner. The instruction tendered dealt with the original letting only, and made no reference to any subsequent agreement between the parties. Its tendency was to lead the jury to believe that they should find for the defendant, notwithstanding a subsequent agreement, if the plaintiff failed to consult the architect as to the meaning of certain terms before submitting his bid.

[9] Instruction VI tendered by the defendant was also properly refused, as the latter part of the instruction exempted the defendant from liability unless the jury "further believe from the evidence that Rosenberg expressly agreed with said Turner to pay for said excavation as an extra." The jury may have been misled by the use of the word "expressly." One of the claims of the plaintiff was that he stopped work as soon as he struck rock and refused to proceed further unless he was paid extra for the blasting, and that the architect thereafter directed him to proceed with the excavating and to keep a separate account of the costs thereof, thereby creating a contract by implication. There was conflict in the evidence as to whether there was an express contract to pay extra for the work, but if there was a contract by implication it was as binding on the defendant as if it had been expressed in words, and this view of the case should not have been excluded from the jury.

For the reasons hereinbefore stated, the judgment of the hustings court is affirmed. Affirmed.

SIMS, J., concurs in the foregoing opinion, except in its conclusion as to the usual and general meaning of the word "excavate," as used in building contracts and as used in the case in judgment.

PRENTIS, J., concurs in the result.

(177 N. C. 543)

STATE v. PITTS. (No. 345.)

(Supreme Court of North Carolina. April 9, 1919.)

1. CRIMINAL LAW §407(2) — EVIDENCE — ADMISSION — ACCUSATION OF CRIME IN DEFENDANT'S PRESENCE—SILENCE.

In a prosecution for violation of the intoxicating liquor law, it was competent to show that two parties, while driving away from defendant's shop, stated to witness in defendant's hearing that they had just bought intoxicating liquor from defendant which they then had in their possession, and that defendant remained silent under the accusation, since defendant had full and fair opportunity to answer the accusation.

2. CRIMINAL LAW §408, 781(1)—EVIDENCE — ACCUSATION OF CRIME—CONFESSION BY SILENCE WHEN ACCUSED—INSTRUCTIONS.

Evidence of a witness that parties in defendant's presence stated defendant had illegally sold intoxicating liquors to them, and that defendant remained silent, should be received cautiously, and the jury should be carefully instructed to disregard it, if they ultimately find that any of the elements essential to make it competent are missing.

3. WITNESSES §52(7) — EVIDENCE OF DEFENDANT'S WIFE AS TO LIQUOR KEPT ON PREMISES—COMPETENCY.

Evidence of the wife of defendant accused of violation of the law against sale of intoxicating liquors as to officers having been to their place three times that fall, and as to the jugs and kegs and liquor kept on the place, and as to its secret hiding places, was competent.

4. CRIMINAL LAW §696(6) — MOTION TO STRIKE TESTIMONY—OBJECTIONS MADE TOO LATE.

In a prosecution for the sale of intoxicating liquors, it was not error to refuse to strike out testimony, where defendant's objections thereto came too late.

Appeal from Superior Court, Forsyth County; Lane, Judge.

Ed. Pitts was convicted of violation of the law relating to the sale of intoxicating liquors, and he appeals. Affirmed.

W. T. Wilson, of Winston-Salem, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. The indictment, with four counts, was for selling liquor, for keeping liquor in defendant's possession for sale, for receiving more than one quart of liquor within a period of 15 days, and for shipping or transporting from places within and places without this state to persons in this state, in one package and at one time, more than one quart of spirituous and vinous liquor and intoxicating bitters, and more than five gal-

lons of malt liquors, it being transported and delivered in one package, which was contained in more than one receptacle. The defendant was convicted, and from the judgment upon the verdict, having excepted, he appealed.

There was evidence fully sufficient and very convincing to support the verdict of guilty, and there is no ground of complaint on that score.

[1] It was competent to show by the witness Geo. W. Flynt that Sam Johnson and a negro, who were in a buggy driving away from defendant's shop, stated to him, in the presence and hearing of the defendant, that they had just bought from the defendant the liquor which they then had in their possession, and that the defendant said nothing when this accusation of selling liquor was made against him, but remained silent and mute. Sam Johnson had two pints, for which he gave \$2 a pint, and the negro one pint, for which he gave \$2, and this was stated in the hearing of the defendant, and he again made no reply to the charge, but stood mute. Objection was taken to this evidence, but it was undoubtedly competent, as an innocent man similarly situated would naturally speak in denial; the charge of his guilt being direct and explicit, and calling for a denial if he was innocent. He also had full and fair opportunity to answer the accusation. The case is therefore well within the rule as stated in *State v. Jackson*, 150 N. C. 831, 64 S. E. 376. It was said in *State v. Suggs*, 89 N. C. 530 (approved and cited in *State v. Walton*, 172 N. C. 931, 90 S. E. 518):

"A declaration in the presence of a party to a cause becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth; for, if he is silent when he ought to have denied, there is a presumption of his acquiescence. And where a statement is made, either to a man or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply, the natural inference is that the imputation is well founded, or he would have repelled it."

[2] This kind of evidence is admitted under the maxim that he who is silent when he is called upon to speak in the protection of his interests, and has the opportunity of doing so, is to be taken as assenting to what is said by another in his presence and hearing. 2 *Taylor on Evidence* (Am. notes by Chamberlayne) p. 527; *State v. Jackson*, supra; *State v. Walton*, supra. Such evidence should be received cautiously, and while the judge may have held it to be prima facie admissible on the facts as they appeared to him, the jury should be carefully instructed in regard to it, and directed to disregard it, if they ultimately find that any of the essential elements which are required to make it competent, and which should be explained to the

jury, are missing. *State v. Walton*, supra; *State v. Booker*, 68 W. Va. 8, 69 S. E. 295. Defendant's conduct should be free and voluntary, and not influenced by duress or promises held out to him, as in the case of other confessions or admissions.

[3, 4] The remaining exceptions are without any merit. Most of the questions to which objection was taken were answered favorably to the defendant, or, at least, in a way that did not prejudice him, and the others, if not competent, were harmless. The evidence of Mrs. Ed. Pitts, to which the defendant objected, was competent, when it is considered in connection with the other parts of her testimony, and at least so upon the charge of keeping liquor for sale. Besides, one of the three objections came too late, and it was discretionary with the judge whether he would strike out the testimony. The answers to the other objections were harmless, if not favorable to defendants. The last question was not answered. In *re Smith's Will*, 163 N. C. 464, 79 S. E. 977; *Schas v. Insurance Co.*, 170 N. C. at page 421, 87 S. E. 222, Ann. Cas. 1918A, 679. None of these rulings was prejudicial, and therefore they cannot be assigned as error. *State v. Shoemaker*, 101 N. C. 690, 8 S. E. 332; *State v. Eller*, 104 N. C. 853, 10 S. E. 313; *State v. Anderson*, 92 N. C. 732; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507.

We cannot find in the record any cause to reverse the judgment and grant a new trial. No error.

(177 N. C. 298)

BRISTOL GROCERY CO. v. BAILS et al.
(No. 353.)

(Supreme Court of North Carolina. April 9, 1919.)

1. EXEMPTIONS — 19 — RIGHTS OF MARRIED WOMEN — EFFECT OF STATUTE.

Revisal 1905, § 2118, relating to filing certificates and displaying the name of a married woman at the place of business when she is a partner, while fixing as a penalty for its violation that the married woman shall be deemed a free trader and liable for her debts, does not deprive her of her rights to personal property exemption as against execution, and noncompliance therewith has no effect on such right.

2. EXEMPTIONS — 104 — RIGHTS OF MARRIED WOMEN — FORFEITURE.

A married woman's right to a personal property exemption guaranteed by Const. art. 10, § 1, is not forfeited even by a fraudulent conveyance.

3. EXEMPTIONS — 19 — RIGHTS OF MARRIED WOMEN — PARTNERS.

A married woman who is a partner with her husband in a mercantile business, and therefore jointly and severally liable with him under Laws 1911, c. 109, is entitled to her personal

property exemption as against execution, under Const. art. 10, § 1, exempting the personal property of any resident of the state to the value of \$500.

Appeal from Superior Court, Ashe County; Lane, Judge.

Action by the Bristol Grocery Company against W. Bails and others. From a judgment allowing a personal property exemption, plaintiff appeals. No error.

The defendant W. Bails was a general merchant and purchased goods from the plaintiffs. Later W. Bails and his wife, Essie Lee Bails, made an assignment for benefit of creditors, alleging that they were partners in the mercantile business and each of them claiming their personal property exemption. The plaintiffs brought an action attacking the deed of assignment for fraud on the part of W. Bails in the purchase of the goods and contesting the right of Essie Lee Bails to exemption, and charging that J. E. Shumate was a partner, and asking judgment against him. The jury found as a fact that she was a partner in the business, and that J. E. Shumate was not. Judgment upon the verdict allowing the personal property exemption to the wife, and appeal by the plaintiffs.

J. B. Council and G. L. Park, both of Jefferson, for appellant.

T. C. Bowle, of Jefferson, and R. A. Dough-ton, of Sparta, for appellees.

CLARK, C. J. The only point presented in the argument in this court was as to the correctness of the judgment permitting Essie Lee Bails to have her personal property exemption allotted.

The right to the homestead and personal exemption is guaranteed to "every resident" by the Constitution. The liability of the wife on her contracts has been settled ever since the statute which provided:

"Every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried." Chapter 109, Laws 1911.

See *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820; *Bowen v. Daugherty*, 168 N. C. 244, 84 S. E. 265, Ann. Cas. 1917B, 1161; *Royal v. Southerland*, 168 N. C. 406, 407, 84 S. E. 708, Ann. Cas. 1917B, 623; *Warren v. Dail*, 170 N. C. 410, 87 S. E. 126; *Thrash v. Ould*, 172 N. C. 730, 90 S. E. 915.

The wife, therefore, has been held, ever since, liable jointly and severally whenever a partner or a surety. There is no question arising here between husband and wife as to the validity of the contract of partnership as between them under Rev. § 2107, nor as to

title derived from them. But they each admit the partnership and assent to the other asserting the claim to exemption as a partner. *Scott v. Kenan*, 94 N. C. 300; *Richardson v. Redd*, 118 N. C. 877, 24 S. E. 420. The jury have found as a fact that such partnership existed, and the Constitution decrees (article 10, § 1) that "the personal property of any resident of this state, to the value of five hundred dollars" shall be exempt from execution.

It was held even prior to the Martin Act of 1911 that on a judgment against the wife she is entitled to her personal property exemption. *Harvey v. Johnson*, 133 N. C. 353, 45 S. E. 644. There are other parts of that decision which do not obtain since the passage of the Martin Act.

[1, 2] The plaintiffs contend that Essie Lee Balls had failed to comply with Rev. § 2118, and chapter 77, Laws 1913, as to filing a certificate with the clerk of the superior court and displaying her name at the place of business, and therefore that she could not be a partner in the business, and hence not entitled to her legal exemption. Rev. § 2118, fixes as a penalty for the violation of that section that the married woman shall be deemed a free trader and shall be liable for her debts, but does not attempt to deprive her of her rights to her personal property exemption. Indeed, such right to an exemption, being guaranteed by the Constitution, is not forfeited even by a fraudulent conveyance. *Crummen v. Bennet*, 68 N. C. 494; *Arnold v. Estis*, 92 N. C. 162; *Rankin v. Shaw*, 94 N. C. 405; *Dorch v. Benton*, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; *Rose v. Bryan*, 157 N. C. 173, 72 S. E. 960. *Stone v. McLamb*, 153 N. C. 378, 69 S. E. 281, holding a married woman liable as a free trader formerly in such cases, is applicable to all married women under the Martin Act, but does not deprive her of her constitutional exemption.

[3] On the findings of the jury, Essie Lee Balls was a partner in the business, was liable for all its debts, and is entitled to her constitutional exemptions against an execution upon the judgment rendered against her. No error.

(177 N. C. 284)

FIDELITY BANK v. WYSONG & MILES CO., Inc. (No. 325.)

(Supreme Court of North Carolina. April 2, 1919.)

1. APPEAL AND ERROR ⇨928(1)—REVIEW—PRESUMPTIONS—CORRECTNESS OF CHARGE.

Where there is no exception to the charge, and charge is not set forth in the record, the court on appeal will assume that it was correct in every respect and satisfactory to appellant.

2. APPEAL AND ERROR ⇨930(2)—PRESUMPTIONS—INSTRUCTIONS.

Jury will be presumed to have followed instructions.

3. TRIAL ⇨343—VERDICT—CONSTRUCTION.

Verdict will be construed in the light of the evidence and what presumably was the charge.

4. APPEAL AND ERROR ⇨999(1)—REVIEW—JURY FINDING.

Finding of jury that usurious agreement was not entered into or that there was no intent to violate statute will not be reviewed on appeal.

5. APPEAL AND ERROR ⇨692(1)—RECORD—SHOWING OF EXCLUDED TESTIMONY.

Objection to exclusion of question addressed to witness cannot be sustained on appeal, where answer witness would have given does not appear.

6. WITNESSES ⇨240(6)—LEADING QUESTION—INSTRUCTIONS BY THIRD PARTY.

In action involving issue of whether there was a usurious agreement between plaintiff bank and defendant maker of notes, requiring defendant to maintain 20 per cent. of indebtedness on deposit, question, "Did * * * instruct you to maintain a balance of 20 per cent. of the indebtedness of (defendant) with (plaintiff) bank," held leading.

7. WITNESSES ⇨240(2)—LEADING QUESTIONS—DISCRETION.

Whether leading question should be excluded was discretionary with court.

8. APPEAL AND ERROR ⇨1058(2)—REVIEW—HARMLESS ERROR.

Exclusion of question was harmless, where witness would have testified to fact previously testified to without objection, and which was not seriously contested.

9. EVIDENCE ⇨242(1) — DECLARATIONS — AGENT—SCOPE OF AUTHORITY.

Evidence as to agent's declaration as against principal is competent, where made about matters within the scope of his authority, and relates to the transaction in which he was then engaged on behalf of principal.

10. EVIDENCE ⇨244(2) — DECLARATIONS — CORPORATE OFFICERS.

Evidence of declarations of president of corporation is competent to bind corporation; the president being an agent of the corporation.

11. WITNESSES ⇨142—COMPETENCY—TRANSACTIONS WITH DECEASED.

In bank's action against defendant corporation, stockholder and officer of bank could testify as to declarations made by deceased president of defendant, not being a party to action or claiming through or under a party, and not testifying against representative of deceased person, or against any person deriving his interest through such person, nor as to personal transaction or communication between witness and a deceased, under Revisal 1905, § 1631.

Appeal from Superior Court, Durham County; Devin, Judge.

Action by the Fidelity Bank against the Wysong & Miles Company, Incorporated. Judgment for plaintiff, and defendant appeals. No error.

The plaintiff alleged that the defendant corporation is indebted to it in the sum of \$13,320, with interest as stated, being the balance due on the three notes, one of \$1,000, another of \$8,000, and the remaining one of \$4,500, due 90 days after their respective dates, and given by defendant to it, for money loaned, in the months of March and April, 1918.

The defendant denied that any money had been loaned, but admitted the execution of the three notes, and alleged, as a counterclaim, that they had an agreement, under which it was to borrow of the plaintiff a large sum of money from time to time, but upon the condition, and as a part of the consideration for the loans, that the defendant should keep on deposit with the plaintiff bank a sum of money equal to 20 per cent. of the total amount of the loan as made to it, which should not be subject to check; or, in other words, the defendant borrowed the money and gave its three notes for the full amount of the loan, but received twenty per cent. less than the amount of it or the same per cent. less than the face value of the notes.

Defendant further alleged that it borrowed other money from the plaintiff bank, under a similar agreement as to the keeping of the 20 per cent. of each loan on deposit with the bank, so that, in all, the defendant had borrowed, and executed its notes for, \$45,000, and had received only \$36,000 thereon, when the plaintiff applied the 20 per cent. kept on deposit under the agreement, and amounting then to \$3,700, to the indebtedness of the defendant; that during the entire course of these transactions, it further alleges, the interest on the respective loans, or the notes given therefor, was regularly paid by defendant at the rate of 6 per cent., and that "the requirement on the part of the plaintiff that the defendant should keep on deposit with the plaintiff 20 per cent. of the amounts represented by the said notes was simply a scheme by which the plaintiff charged, reserved, and collected a greater rate of interest than that allowed by law;" that under this scheme, which was devised for the purpose of exacting and receiving excessive and unlawful interest, under the guise of a fair and valid transaction, the defendant had paid to the plaintiff, and the latter has received, as usury, the sum of \$5,232.50, and for this amount it demands judgment.

The plaintiff answered to the counterclaim and denied that it had received any excessive or unlawful interest from the defendant, or that it had agreed to do so, or to enter into any scheme or device for the purpose of reserving usurious interest in any

form or manner, and specially that it required a deposit to be kept by defendant in its bank of 20 per cent. of the loans, or that it charged, reserved, or received interest, either directly or indirectly, on any amount which was really larger than that which was actually loaned. The defendant circumstantially denied all of the averments of the counterclaim as to the alleged usury.

There was evidence that when 20 per cent. of a discounted loan is kept on deposit, it amounts to $7\frac{1}{2}$ per cent. on the original indebtedness.

O. C. Wysong was former president of the defendant company. He is now dead.

Defendant asked Guy Branson, its own witness, this question:

"Did Mr. Wysong, president of this company, while you were there, ever instruct you to maintain a balance of 20 per cent. of the indebtedness of the Wysong & Miles Company with the Fidelity Bank? (Objection by plaintiff. Objection sustained, and defendant excepted.)

"By the Court: Any declaration by the deceased president is incompetent and hearsay."

J. F. Wiley, witness of plaintiff, testified that he was a stockholder and an active officer, as cashier, of the plaintiff bank at Durham, N. C.; that he had a conversation with Mr. Wysong, and agreed to refer the defendant's application for a loan to the directors of the plaintiff bank, if defendant would send a statement of its financial condition, and would give a satisfactory reference, and that after that the loan was made. The witness then testified that the balance of defendant's account with the bank varied, sometimes considerably below the 20 per cent. level, and at other times above it; in July it dropped to \$899, and at other times it was as low as \$1,000, \$1,200, \$1,400, and \$1,600, the defendant having the right to check on the deposit at will. This witness stated that the \$3,700 was credited on defendant's note under its instructions, given by Mr. Wysong, who was its president. The latter evidence was objected to by defendant, and the objection was overruled. Defendant excepted. He then further testified that he had never heard of any usury agreement until this suit was brought, and that defendant ratified what was done by the plaintiff as to the \$3,700 by giving the note for \$1,300, which was the balance. The witness further testified as follows:

"The account varied every day because they checked on us. There was nothing unusual about the account. The account has been practically dead since the time of the application of the \$3,700, May 6, 1914. The final statement shows a balance of \$33.02. I have never objected to their drawing that out, and did not know it was in the bank until we worked up this statement. * * * I have made demand for payment of the notes now due for \$4,500, \$1,000, and \$7,820, total \$13,320. Mr. Wysong did not sign these notes, and I am asserting no claim against his estate. I am simply pressing

these notes. They never made any suggestion of usury. We were requested to renew these notes, but refused. (Plaintiff here offers three notes in evidence as follows: April 6, 1918, \$4,450; March 6, 1918, \$1,000; March 29, 1918, \$7,820."

Cross-examined, he said:

"Mr. Wysong was indorser on the first notes, and I think on all the notes given up to the time of his death. I think he died last January. Up until the time Mr. Wysong died he was indorser on these notes."

He did not indorse those now sued on.

Several letters of a correspondence between the parties were introduced by the defendant, the first letter, dated January 10, 1912, asking for "a line of credit," and proposing to keep a 20 per cent. balance of all discounted papers in the bank. This could not be answered, as Mr. Wiley, cashier of plaintiff bank, was about to leave Durham for a business trip, and he so wrote to defendant in a letter dated January 10, 1912. In the third letter, dated May 12, 1912, the defendant refers to it having kept such a balance in another Durham bank, where it had an account, and stated that it was favorable to that bank, as it averaged between $7\frac{1}{4}$ and $7\frac{1}{2}$ per cent. interest on the loans. This letter was answered by the plaintiff on January 24, 1912, in which it said:

"We beg to say that the matter mentioned in your letter has been considered, and it looks like we can accommodate you. If convenient, come down some day and talk it over, and in that way we can understand each other much better than by attempting to do so by correspondence."

The other letters written in 1912 refer merely to a loan of \$5,000. A letter of May 6, 1914, refers to the application of the \$3,700 to the note in the bank, which would leave a balance of \$33.02. The letter of May 6, 1914, also stated that Mr. Vaughn, who represented the defendant and was then in Durham, had assented to the suggested application of the \$3,700, or rather had said it was the proper thing to do. The remaining letter, dated May 23, 1917, asked for a detailed statement of defendant's account with the plaintiff, so that it will show the balance on deposit subject to check; a list of defendant's notes discounted by the plaintiff, with face value dates, and maturity of the same, giving as a reason for making the request that defendant had just employed a new auditor, who would post and balance its books for the closing fiscal year.

The jury under the evidence (and the charge of the court, which is not in the record), rendered the following verdict:

"(1) Did the plaintiff knowingly take, receive, reserve, or charge a greater rate of interest than 6 per cent. per annum on the notes set up in the complaint, or any notes of which the said notes

set up in the complaint are renewals, as alleged in the answer? Answer: No.

"(2) What amount, if any, is the defendant entitled to recover of the plaintiff on the counterclaim set up in the answer? No answer.

"(3) What amount, if any, is the plaintiff entitled to recover of the defendant? No answer."

Judgment was entered upon the verdict for the plaintiff, and an appeal taken by the defendant.

Jerome & Scales, of Greensboro, for appellant.

Bryant & Brogden and Fuller, Reade & Fuller, all of Durham, for appellee.

WALKER, J. (after stating the facts as above). [1-3] The exceptions in this case, as will appear by reference to our statement of it, relate chiefly to the admission and exclusion of testimony. There is no exception to the charge, which is not set forth in the record, and we must therefore assume that it was correct in every respect, and perfectly satisfactory to the appellant. *Muse v. Motor Co.*, 175 N. C. 466, 95 S. E. 900. We make brief reference to this fact because it makes it unnecessary for us to decide whether the transaction between the parties was usurious on its face, or tainted per se with usury, if it were such as the defendant contends that it was, or if, in other words, the defendant has established his claim that the 20 per cent. of the discounted notes was left in the bank by it, and held by the bank, without being subject to defendant's check, under an express agreement of the parties to that effect. As the charge is presumed to have been correct, we must conclude that the judge instructed the jury as to all phases of the case, and that they found under the evidence and charge, either that there was no such agreement, or, if there was such an agreement, the jury were instructed that it was not usurious on its face, and therefore they must find whether there was any actual intent to charge unlawful interest, and that under the last instruction they did find that there was no such intent. If they had found that there was an agreement, as claimed by the defendant, and the judge charged that it was usurious in law, they could not have answered the first issue, "No," if they had followed the judge's instructions, which we assume that they did. So that, upon a fair and proper construction of the verdict, which should be read in the light of the evidence and what presumably was the charge (*Southerland v. Brown*, 176 N. C. 187, 96 S. E. 946; *Jones v. Railroad*, 176 N. C. 260, 97 S. E. 48), they either found that there was no such agreement, or that there was no intent to violate the statute.

[4] We are of the opinion, though, that the jury found there was no agreement reserving unlawful interest, which, of course, would cut the defendant's case up by the

roots, as the existence of such an unlawful agreement is the basic fact of his whole contention. In any aspect of the case, therefore, the question as to whether there was a transaction infected with usury is not before us, and will not be hereafter, unless there was some substantial error in the rulings upon the evidence, which we now proceed to consider, but as preliminary to this discussion, we may state tentatively, and without being committed to them, a few general principles of the law concerning the main question, and as they are found in books. The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the loan than is allowed by law. To sustain the defense of usury, there must be satisfactory proof of some unlawful gain or advantage secured by the creditor. The form of the agreement is immaterial, since any shift or device by which illegal interest is arranged to be received or paid is usurious. As above stated, it is not essential to usury that the contract to pay illegal interest should be absolute; the payment of the illegal interest may depend upon the happening of some contingent event, provided the principal is not put at hazard. Neither is it at all necessary that the parties shall have designated the usurious compensation as interest *eo nomine*. If the money, property, or other thing of value agreed upon is intended as compensation for the use of the principal sum, it is, as a matter of law, interest. Thus it has been held that an agreement for unlawful interest may, it seems, be inferred from an unexplained retention by the lender of a portion of the loan, the whole amount of which bears interest at the highest rate. Webb on Usury, § 28, and notes; 27 Am. & Eng. Enc. of Law, p. 925, citing *Cummins v. Wire*, 6 N. J. Eq. 73; *Andrews v. Poe*, 30 Md. 485; *MacKenzie v. Garnett*, 78 Ga. 251; *Uhlfelder v. Carter*, 64 Ala. 527; *Vilas v. McBride*, 62 Hun, 324, 17 N. Y. Supp. 171. And in another case it was said that, where a person went to obtain discount at a bank voluntarily leaves a sum of money on deposit, with the expectation that he will be thus enabled to obtain discount more readily, but without any understanding to not withdraw his money at any time, there is no usury. *Appleton v. Fiske*, 8 Allen (Mass.) 201.

The following illustrations have been given: Where, in a state in which the legal rate of interest is 10 per cent., a municipal corporation attempts to satisfy a judgment against it by issuing warrants at the rate of \$1 in warrants for every 75 cents of the judgment, such warrants are void for usury. *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423. In determining whether usury exists in any particular case, the proper inquiry is not necessarily whether the borrower is to pay for the use or forbearance,

but what is the lender to receive for the loan or forbearance of his money? Where the entire gain of the lender is derived from the borrower, the profit to the former and the cost to the latter are commensurate; but where there are intervening sources of profit to the lender or expense to the borrower, the proposition stated in the last preceding sentence may have application. Webb on Usury, p. 30, and notes.

In *Ehringhaus v. Ford*, 25 N. C. 522, where a bank of this state agreed to lend to an individual notes of a Virginia bank, which were at a depreciation in the market, below both specie and the notes of the bank of this state, and the borrower was to give his note at 90 days, to be discounted by the bank, and to be paid in specie or in the notes of the bank making the loan, it was held that the note given in pursuance of this agreement was void for usury, though the borrower stated at the time that he could make the Virginia notes answer his purpose in the payment of his debts to another.

Usury consists in the unlawful gain, beyond the rate of 6 per cent., taken or reserved by the lender, and not in the actual or contingent loss sustained by the borrower. The proper subject of inquiry is, what the lender is to receive, and not always what the borrower is to pay, for the forbearance. It is generally true that, to constitute usury, there must be an agreement between the lender and the borrower by which the latter pays or promises to pay and the former knowingly receives or secures a higher rate of interest than is allowed by the statute. Webb on Usury, p. 30, § 30. As to the practice and procedure, it has been said that in all cases the purpose should be to ascertain the intention of the parties. The intent may be construed by the law upon the face of the usurious contract, as we have clearly shown, or it may be proved as a fact. Since, therefore, the question of usury may depend sometimes upon the purpose and intent of the parties, it follows that usury may be a question of law, or fact, or a mixed question of both law and fact. There cannot be usury without facts; and those facts, which may include the actual intent, when they are controverted, must be tried and ascertained by the jury. Whether upon those facts the transaction be usurious is a question of law which addresses itself alone to the court. But the question of unlawful interest is commonly one for the jury, where it does not follow as a clear deduction from undisputed facts, or is not imputed by the mere construction by the court of a written instrument, unaided by extrinsic evidence, when it becomes a question of law to be determined by the court. The latter is the case where the contract on its face and by its own terms *per se* imports usury. Webb on Usury, § 434; *Lynchburg v. Norvell*, 20 Grat. (Va.) 601; *Smith v. Hathorn*, 88 N. Y. 211;

Walker v. Bank of Washington, 44 U. S. (3 How.) 62, 11 L. Ed. 494; Levy v. Gadsby, 3 Cranch, 80, 2 L. Ed. 404; Banning v. Hall, 70 Minn. 89, 72 N. W. 817; Woolsey v. Jones, 84 Ala. 88, 4 South. 190. But we need not decide these questions, as they are not directly involved, and merely refer to them incidentally, as they serve to throw some light upon the other questions which are presented for decision. They will all be found fully treated in Webb on Usury, §§ 27 to 41, pp. 27 to 31, and sections 454, 455, pp. 500, 501, and cases in the notes. See, also, Grant v. Morris, 81 N. C. 150; Burwell v. Burgwyn, 100 N. C. 389, 6 S. E. 409; Bennett v. Best, 142 N. C. 168, 55 S. E. 84; Yarborough v. Hughes, 139 N. C. 199, 51 S. E. 904; Miller v. Insurance Co., 118 N. C. 612, 24 S. E. 484, 54 Am. St. Rep. 741; Meroney v. B. & L. Asso., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Arrington v. Goodrich, 95 N. C. 462. This brings us to the rulings on evidence.

[5-7] First. The objection based upon the exclusion of the question addressed to the witness Guy Branson as to instructions from Mr. Wysong cannot be sustained for several reasons, one of which is that it does not appear what answer he would have given. Jenkins v. Long, 170 N. C. 269, 87 S. E. 47; Rawls v. Railroad Co., 172 N. C. 211, 90 S. E. 116; Smith v. Commissioners, 176 N. C. 466, 97 S. E. 378. He might have answered, "No," in which case the defendant would have proved nothing. If we should hold this ruling to be error, and reverse, when the witness is called at the next trial, he may answer, "No," and we will have been at great pains to decide a matter utterly immaterial. The question also was leading, and it was discretionary with the court whether it should be excluded. State v. Price, 158 N. C. 641, 74 S. E. 587; McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445; State v. Williams, 168 N. C. 191, 83 S. E. 714.

[8] The defendant's witness J. R. Brown testified four times, and without objection, that a 20 per cent. deposit was required at all times, though we do not place our decision on this ground. It merely goes to show that defendant was not materially harmed, even if the ruling was technically erroneous. The witness J. R. Brown testified at least three times, under cross-examination, to the instructions from Wysong as to the 20 per cent. deposit without any protest from the plaintiff. It would seem, therefore, that the fact was not seriously contested, and, if so, no real harm was done by the judge's ruling (Weathersbee v. Goodwin, 175 N. C. 234, 95 S. E. 491), and we would be slow to reverse, unless it was reasonably clear that the ruling was prejudicial (Weathersbee Case, supra; State v. Davis, 175 N. C. 723, 729, 95 S. E. 48; Goins v. Indian Tr. School, 169 N. C. 737, 86 S. E. 629; Elliott v. Smith, 173

N. C. 265, 91 S. E. 954; Mitchell v. Bottling Co., 174 N. C. 771, 93 S. E. 850).

We need not, therefore, consider whether the order given by Wysong to the witnesses J. R. Brown and Guy Branson, and testified to by them, should be regarded as a self-serving declaration by Wysong, as contended by the plaintiff. They swore to the fact of retaining the 20 per cent., and it is claimed by defendant to be therefore competent for them to state that it was done under an order given at the same time, which was *pars rei gestae* as qualifying or explaining their act (Jones on Ev. § 346); but however this may be, the result will be the same, in the view we take of the case.

[9-11] Second. As to the testimony of John F. Wiley, plaintiff's cashier, relating to conversations with O. C. Wysong, defendant's former president, who is dead: A corporation can act only through its agents, and it is competent to prove the agent's declaration as against the principal, when it was made about matters within the scope of his authority and relates to the transaction in which he was then engaged on behalf of the principal. Gwaltney v. Assurance Society, 132 N. C. p. 925, 44 S. E. 659; Walker v. Cooper, 159 N. C. 536, 75 S. E. 727; Molyneux v. Huey, 81 N. C. 107; Roberts v. Railroad, 109 N. C. 670, 14 S. E. 106; Sprague v. Bond, 113 N. C. pp. 551, 557, 18 S. E. 701. Mr. Wysong was acting as defendant's agent throughout the transaction, and was its leading officer. The evidence, therefore, falls within the principle just stated. But the defendant's objection is mainly founded upon another ground, that the conversations between the two officers, one of them, Mr. Wysong, the defendant's agent, being dead, is forbidden by Revisal 1905, § 1631. We do not think so. A slight examination of the clear and excellent analysis of that section (Code of 1883, § 589), made by the present Chief Justice in Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043, will show that no such case is presented as will exclude Jno. F. Wiley as a witness, or render his testimony incompetent. Mr. Wiley is not a party to the action, nor did he claim through or under any one who is a party. He did not testify in behalf of himself or in behalf of any party succeeding to his title, for he had none, but solely as a witness for the plaintiff; nor did he testify against the representative of a deceased person, or against any person deriving his interest through such person, nor as to any personal transaction or communication between the witness and the person since deceased, whose representative is a party to the action. The exception to this rule of exclusion stated in Bunn v. Todd, supra, does not apply to the facts of this case. That the suit must be prosecuted against the representative of a deceased person, which is the capital requirement of the section, has no application

here, as this is not that kind of a suit, there being no representative of a deceased person as defendant, or even as plaintiff. There is nothing but the bare fact that Mr. Wiley had an interest as stockholder in the plaintiff bank and was one of its officers, and Mr. Wysong had an interest in the defendant corporation and was one of its officers. But this does not bring the testimony admitted by the court within the prohibition of section 1631. It may be that the section should be broadened so as to include such a case, but that must be done by legislation and not by our construction. If it would be wise and fair for this change to be made, the Legislature, which declares the policy of the state, must say so, as it makes the law and we merely declare what it is. This case is not within the spirit of the section, and certainly not within its letter. *Bunn v. Todd*, *supra*, has frequently been approved since it was decided, the two most recent cases which expressly indorse its statement of the rule and apply it being *Brown v. Adams*, 174 N. C. 490, 93 S. E. 989, L. R. A. 1918C, 911, and *Pope v. Pope*, 176 N. C. 283, 96 S. E. 1034. Mr. Wysong was not a party to the last notes of the series of renewals, which are now sued on, nor is his estate sought to be charged with any liability in this action through his personal or legal representatives. As no claim was being or could be asserted in this action against the estate of Mr. Wysong or his representatives, and as the defendant derived no title, or interest through or under him, Mr. Wiley's testimony did not relate to such a personal transaction or communication with a deceased person, as is forbidden by section 1631 of the Revisal. *Roberts v. Railroad*, 109 N. C. 670, 14 S. E. 106; *Sprague v. Bond*, 113 N. C. pp. 551, 557, 18 S. E. 701; *Gwaltney v. Assurance Society*, 132 N. C. 925, 44 S. E. 659, *supra*. Wysong's estate will not be affected in law by the event of this action, although he may have been an indorser on some of the renewals given prior to the notes in suit, and, if he had such a vague, indirect, and eventual interest, the suit is not against Mr. Wysong's representatives, and the witness was not, therefore, testifying against the latter within the meaning of the statute, but only against the defendant, which is an incorporated company.

We do not see how Mr. Wysong derived any interest in this suit under the defendant, as was argued; and, if he had any personal interest in the transaction, it is not represented by his administrator in this action.

There are other answers to the contention, which need not be stated.

It results that there is no error in the record, and it must be so certified.

No error.

(177 N. C. 533)

BOWEN PIANO CO. v. NEWELL et ux.
(No. 356.)

(Supreme Court of North Carolina. April 9, 1919.)

1. APPEAL AND ERROR ¶93—MATTERS REVIEWABLE—REFUSAL TO DISMISS ACTION.

An appeal does not lie from the refusal to dismiss an action under Revisal 1908, § 587.

2. APPEAL AND ERROR ¶93—MATTERS REVIEWABLE—REFUSAL TO REMOVE BECAUSE OF WRONG VENUE.

An appeal lies from the refusal to remove because of a wrong venue under Revisal 1908, § 587.

3. DISMISSAL AND NONSUIT ¶55—GROUNDS—VENUE.

Where court has general jurisdiction of cause of action, motion to dismiss for want of jurisdiction will not reach objection based on venue.

4. COURTS ¶183—JURISDICTION OF COUNTY COURT—CIVIL ACTIONS.

The county court has general jurisdiction of actions to recover debts secured by conditional sale notes and to recover possession of the property described therein for purpose of sale.

5. VENUE ¶15—INCIDENTAL RELIEF—RECOVERY OF PERSONAL PROPERTY AS INCIDENT TO SUIT.

In an action to recover a debt secured by a conditional sale note, and to recover the personal property described therein for the purpose of sale, the recovery of the personal property not being the chief relief demanded, the action need not be brought in the county wherein the property is located, but may properly be brought in the county of plaintiff's residence.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Action by the Bowen Piano Company against J. J. Newell and S. C. Newell, his wife, doing business under the firm name and style of Newell & Newell. Defendants' motion to dismiss was denied, the denial affirmed on appeal to the superior court, and defendants appeal. Affirmed.

This action was brought to recover a debt secured by a conditional sale note. The plaintiff, who lives in Forsyth, also sought to recover possession of the personal property—one piano, described in the note, which was situated in Lee county. Plaintiff demands possession of the piano and for an order to sell the same and apply the proceeds of the sale to the payment of the note sued on.

Defendants are residents of Lee county, where, as defendants allege, the contract was made. Plaintiff lives in Forsyth county, where this action was commenced and is pending. Defendants, in apt time, and in writing, moved to dismiss the action because the court had no jurisdiction to try the case.

This motion was overruled and defendants excepted. They then asked, in writing, that the case be removed to the superior court, so that the trial can be held in the proper county, as provided by statute. This request was also denied, and they again excepted.

The facts found by Judge Starbuck as to the motions were as follows:

"The plaintiff is, and was at the time of beginning this action, a resident of Forsyth county. The piano described in the complaint is, and was at the time of beginning his action, at the home of the defendants in Lee county, and the defendants are now, and were then, residents of Lee county. The court is of opinion, under sections 2 (b), 9, and 17 of the acts creating the Forsyth county court (chapter 520, Public Local Laws of North Carolina, Session 1915), that actions falling within the provisions of civil procedure relating to venue are removable from said court to the superior courts of other counties, but upon inspection of the complaint the court considers that the plaintiff's cause of action is for the recovery of the amount alleged to be due by the defendants to the plaintiff on the note set out in the complaint, and that the recovery of possession of the piano is incidental thereto for the purpose of foreclosure and application of so much of the proceeds as may be necessary to the satisfaction of the judgment on the note. It is therefore ordered that the motion to dismiss be denied, and that the motion to remove be denied."

In the superior court the findings of fact by Judge Starbuck were approved and adopted as those of the latter court, which affirmed the ruling of the county court, and refused to dismiss the action or to remove it. Defendants again excepted and appealed.

Fred S. Hutchins and Louis M. Swink, both of Winston-Salem, for appellants.

Frank T. Baldwin, of Winston-Salem, for appellee.

PER CURIAM. [1-4] While, as a general rule, an appeal does not lie from the refusal to dismiss an action (Pell's Anno. Revisal, vol. 1, p. 313, c. 12, § 587, where many of the cases are collected), it does lie from a refusal to remove because of a wrong venue (Pell's Revisal, vol. 1, p. 309, c. 12, § 587, citing *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515 and other cases). The motion to dismiss, though, was properly overruled, as it was not a question of jurisdiction, but of venue or place of trial. The court had general jurisdiction of such actions, and we must therefore confine our inquiry to the second ground of the motion. We are of the opinion that both Judge Starbuck and Judge Bryson were right in refusing a removal on this ground.

[5] The matter has been thoroughly well settled by our decisions, and an independent

discussion of it is not called for. A removal was requested in *Woodard v. Sauls*, 134 N. C. 274, 46 S. E. 507, in a case similar to this one and denied in the superior court. The judgment was affirmed here. It was there held that—

"Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located."

Referring to that case in another of a like kind (*Clow v. McNeill*, 187 N. C. 212, at page 214, 83 S. E. 808, at page 309), Justice Allen said:

"The action was improperly removed to the county of Lee, as it is an action for an accounting, and the ownership of the notes and bonds was only raised incidentally. The case of *Woodard v. Sauls*, 134 N. C. 274 [46 S. E. 507], is directly in point. In that case it was alleged that the defendant was indebted to the plaintiff by promissory notes and for further large sums, and that, to secure such indebtedness, had turned over to the plaintiff sundry notes, that the defendant afterwards got possession of a portion of said notes, to be collected by him as agent of the plaintiff and applied on said indebtedness, which the defendant had not done, and that the defendant got possession of another portion of said collaterals surreptitiously, without the knowledge or consent of the plaintiff, and retained the same, to recover which notes plaintiff sued out the ancillary proceeding of claim and delivery; and it was held that, where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located, and that the action ought not to be removed. This case is not in conflict with *Brown v. Cogdell*, 136 N. C. 32 [48 S. E. 515], and *Edgerton v. Games*, 142 N. C. 223 [55 S. E. 145], as in the first of these cases the only question involved was the ownership of certain furniture, and in the second a separate and distinct cause of action was alleged in the complaint for the recovery of a horse."

It is also apparent, from reading the two cases, that *Manufacturing Co. v. Brower*, 105 N. C. 440, 11 S. E. 313, and *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641, are not authorities in favor of a removal of this case, because the first of them was, as the court says, substantially for the foreclosure of a mortgage of land, and the second for the sole subjection of the particular tract of land, described in the pleadings to the payment of the debt, confining the entire relief for the satisfaction of the debt to that tract. That case was also in the nature of one for the foreclosure of a lien upon land. *Manufacturing Co. v. Brower*, supra.

There was no error in the proceedings of the county and superior courts, and we therefore affirm the judgment.

Affirmed.

(177 N. C. 261)

HEADMAN et al. v. BOARD OF COM'RS OF BRUNSWICK et al. (No. 282.)

(Supreme Court of North Carolina. April 2, 1919.)

1. PLEADING —214(3)—ADMISSIONS BY DEMURRER.

In an action to cancel tax deed as a cloud upon plaintiffs' title, allegations in complaint that plaintiffs were willing and able to pay the taxes in question, and tendered them to defendant entitled to receive them, and that he will not receive them, must be considered as admitted for the purpose of deciding the legal questions presented by demurrer.

2. TAXATION —800(2)—TENDER OF TAXES—WAIVER.

Refusal to accept payment of taxes by defendant entitled to receive them is a waiver of further tender, and dispenses with it; this being also the usual rule as to tender.

3. TAXATION —814(1)—JUDGMENT REMOVING DEED AS CLOUD—RELIEF—REIMBURSEMENT.

Though refusal of taxes tendered was a waiver of further tender, the court will require, as a condition of entry of judgment in favor of plaintiffs in action to remove tax deed as cloud upon title, that amount of taxes, together with any other amount due by way of penalty or interest, be paid by plaintiffs.

4. TAXATION —734(3)—TAX SALES—LISTING LAND IN NAME OF OTHER THAN TRUE OWNER.

That the land was in the hands of a receiver appointed while taxes were due, and that the land was listed in the name of some one other than the true owner, did not invalidate sale for taxes which was otherwise free from fatal defects, in view of Revisal 1905, §§ 2862, 2879, 2894.

5. TAXATION —806—SUIT TO CANCEL TAX DEED—PARTIES.

Receiver appointed while taxes in question were due would be a proper party to action to cancel tax deed as cloud upon plaintiffs' title.

6. TAXATION —745—TAX DEED—STATUTE—NECESSITY OF FORECLOSURE.

While formerly, the only remedy of a county or city in case either was the purchaser at tax sale was by foreclosure under Revisal 1905, § 2912, the statute has been changed by Laws 1901, c. 558, § 18, giving the right to tax deed without resorting to foreclosure.

7. APPEAL AND ERROR —840(4)—MATTERS EMBRACING ONLY A PART OF CAUSE OF ACTION—REVIEW.

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it; appeal from ruling in such case being fragmentary and premature.

Appeal from Superior Court, Brunswick County; Stacy, Judge.

Action by Frank C. Headman, executor, and others against the Board of Commissioners of Brunswick and the City of Southport and another. From the judgment rendered, defendants appeal. Modified.

C. Ed. Taylor, of Southport, for appellant Brunswick Co.

Cranmer & Davis, of Southport, for appellant City of Southport.

Russell W. Richmond, of Providence, R. I., and Joseph W. Ruark and Robert Ruark, both of Southport, for appellant Allen.

E. K. Bryan, of Wilmington, for appellees.

WALKER, J. The plaintiffs alleged in their complaint that a deed under a tax sale of their land had been fraudulently obtained, and that the notice required by the law, before such a deed is executed, was not given, and that plaintiffs' only remedy was by foreclosure; and that the land was in the hands of a receiver, and was improperly listed in the name of the Southport Land Company, and by reason of the defects in the sale and deed a cloud has been put upon their title, which they ask to be removed.

The defendants demurred to the complaint, assigning the following grounds of demurrer, which will be stated and considered in their proper order:

[1] First. That plaintiffs had not paid the taxes due for the years 1914 and 1915, for which the land was sold. The plaintiffs alleged that they were willing and ready to pay the taxes, and tendered them to the defendant entitled to receive them, and that he will not receive them. This, of course, is admitted by the demurrer, or rather to be considered as admitted, for the purpose of deciding the legal questions raised by it. *Balfour Quarry Co. v. West Const. Co.*, 151 N. C. 345, 66 S. E. 217; *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *Kendall v. Highway Commission*, 165 N. C. 600, 81 S. E. 995.

[2] The defendant cannot be forced to accept payment of the taxes, and his refusal is a waiver of further tender, and dispenses with the necessity of it. *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613 (a tax sale case). This is also the usual rule as to a tender. *Abrams v. Suttles*, 44 N. C. 99; *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133, Ann. Cas. 1913C, 642; *Gallimore v. Grubb*, 156 N. C. 575, 72 S. E. 628; *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642; and *Gaylord v. McCoy*, 161 N. C. 685, 77 S. E. 959, where this court said:

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused; that payment or performance will not be accepted."

And this was also held in *Mobley v. Fossett*, 20 N. C. 96, bottom page 78; *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558; *Terrell v. Walker*, 65 N. C. 91.

[3] In *Mobley v. Fossett*, *supra*, it was held that, when a party is bound by his agreement to make a tender of an article at a particular place, and the other party apprises him that he will not receive the article at all, it dispenses with the necessity of making the tender, citing 2 Starkie on Evidence, p. 778. But while this is so, if the plaintiff finally prevails in this action, the court will require as a condition of entering a judgment upon the verdict that plaintiffs pay into the court the amount of the taxes, for the use of the party entitled thereto, or to him directly, with any other amount due by way of penalty or interest. Brunswick county and the city of Southport, it is presumed, already have received their taxes, and the defendant Philip Allen may have paid them, so that no other payment is now necessary, but inquiry will be made as to this matter and the facts found, so that the proper judgment may be rendered and the amount of taxes, and other amounts due may be paid. *McLaurin v. Williams*, 175 N. C. 290, 95 S. E. 559. The county and city, or their assignee, must have all taxes and charges due to them, or to those claiming under them, before any decree is entered, on the verdict, if the plaintiff finally gets one. The payment of taxes is only required to be shown, not pleaded. *Beck v. Meroney*, 135 N. C. 532, 47 S. E. 613; *Moore v. Byrd*, 118 N. C. 688, 23 S. E. 968.

[4] Second. That listing the land in the name of some one other than the true owner did not invalidate the sale of the land for the taxes, as alleged by the plaintiff. We have so held in several well-considered cases. *Peebles v. Taylor*, 118 N. C. 165, 24 S. E. 797; *Moore v. Byrd*, *supra*; *Eames v. Armstrong*, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436; and the recent case of *Stone v. Phillips*, 176 N. C. 457, 97 S. E. 375, in which attention is called to Revisal 1905, § 2894, which reads, as follows:

"That no sale of real estate shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects sufficiently described. But no sale of property so listed in the name of the wrong person shall be held valid where the rightful one has listed the same and paid the taxes thereon."

Stone v. Phillips, *supra*, cites *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359, as approving the principle embodied in the statute, and distinguishes *Rexford v. Phillips*, 159 N. C. 213, 74 S. E. 337, in which case it appeared that there had not been any listing of the property as the law required, but the placing on the books of an indefinitely described part of a large body of land by a person having

no semblance of authority, in law or in fact for doing so. To have permitted such a false and unauthorized listing and description to bind and conclude the owner would have been a plain act of injustice, which is not warranted by any reasonable construction of the statute, and is directly contrary to its expressly declared purpose. The *Stone Case* holds, in a well-considered opinion by Justice Hoke, that the listing of property in the name of a person other than the true owner will not invalidate a sale of it for the taxes, which is otherwise free from fatal defects, and this opinion we again approve. Counsel who argued the present case before us (Mr. Robert Ruark) correctly understood and stated in his argument, and in his brief, the palpable distinction between *Rexford v. Phillips*, 159 N. C. 213, 74 S. E. 337, and the cases holding that the mere listing in the wrong name, when the property is sufficiently described, will not invalidate a sale for taxes.

[5] It can make no difference, as to the validity of a tax sale, that the property was in the custody of a receiver, appointed by the court, while the taxes were due. Revisal 1905, § 2879, provides fully for such a case, and section 2862 requires a receiver and other fiduciaries named therein to pay the taxes assessed against the trust property, and makes him liable personally to the sheriff, by an action against him, and in damages to the owner of the property, who suffers loss by his default, for the failure to pay the taxes out of the trust fund in his hands. But we do not think this section deprived the owner of the right to protect his property, although held in trust by a receiver, by making a tender of the taxes to save it from a sale and the consequent loss of it by him. Such was not the intent and meaning of this section, which was to give an easy remedy to the sheriff, against the trustee or receiver, which was cumulative to that against the owner, and it could not have been intended that the owner should be made to see his property sacrificed by the neglect of a receiver, and not be able to save it by paying the taxes, and such an injustice would be aggravated and more apparent when the receiver really had no funds with which to pay them, as may happen to be the case in some instances. It would be proper, at least, to make the receiver a party to this action, as he has an interest in it. The court, by which he was appointed, would, upon proper application, direct him to make himself a party, as the fund in his hand is involved, and will be lost in the event the sale eventually is held to be valid.

[6] Third. The plaintiff further alleges that the only remedy of the county and city was by foreclosure. This was so at one time, but the statute has been changed, and each case must be decided under the law existing at the time of the particular trans-

action. With reference to this question, the Chief Justice said, in *Townsend v. Drainage Commissioners*, 174 N. C. 556, 559, 94 S. E. 104, 106:

"The appellant contends that Revisal, § 2912, requires the purchaser at a tax sale to bring an action to foreclose upon his tax certificate, and that this is his only remedy. In this he is in error, for section 2912 gives this as an additional remedy and uses the following language: 'The holder of a deed for real estate sold for taxes shall be entitled to the remedy provided in this section [2912] if he elect to proceed thereunder,' or he may proceed to acquire a deed from the sheriff as otherwise pointed out in sections 2899 to 2907 of the Revisal. Every individual purchaser has two remedies, one to proceed under the statute to require a deed, and the other to foreclose by action in court under section 2912. Formerly, if the county was purchaser it had only the right to foreclose (*Wilcox v. Leach*, 123 N. C. 74 [31 S. E. 374]), but this was changed by Laws 1901, c. 558, § 18 (now *Pell's Revisal*, § 2905), which provides that the sheriff can execute a deed upon the demand of the county commissioners or the governing board of a municipal corporation in the same manner as in cases where individuals have purchased."

And Justice Hoke said in *Kivett v. Gardner*, 169 N. C. 78, 80, 85 S. E. 145, 146:

"It may be well to note that, under the present law (*Revisal*, § 2906) a county purchasing land for taxes may take a deed therefor without resorting to foreclosure (*McNair v. Boyd*, 163 N. C. 478 [79 S. E. 966]), and this case holds, too, that it is only when the owner has been in possession that the ordinary statutes of limitations do not operate against him."

So we find this matter to be settled by statute and adjudication.

[7] Fourth. We have so far considered only those grounds of objection which, if sustained, would dismiss the action. In other words, they cover the entire case, and may finally dispose of it. But the next allegation of the plaintiff, as to the failure of the purchaser to give notice before the deed was made by the sheriff, which also was demurred to, embraces only a part of the cause of action, and, if sustained, will not dismiss it, as there is another ground left upon which the plaintiff may recover. When this is the case, we do not review the overruling of the demurrer, but allow defendant to except and leave a decision upon the question to the final hearing. An appeal from the ruling is premature and fragmentary. We so held in *Shelby v. Railroad Co.*, 147 N. C. 537, 61 S. E. 377, which was approved in *Chambers v. Railroad Co.*, 172 N. C. 555, 90 S. E. 590, citing numerous decisions of this court in support of the rule. There is a full discussion of the point in the latter case, but it may be well to quote the language of the present Chief Justice in *Shelby v. Railroad Co.*, supra, where it is said, at page 537 of 147 N. C., at page 377 of 61 S. E.:

"The defendant pleaded in its answer two separate and distinct defenses. The plaintiff demurred to one of them, as he had a right to do. *Revisal*, § 435. The demurrer was overruled, and the defendant appealed. This is obnoxious to the rule forbidding fragmentary appeals. An appeal from a ruling upon one of several issues will be dismissed. *Hines v. Hines*, 84 N. C. 122; *Arrington v. Arrington*, 91 N. C. 301. The plaintiff should have noted his exception and the judge should have proceeded with the trial upon both issues. If both issues or only the issue as to this defense were found with the plaintiff, he would not need to * * * review the order overruling the demurrer as to this, but should he desire to do so, the overruling the demurrer as to this issue can be as well reviewed on appeal from the final judgment. It is true that the plaintiff will have to try this issue, but, aside from the presumption that the judge ruled rightly, it is better practice that the issue raised by the second defense should be tried, even unnecessarily, than that an action should thus be cut in two and hung up in the courts till it is determined, after much delay, on appeal, whether two issues or one should be tried. It is better to try both, and after final verdict and judgment pass upon the validity of the defense demurred to, if the result is such as to make the plaintiff still desirous to review it, which he will not be if he gain the case, nor if he lose on the other issue without ground of exception thereto."

And again at page 538, of 147 N. C., at page 378 of 61 S. E.:

"Hence, fragmentary appeals like this, and premature appeals and appeals from interlocutory judgments, usually are not tolerated. It can prejudice neither party to have the issue as to the second defense found by the jury (plaintiff's exception being noted) at the same time the issue as to the other defense is found. With all the parties before the court and the facts fully brought out, a correct conclusion is more likely to be reached by both judge and jury."

In *Knott v. Burwell*, 96 N. C. 272, 2 S. E. 588, where there was a demurrer to a matter of defense and also to a counterclaim presenting a very strong illustration of the doctrine, it was said:

The demurrer "being sustained by the court and the counterclaim disallowed, the defendant appealed, and at the same time moved the court to suspend further proceedings in the action until the appeal could be heard and decided. This was also refused, and the trial ordered to go on. To these rulings the defendant's first exception is taken, and it is in our opinion without support in law. The proposed appeal was premature; and, the exception being noted upon the record, the ruling would come up for review after the final hearing upon an appeal then taken, and this opportunity is now afforded the defendant."

Commenting on these cases (and the same question we are now discussing) in *Chambers v. Railroad Co.*, supra at pages 558 and 559 of 172 N. C., at pages 591 and 592 of 90 S. E., this court said:

"To the same effect is *Bazemore v. Bridgers*, 105 N. C. 191 [10 S. E. 888]. So it will be seen that the practice and procedure in such cases has been thoroughly settled by decisions above considered. Justice Reade, in *Commissioners v. Magnin*, supra [78 N. C. 181], strongly intimated that the result as declared in the above cases was in accordance with the true construction and meaning of the Code, and if there were any cases to the contrary it might be well for this court to settle the matter finally by the adoption of a rule forbidding such premature and fragmentary appeals and requiring an exception to be noted to the adverse ruling so that the trial of the case can proceed. The point may be reserved for consideration upon appeal at the final hearing. We think that it will, perhaps, be found that the cases in which appeals have been entertained in this court from the overruling of demurrers are those where a decision of the question would finally dispose of the case, and not merely be one step forward, and perhaps a useless one."

We further said in the *Chambers Case*:

"The practice we here adopt as the preferable one, besides having been settled by our decisions, is not, in principle, unlike that in cases of nonsuit, where the courts have held that, upon an adverse intimation of the court, the plaintiff may submit to a nonsuit, if he so desires, but he cannot appeal from the judgment of nonsuit, entered upon his submission, and have it reviewed in this court, if there is any ground left upon which he may recover, for the ruling must go to the whole case and prevent a recovery before an appeal will lie. We have so held during this term in *Chandler v. Mills*, 172 N. C. 336 [90 S. E. 299], where it is said: 'The nonsuit and appeal were prematurely taken. The law with respect to this matter has been thoroughly well settled by this court. Before a plaintiff can resort to a nonsuit, and have any proposed ruling of the trial court reviewed here by appeal, the intimation of opinion by the judge must be of such a nature as to defeat a recovery. If there is any ground left upon which the plaintiff may succeed before the jury, after the elimination of all others by an adverse intimation, the remedy is not by nonsuit and appeal, but the case should be tried out upon the remaining ground, for the plaintiff may recover full damages, in which case no appeal by him would be necessary. In other words, the threatened ruling must exhaust every ground upon which a verdict could be had, and therefore be fatal to plaintiff's recovery'"—citing *Hayes v. Railroad*, 140 N. C. 131, 52 S. E. 416; *Hoss v. Palmer*, 150 N. C. 12, 63 S. E. 171; *Merrick v. Bedford*, 141 N. C. 504, 54 S. E. 415; *Midgett v. Mfg. Co.*, 140 N. C. 361, 53 S. E. 178.

It may well be said here, in illustration of the rule, and as showing its practical working to be in favor of a reasonable expedition of trials and how it is preventive of unnecessary delay, that, if we should consider the question, as to notice, and sustain the demurrer, we would be compelled to remand the case, for the trial of the issue, as to the fraud, and a demurrer may yet be filed to that cause of action and appeal taken, multi-

plying costs and causing vexatious delay, when defendant will lose nothing by excepting, and reserving the question raised by him until the final hearing. He may even then take advantage of the alleged defect in plaintiff's case by a simple request for an instruction covering the point. If the jury, as remarked by the present Chief Justice in *Shelby v. Railroad Co.*, should answer the issue as to the fraud in favor of the plaintiff, the other question will never arise again. There will be no necessity for deciding it. Besides the delay, therefore, there will be a waste of labor and an idle consumption of time in passing upon a question which may become entirely immaterial. Not longer than the last term of this court it was said by Justice Brown, in *Yates v. Dixie Fire Ins. Co.*, 176 N. C. 401, 97 S. E. 209:

"We suggest to the judges of the superior court that fragmentary and premature appeals be not permitted. It is best that all the issues be determined, and a final judgment rendered, before a case is brought to this court."

It, therefore, becomes unnecessary to consider what effect the want of notice from the parties, or the sheriff, of the sale and the intention to make a deed to the purchaser will have upon the case. The jury may find that there was an unlawful combination or conspiracy to defraud the plaintiffs, or that the notice was given, which would render vain and useless any decision upon the question just stated. The case of *Matthews v. Fry*, 141 N. C. 582, 54 S. E. 379, which was referred to by counsel on both sides was decided under the Public Laws of 1897, c. 169, and it has since been approved in several cases. *S. C.*, 143 N. C. 384, 55 S. E. 787; *Eames v. Armstrong*, 146 N. C. 6, 59 S. E. 165, 125 Am. St. Rep. 436; *Warren v. Williford*, 148 N. C. 479, 62 S. E. 697; *Rexford v. Phillips*, 159 N. C. 213, 74 S. E. 337; *Board of Education v. Remick*, 160 N. C. 563, 76 S. E. 627; *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966. It was founded upon *King v. Cooper*, 128 N. C. 347, 38 S. E. 924 (opinion by the present Chief Justice), where the principle, which is applicable to such cases, is fully discussed. See *Jones v. Schull*, 153 N. C. 517, 69 S. E. 498 (by Manning, J.), in which *King v. Cooper* and *Matthews v. Fry* were especially approved and followed. The controversy in *Matthews v. Fry* and *King v. Cooper*, supra, was between the purchaser at the sale and the owner, and the notice of the purpose to make the deed to the former was intended to give a solitary, and last, chance to redeem the land by paying taxes, charges, costs, and expenses. It was a wise provision to prevent what might turn out to be gross injustice, that is, to take his land without notice and an opportunity of paying the taxes, costs, expenses, and the large interest or per cent. exacted by the statute, when no doubt he would be perfectly willing to pay

it, and too, it might be a small amount, when compared with the true value of the land. But that statute was amended by Public Laws of 1901, c. 553, § 20 (Revisal, sec. 2909), in material respects, which is mentioned by Justice Connor in *Eames v. Armstrong*, supra, and though we do not decide the question, as to the effect of that change in the law, we may again say, as we have already said, that each case must be governed by the particular statute applicable to it *Jones v. Schull*, supra. It may be that the act of 1901 changes the law in the manner and to the extent that is claimed by the defendant, but we withhold our opinion upon this contention until it is properly presented.

We have carefully considered the case, and have been at much pains to state the contentions fully and to decide all questions within the compass of the appeal, as the whole matter, and every detail of it, came under elaborate discussion in this court, and the questions were ably argued by counsel.

As we have sustained some of the grounds of demurrer and overruled others, we direct, in the exercise of our discretion, that the costs of this court be equally divided between the parties, one half thereof to be taxed against the plaintiffs and the other half against the defendants.

The judgment is modified, as above indicated.

Modified.

(177 N. C. 536)

ALEXANDER et al. v. RICHMOND CEDAR WORKS. (No. 10.)

(Supreme Court of North Carolina. April 9, 1919.)

1. NEW TRIAL ⇐168 — NEWLY DISCOVERED EVIDENCE.

A new trial, will not be granted on petition in Supreme Court for newly discovered evidence which is entirely cumulative.

2. NEW TRIAL ⇐168 — NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on petition in Supreme Court for newly discovered evidence, unless there is something to reasonably indicate that result will be changed.

3. NEW TRIAL ⇐168 — MOTION FOR — DILIGENCE.

A petition in Supreme Court for a new trial on ground of newly discovered evidence must affirmatively show that petitioners were diligent in their efforts to produce testimony at trial, and it is not enough to allege generally that they were not guilty of laches; it being necessary to set forth the facts.

4. EQUITY ⇐67—"LACHES."

"Laches" is negligence consisting in omission of something which a party might do and might reasonably be expected to do towards vindication or enforcement of his rights, being

generally a synonym of "remissness," "dilatatoriness," "unreasonable or unexcused delay," the opposite of "vigilance," and means a want of activity and diligence in making a claim or moving for the enforcement of a right, particularly in equity, which will afford ground for presuming against it or for refusing relief where that is discretionary with the court, but laches presupposes, not only lapse of time, but also the existence of circumstances which render negligence imputable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

Appeal from Superior Court, Tyrrell County; Bond, Judge.

Suit for partition by J. E. Alexander and others against the Richmond Cedar Works. From a decree for defendant, plaintiffs appeal. Petition by plaintiffs after argument for a new trial upon the ground of newly discovered testimony. Petition dismissed.

See, also, 98 S. E. 312.

Aydlett, Simpson & Sawyer, of Elizabeth City, and W. L. Whitley, of Plymouth, for appellants.

J. Crawford Biggs, of Raleigh, and Thompson & Wilson, of Elizabeth City, for appellee.

PER CURIAM. This is a petition for a new trial in the above entitled case, upon the ground of newly discovered testimony. The petition is denied for the following reasons:

[1, 2] First. The proposed testimony appears to be entirely cumulative, there being no new kind of evidence offered, and besides there is nothing to reasonably indicate that the result will be changed.

[3] Second. There is no acceptable excuse given for the delay in procuring the new testimony, and no sufficient reason assigned for not having presented it at the trial of the action.

Third. But another reason, and the main one, is that petitioners do not sufficiently show that they had been diligent in their efforts to produce this testimony at the trial, or to put it conversely, they do not show that they have not been guilty of laches. They allege generally that laches cannot be imputed to them, but this will not do, as the facts should have been set forth, so that we can determine whether laches existed. They could not decide that question for us by merely asserting that there had been no laches.

The petitioners have not brought themselves within the rule, which we have adopted in regard to such applications as this one. We said in *Johnson v. Railroad Co.*, 163 N. C. at page 453, 79 S. E. at page 699, Ann. Cas. 1915B, 598, and its language, in most respects, is peculiarly applicable to this case:

"Since this case was argued, the defendant has moved for a new trial, upon the ground of

newly discovered evidence. Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 A. & E. Enc. Pl. & Pr. 790. We require, as a prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *Turner v. Davis*, 132 N. C. 187 [43 S. E. 637]; *State v. Starnes*, 97 N. C. 423 [2 S. E. 447]; *Brown v. Mitchell*, 102 N. C. 347 [9 S. E. 702, 11 Am. St. Rep. 748]; *State v. De Graff*, 113 N. C. 688 [18 S. E. 507]; *Schehan v. Malone*, 72 N. C. 59; *Mottu v. Davis*, 153 N. C. 160 [69 S. E. 63]; *Aden v. Doub*, 153 N. C. 434 [146 N. C. 10, 59 S. E. 162]. When we examine the affidavits of Hector Austen, and the others upon which the defendant bases its motion for a new trial, we find that they fall short of complying with the rule we have just stated. In some respects the proposed testimony is merely cumulative, and in others it only tends to contradict or impeach the plaintiff's witnesses at the trial. It is not very definite. The witness does not speak with sufficient positiveness and directness to give us the slightest assurance that there will be a different result if we grant the application. * * * It is not satisfactorily shown that the testimony of the witness, if desired, could not have been secured at the trial by the exercise of proper diligence. We are convinced that the testimony, if it had been introduced before, would not have changed the result. We refer now to the second affidavit of Hector Austen, made in behalf of plaintiff."

See *Wheeler v. Cole*, 164 N. C. 378, 80 S. E. 241; *Padgett v. McCoy*, 167 N. C. 508, 83 S. E. 756; *Gainey v. Godwin*, 171 N. C. 754, 88 S. E. 230; *Steeley v. Lumber Co.*, 165 N. C. 35, 80 S. E. 963.

[4] If we should grant this application, upon the case as made out by the petitioners,

even giving to it the best possible construction in their favor, we would have to do so in every case which is based upon the ground that there is additional testimony, which might have been produced with reasonable effort, and there would consequently be no end of trials, for there are a very few, if any, cases where it could not be alleged that the losing party has lost the benefit of evidence which they are prepared to introduce if permitted to do so. But we put our decision chiefly upon the ground that a want of laches has not been sufficiently shown. Laches is negligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights. The word is generally a synonym of "remissness," "dilatatoriness," "unreasonable or unexcused delay," the opposite of "vigilance," and means a want of activity and diligence in making a claim or moving for the enforcement of a right (particularly in equity) which will afford ground for presuming against it, or for refusing relief, where that is discretionary with the court. It may be that petitioners were actually free from laches, but, if so, it should have appeared affirmatively; the burden of showing diligence being upon them. It is not sufficient to allege it, but it must be proven with reasonable certainty. Indifference to one's interests will not be excused by the law, as it requires of a party that he should devote that care and attention to his case which a man of ordinary prudence bestows upon his important business affairs. *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424; *McLeod v. Gooch*, 162 N. C. 122, 78 S. E. 4; *Dell School v. Pierce*, 163 N. C. 424, 79 S. E. 687; *Smith v. Duncan*, 16 N. J. Eq. 242. Laches presupposes, not only lapse of time, but also the existence of circumstances which render negligence imputable; and, unless reasonable diligence is shown in the prosecution of a claim to relief, the court, acting on the familiar maxim of the law as to giving preference to one who has been watchful of his rights, rather than one who has slept upon them, will decline to interfere.

Petition dismissed.

(177 N. C. 580)

STATE v. HARDEN et al. (No. 348.)

(Supreme Court of North Carolina. April 9, 1919.)

1. CRIMINAL LAW — §841 — OBJECTIONS TO INSTRUCTIONS.

Where the trial court, in stating the evidence and contentions to the jury, inadvertently refers to an excluded statement by a witness, such reference should be called to the court's attention at the time so that it may be corrected.

2. ROBBERY — §23(1) — EVIDENCE — ADMISSIBILITY.

In prosecution for highway robbery testimony by the prosecuting witness that 10 or 15 minutes after the robbery, while he was in a store telephoning to the police, defendants entered "and seemed surprised to see him there," was competent; the fact that defendants were surprised being a relevant circumstance for the jury to consider.

3. COURTS — §66(3) — ORGANIZATION — COMMENCEMENT OF TERM — PRESENCE OF JUDGE — VALIDITY OF ACTS.

Where no judge was present on the first Monday of court upon which the spring term was by statute directed to commence, and court was adjourned by the sheriff from day to day under Revisal 1905, § 1510, but the judge assigned by statute to preside at the spring term appeared as soon as he had qualified, and before the fourth day organized the court and proceeded with its business, the court was regularly constituted, the judge a de jure official, and the proceedings thereafter taken were valid.

4. COURTS — §66(1) — ORGANIZATION — ABSENCE OF JUDGE — ADJOURNMENT BY SHERIFF.

Under the express terms of Revisal 1905, § 1510, when the judge fails to appear on the first day of the term, the sheriff may adjourn court from day to day until the fourth day without any special order from the judge.

5. COURTS — §63 — ORGANIZATION — COMMENCEMENT OF TERM.

Where Pub. Laws 1917, c. 169, prescribed that court should commence on the ninth Monday before the first Monday in March for the spring term, that such Monday occurs in December does not prevent the term from being the spring term, and a judge assigned by statute to such court may properly preside.

6. JUDGES — §26 — DE FACTO JUDGE — RECONVENING ADJOURNED TERM.

Conceding that judge assigned to spring term of court was not authorized to reconvene the court after its adjournment by the sheriff, acts of judge would be valid as a de facto officer.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Tom Harden and another were convicted of highway robbery, and they appeal. No error.

Hastings & Whicker, of Winston-Salem, for appellant Beale.

Fred M. Parrish, of Winston-Salem, for appellant Harden.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. The state's witness, A. J. Edwards, upon whom the assault and robbery were committed, during the course of his testimony stated that about 10 or 15 minutes after the robbery he was in George Anderson's store, telephoning for a policeman, when defendants entered the store [and seemed surprised to see him there]. The last part of this testimony, which we have inclosed in brackets, was excluded by the court on objection by defendants; but, in stating the evidence and contentions to the jury, the learned judge inadvertently referred to it, but gave no instruction in regard to it in his general charge, though at the time it was ruled out the judge told the jury they should not consider it. The reference to this statement of Edwards is now assigned as error.

[1] It is evident that the reference to the excluded statement was made by mistake, and should have been called to the court's attention at the time, so that it might then be corrected. We have repeatedly held that this should be done when the judge is reciting the evidence or the contentions of the parties. *State v. Spencer*, 176 N. C. 709, 97 S. E. 155, is the most recent case settling this question, and it cites *State v. Blackwell*, 162 N. C. 672, 78 S. E. 316; *State v. Martin*, 173 N. C. 808, 92 S. E. 597, and *State v. Burton*, 172 N. C. 939, 90 S. E. 561; there being numerous cases both before and since they were decided.

[2] But the evidence was competent, as held in *State v. Spencer*, supra. The surprise or confused appearance of the defendants was natural evidence. A man may show his guilt by his action or conduct, as well as by his words. The witness did not know the defendants before he was robbed, and when they first entered the store he inquired of Van Surratt and Emma Anderson who they were. If he did not know them and they did not know him, there was no reason for them to be surprised at seeing him in the store. The fact that they were surprised is therefore a proper and relevant circumstance for the jury to consider. Whether they were surprised is also for them to determine. We said in *State v. Spencer*, 176 N. C. at page 712, 97 S. E. at page 157:

"The instantaneous conclusions of the mind as to appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact and are admissible in evidence." *State v. Leak*, 156 N. C. 643, 72 S. E. 567; *Renn v. Railroad*,

170 N. C. 128, 86 S. E. 864. Within this rule, the opinion of the witness as to the appearance of the dog and his conduct was permissible."

If the defendants exhibited surprise by their conduct, it was because they had been with the witness George Edwards, and recognized him as the victim of their robbery, or rather it is a fair and reasonable inference for a jury to draw. Judge Gaston said, in *State v. Swink*, 19 N. C. 9 (which was approved in *State v. Rowe*, 98 N. C. 629, 4 S. E. 506, and *State v. Spencer*, supra):

"All the surrounding facts of a transaction may be submitted to a jury when they afford any fair presumption or inference as to the question in dispute. Upon this principle it is that the conduct of the accused at the time of the offense, or after being charged with it, such as 'flight, the fabrication of false and contradictory statements, the concealment of the instruments of violence, the destruction or removal of proofs tending to show that an offense had been committed, or to ascertain the offender,' are all receivable in evidence as circumstances connected with, and throwing light upon, the question of imputed guilt."

See *State v. Hastings*, 86 N. C. 596.

We are of the opinion that the defendants were properly tried, and that the evidence fully sustains the verdict and judgment.

The right of Judge Bryson to preside at the court is questioned by an exception of the defendants, but, we think, without sound reason. We will briefly state the facts: The court calendar in that judicial district is based upon two fixed periods of the year, the first Monday of March for the spring ridings, and the first Monday in September for the fall ridings, and the courts are required to be held commencing on those days, or on a certain designated number of Mondays before and after, for each of the counties in rotation. Public Laws 1917, c. 169, provided that the particular court in question should commence on the ninth Monday before the first Monday in March, which, it so happened, fell upon December 30, 1918, the first week being for the trial of civil cases, there being three weeks of the term. Judge Lane had presided at the fall terms of 1918 of Forsyth superior court, and the contention of the defendants is that he should have held the court at which they were tried and convicted. Judge Bryson was elected for the Twentieth judicial district, and was commissioned and duly qualified as such, and assigned by statute to hold the courts of the Eleventh district. When his right to hold the court was challenged, he made, and ordered to be entered in the minutes, the following findings:

"That the term of superior court for Forsyth county at which the defendants were tried and convicted was the regular term of court fixed by the statute, beginning upon the 30th day of December, 1918, and continuing for a term of three weeks; that, no judge appearing upon

Monday, the 30th day of December, 1918, it was the duty of the sheriff of said county, in compliance with the law, to open said court and adjourn the same from day to day for the first four days of said term; that the adjournment of said court on Monday and Tuesday by said Sheriff Flynt was in compliance with the statute; that the direction to the sheriff by wire from Judge Bryson, who was assigned by statute to hold the courts of the Eleventh judicial district of North Carolina for the Spring term of 1919, was lawful and in compliance with the statute; and that the said court was legal and properly constituted."

[3, 4] It appears, therefore, that as no other judge was present on the first Monday of court, it was adjourned by the sheriff from day to day, under Revisal, § 1510, and Judge Bryson "being present" before sunset of the fourth day of the court, he organized the same and proceeded with the trial of causes and the transaction of the other business of the court. This was all regular and within the intent and spirit of the statute, even if not within its letter, and we have so held in *State v. McGimsey*, 80 N. C. 877, 80 Am. Rep. 90. Under the statute and that case, the sheriff could have adjourned the court from day to day until the fourth day without any special order from the judge, as he is so directed to do by the statute itself, and in *Norwood v. Thorp*, 64 N. C. 682, it was said:

"The provision" of Code of Civil Procedure, § 396 (Revisal of 1905, § 1510), "that where the judge fails to appear at any term until the fourth day thereof, inclusive, the sheriff shall adjourn the court until the next term, does not avoid the acts of any term, where, upon the nonappearance of the judge, the sheriff did not in fact adjourn the court, and the judge afterwards (here in the second week) actually appeared and held court."

Judge Bryson appeared immediately after he was inducted into office, and we are clearly of the opinion that he rightfully presided at the court, and all of its proceedings thereafter taken were valid, and that he was judge of the court de jure. The record sets forth that a regular term of the superior court was opened and held Wednesday, instead of the Monday preceding, fixed by the statute as the first day, and it has been held by us that upon this recited fact the presumption is that the sheriff adjourned the court from day to day, as he is required to do by the statute, and that the court was legally held, and its proceedings were valid. *State v. Weaver*, 104 N. C. 758, 10 S. E. 486, where Justice Avery said:

"The record of the term at which the case was tried before Bynum, J., sets forth that 'at superior court, continued and held in and for the county of Granville and state of North Carolina, at the courthouse thereof in Oxford, on Wednesday, the 24th day of April, A. D. 1889, present,' etc. It is contended by counsel that the fact that the court appears to have been first opened on Wednesday is fatal to the ju-

risdiction. The sheriff is required by section 926 of the Code to 'adjourn the court from day to day until the fourth day of the term inclusive,' etc., if the judge of the superior court shall not be present. It was therefore lawful to open the court as late as Thursday, and it must be presumed that it was adjourned from day to day, as the law directs, by the sheriff."

In any view of the matter, Judge Bryson was a de facto officer, and his acts were valid as such so far, at least, as the public and third persons are concerned. This was expressly held in *State v. Lewis*, 107 N. C. 967, 970, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105, where the question is fully discussed by Justice Avery. Our case is certainly within the third rule stated by Chief Justice Butler in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, which authority was cited with approval in the *Lewis* Case, where Justice Avery said:

"If Judge Whitaker was acting either de jure or de facto as judge of the superior court of Rockingham county in opening and organizing that court, and in presiding at the trial of the defendant until the jury returned a verdict of guilty, it was error to allow the motion of the defendant and enter the order arresting the judgment. Were we to concede not only that the Governor did not have the power, under the Constitution, to appoint him and clothe him with the rightful authority, but that his acts as a de facto officer also ceased to be valid and binding as to the public and third persons, when he declared in open court his purpose to abdicate because he was of opinion that the said term could not have been lawfully held except by a successor regularly appointed and commissioned by the Governor to fill the vacancy caused by the death of Judge Shipp, still his refusal to proceed further with the business of the court would not affect the validity of any previous act done under color of his appointment from the Governor, and when he was holding himself out to the public as the rightful incumbent by virtue of the special commission entered of record. Judge Whitaker was a de facto officer so long as he continued to preside and to assert his power under and by virtue of the commission issued by the Governor, even if we concede, for the sake of the argument, that he was not the rightfully constituted judge of the superior court of Rockingham county, and that his power as a de facto officer continued only so long as he exercised it."

See, also, *State v. Hall*, 142 N. C. 710, 55 S. E. 806, which cites and approves *State v. Lewis*, supra; *State v. Speaks*, 95 N. C. 689; *Norfleet v. Staton*, 73 N. C. 546, 21 Am. Rep. 479; *Burke v. Elliott*, 26 N. C. 360, 42 Am. Dec. 142; and *Burton v. Patton*, 47 N. C. 124, 62 Am. Dec. 194.

We might rest this part of the case upon other reasons, but it is not necessary that we should do so, as we hold that Judge Bryson acted properly and rightly in opening and holding the court, and that his right to do so appertained to him as a de jure of-

ficer, designated by the law to hold this particular court, among others, in the district.

[5, 6] While the term of this court commenced in December, next before the last day of that month, it is specifically described by the statute as one of the spring courts in the year 1919, and must be regarded as such; the law having so provided in clear and explicit language.

A careful inspection of the record proper and case on appeal convinces us that no error has been committed, and it will be so certified.

No error.

(177 N. C. 545)

STATE v. SIMMERSON. (No. 346.)

(Supreme Court of North Carolina. April 9, 1919.)

1. INTOXICATING LIQUORS §140 — POSSESSION FOR PURPOSE OF SALE — AMOUNT IN POSSESSION.

In a prosecution for having in possession spirituous liquor for purposes of sale, the amount kept on hand by defendant is immaterial as far as his guilt is concerned; the gist of the offense being to have intoxicating liquor on hand for the purpose of sale.

2. INTOXICATING LIQUORS §224—POSSESSION OF LIQUOR FOR PURPOSE OF SALE — AMOUNT IN POSSESSION—PRESUMPTIONS.

In a prosecution for having spirituous liquor on hand for purposes of sale, a presumption of guilt is created by the statute where defendant has in his possession more than one gallon.

Appeal from Superior Court, Forsyth County; Bryson, Judge.

Bryant Simmerson was convicted of having in possession more than one gallon of spirituous liquor for purposes of sale, and he appeals. No error.

Indictment for having in possession more than one gallon of spirituous liquor for purposes of sale. The defendant was tried and convicted in the municipal court of Forsyth, and on appeal to the superior court was again convicted. He moved in arrest of judgment because that the term which should have been begun December 30, 1918, was continued by the sheriff until January 3d, when Bryson, J., whose term of office began January 1, 1919, arrived and opened court. The plea is presented that the trial, conviction, and sentence were illegal because the court had no jurisdiction. Motion denied, and defendant appealed.

Hastings & Whicker and Benbow, Hall & Benbow, all of Winston-Salem, for appellant.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

PER CURIAM. The question here raised as to the validity of this same term of the court, which was not opened until Friday January 3, 1919, was presented and fully discussed in *State v. Harden*, 98 S. E. 782, at this term, and it is not necessary to repeat what is there said.

On almost exactly the same state of facts, the same proposition of law was presented in *State v. Wood*, 175 N. C. 815, 816, 95 S. E. 1050. Though Judge Bryson was not sworn in till January 3, 1919, he was a judge de jure and de facto when this case was tried. The motion in arrest was properly denied. *State v. Hall*, 142 N. C. 713, 55 S. E. 806.

[1, 2] The court properly told the jury:

"It is immaterial, in so far as the guilt of the defendant is concerned, whether he had on hand a gallon or a pint of liquor or a gill of liquor; the gist of the offense is having on hand whisky for the purpose of sale, and the amount kept on hand has nothing to do with the crime; but you will further note that by statute, where the state has shown to the jury by evidence which satisfies them beyond a reasonable doubt that the defendant had in his possession at one time more than a gallon of whisky, then the statute raises the presumption it was had and possessed for the purpose of sale. That presumption is made so by statute."

"If you find beyond a reasonable doubt that he had in his possession more than one gallon of whisky, then the statute raises a presumption of guilt and makes what the law calls a prima facie case—such a case as the jury may convict upon or should not convict upon, as they would be satisfied therefrom. If you have a reasonable doubt in your mind of any of the material facts to constitute the guilt of the defendant, it is your duty to return a verdict of not guilty."

No error.

(177 N. C. 573)

STATE v. DAVIS. (No. 347.)

(Supreme Court of North Carolina. April 9, 1919.)

1. CRIMINAL LAW — 368(2)—EVIDENCE—RES GESTÆ.

In a prosecution for murder by a member of a mob, evidence that, as the car in which deceased was riding approached, some one in the crowd said, "Let's hold him," was competent as part of the *res gestæ*.

2. CRIMINAL LAW — 365(1) — EVIDENCE—ACTS OF CODEFENDANTS—RES GESTÆ.

In a prosecution for a murder committed by a member of a mob, testimony as to an assault on witness made by a codefendant was admissible as *res gestæ* where there was evidence that accused was with the rioters when such assault was committed.

3. CRIMINAL LAW — 368(1)—EVIDENCE—RES GESTÆ—ACTIONS OF MOB.

In a prosecution for murder committed by a member of a mob, evidence that the crowd of rioters when coming up the street said,

"Halt!" was admissible as part of the *res gestæ*, where it appeared that accused was with the rioters at the time.

4. COURTS — 86(1) — ORGANIZATION — ADJOURNMENT BY SHERIFF — AUTHORITY OF TRIAL JUDGE.

Where the trial judge was unable to be present at the commencement of the term, it is proper for him to notify the sheriff to adjourn court from day to day for four days, although the sheriff had, under Revisal 1905, § 1510, power to do this without notice.

Appeal from Superior Court, Forsyth County; T. D. Bryson, Judge.

Will Davis was convicted of murder, and he appeals. No error.

The prisoner was indicted for the murder of Charles White. In order to understand the questions presented to this court, it will be necessary only to state a portion of the testimony of Jacob Jackson, a witness for the state, and the assignments of errors, as follows:

Jacob Jackson testified:

"On November 17, 1918, in the evening, I was standing on Depot street, in front of Cook's Café, and a crowd of about 50 or 75 people came by, defendant, Will Davis, being in the crowd, and they made me come with them on down Fifth street, and just after crossing the railroad they held up one car, and the man in the car said he was a doctor, and the crowd let him go on by. They went on down to Fifth and Linden streets, and another car came down the hill, and they stopped it; three men went to the middle of the street and stopped the car. Will Davis was one of the three. One of the fellows had on a big overcoat, and the other one was a soldier boy named 'Red'—that being all I know of his name. I do not know the man who had on the big overcoat, nor do I know who was in front, when they stopped the doctor's car, but after stopping that car the crowd went about as far as from me to the end of the courthouse, until they stopped the car that the man was shot in. The car in which the man was shot was coming towards town and down the hill, and the lights on the car were burning. They saw the car coming over the hill, and said, 'Let's stop him.' (The prisoner objected to what was said, unless prisoner said it. Objection overruled. Exception by prisoner). They waited until the car got very near to them, and then Will Davis, the man with the big overcoat on and the soldier named 'Red,' stepped out in the street in front of the car and stopped it. There were two men in the car. Mr. White was at the steering wheel. They made the other man get out of the car until they searched the car and got what they wanted out of it, and then made the man get back in the car. Mr. White said, 'I am the electric light man; let me by.' Some of the boys said, 'Let him by,' and others said, 'Don't let him by,' and about that time a pistol fired, and the man in the car hallooed that he was shot. After these three men got in front of the car and stopped it, Will Davis went on the

south side of the car, which was the same side Mr. White was sitting on, the man that was shot, and Will Davis put his gun right through the ribs or arms of the top of the car, the top being up; right at White's side, and the shot was fired, and as the car drove away all of them—I reckon all of them that had pistols—commenced shooting at the car. I have been knowing Will Davis for about a year. I never saw defendant Jim Scales in the crowd that night, as I know of; I didn't know him. Immediately after Mr. White was shot, the crowd went on up the street and held up another man, but I do not know who the man was. The distance from where they held up Mr. White to where they held up the other man was about as far as from witness stand to back end of courthouse. Then the crowd went on towards Jordan's store, and stopped on the corner of Fifth street and Highland avenue, right under the light."

Under the evidence and the charge of the court, to which there was no exception, the jury convicted the prisoner, Will Davis, of murder in the first degree. He was sentenced to death, and appealed from the judgment, assigning the following errors:

"(1) The court erred in overruling the prisoner's objection and allowing the witness Jacob Jackson to testify that some one in the crowd, seeing a car approaching, said, 'Let's stop him,' as shown by the prisoner's first exception.

"(2) There was error in overruling the prisoner's objection, and allowing the witness Jeff H. Jackson to testify that some one in the crowd of colored people said, 'We'll get him,' as shown by the prisoner's second exception.

"(3) There was error in allowing the witness John C. Ayers to testify in regard to an assault made upon him by Jim Scales, over the objection of the prisoner, when there was no evidence that this defendant had anything to do with the assault on Ayers, or that he was in the crowd at that time, as shown by the prisoner's third exception.

"(4) There was error in allowing the witness Ed. Gordon to testify, over the prisoner's objection, that a crowd was coming up Fifth street, and they said, 'Halt!'; as there was no evidence that this defendant was in the crowd at that time, as shown by prisoner's fourth exception."

By consent of the solicitor, a verdict of not guilty was returned as to James Scales.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). There was plenary evidence to show that the prisoner shot the deceased, inflicting a mortal wound from which he died. The charge of the court upon all the different phases of the case was exhaustive and correct in every particular, and there is no exception to it. We will proceed, therefore, to consider the questions of evidence.

[1] First. There is a slight error of fact in this assignment of error, as the witness Jacob Jackson stated, not that "some one in the crowd said 'Let's hold him,'" but that

"they," meaning, of course, the crowd, said so. But, assuming that he had referred to only some one in the crowd, the evidence was competent, and what we say here covers the second assignment of error. For the purpose of showing the admissibility of this evidence, we may well refer to *Saunders v. Gilbert*, 156 N. C. 468, at pages 470 and 471, 72 S. E. 610, at page 613 (38 L. R. A. [N. S.] 404). In that case it appeared that many persons had gathered in the street and followed the plaintiff to his home, where they stopped in front of his house, some or all of them using abusive and threatening language. The question arose in the trial below whether these outcries of this mob, or unlawful assembly, were competent against each and every one of the crowd. With regard to this we said:

"The testimony as to what was said in the road and in front of the plaintiff's home was clearly competent. The *res gestæ* includes what was said as well as what was done. The acts and the outcries of this unlawful assembly—for that is, in plain speech and in law, what it was—is held to be competent as *pars rei gestæ*, and also as tending to show their purpose or *quo animo*. Nothing is better settled than this rule of evidence. *State v. Rawls*, 65 N. C. 334; *State v. Worthington*, 64 N. C. 594. We find it stated in 4 Elliott on Evidence, § 3128, that 'what is said and done by persons during the time they are engaged in a riot (or unlawful assembly) constitutes the *res gestæ*, and it is, of course, competent, as a rule, to prove all that is said and done—the acts and words of the mob or any members of it, as in *Rex v. Gordon*, 21 State Trials, 485 (563), wherein evidence of the cries of the mob 'No Popery,' as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ*."

This would seem to be a full answer to these objections. The same rule of evidence had been before stated, and applied, by us in *Henderson-Snyder Co. v. Polk*, 149 N. C. 104, 107, 62 S. E. 904. We there held that, where two prisoners are engaged together in the execution of a common design to defraud others, the declarations of each relating to the enterprise, and in furtherance of it, are evidence against the other, though made in the latter's absence, if a common design has been shown, citing *Lincoln v. Clafin*, 7 Wall. 132, 19 L. Ed. 106. It is, perhaps, the universal rule that any act done, or any declaration made, by any one of the conspirators in the furtherance or perpetration of the alleged conspiracy may be given in evidence against himself or his coconspirators. This rule has been more aptly stated as follows:

"The law undoubtedly is that, where two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, any act or declaration made by one of them in furtherance of the common object, and forming a part of the *res gestæ*, may be given in evidence against the other."

The principle on which the declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by one in furtherance of that design a part of the *res gestæ*, and therefore the act of all. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. 4 Elliott on Evidence, § 2939, citing *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Cuyler v. McCartney*, 40 N. Y. 221; *State v. George*, 29 N. C. 327; *Cabiness v. Martin*, 15 N. C. at page 110. See, also, *Lockhart on Evidence*, § 210; *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434. This doctrine as to the competency of the cry, or exclamation, of a mob, or any one of the mob, while it is in the prosecution of its illegal design or purpose, has been of long standing, and was certainly established in the proceedings against Lord George Gordon for high treason, when such evidence was freely admitted by Lord Mansfield and his associates on the King's Bench, Justices Willes, Ashurst, and Buller, who presided at the hearing of that celebrated case (21 St. Trials, 486) for the same riot, so graphically described by Charles Dickens in his *Barnaby Rudge*.

[2, 3] Second. As to the third and fourth assignments, we must hold that there was evidence that the prisoner was with the rioters when the assault was committed on John O. Ayers, and also when they were marching on Fifth street and crying, "Halt!" These events were but a part of one whole transaction, which was continuous in its nature and essence, from beginning to end, and what was said or done by the mob, or any of its members, was competent to show its unlawful character and motives. It was held, in a case resembling this one in its principal features, that acts and circumstances forming a continuation of the main transaction are admissible as *pars rei gestæ*. *Floyd v. State*, 143 Ga. 286, 84 S. E. 971. The several events occurring, one after the other, in close and connected succession, must be viewed as linked together for one purpose, which was a bad one as tending to a breach of the public peace and to strike terror into the travelers on the highway, who had the right to go their way without molestation or being made afraid. It had for its purpose even more than that evil design; it aimed actually, not only to terrify, but to commit highway robbery, or murder, if need be, in order to gratify its fiendish and wanton desire. It was regardless of every duty it owed to society, and fatally

bent on mischief. While in the execution of their illegal and high-handed purpose, to hold that any outcry from this band of marauders is not admissible as evidence against each one of them would violate a rule of the law too well established, founded as it is upon a just and adequate reason, to be set at naught where it applies so aptly. Dr. Wharton, in his excellent treatise on Evidence, has said: If in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision are confined within the few moments that it occupies. When again there is a social feud in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestæ* as the blows given in homicides for which particular prosecutions may be brought. 1 Wharton on Evidence, § 258; *Lake Shore, etc., Ry. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052; *Small v. Williams*, 87 Ga. 681, 13 S. E. 589; *Linck v. Vorhauer*, 104 Mo. App. 368, 79 S. W. 478. And 2 Jones on Ev. § 347, states that in such cases the declarations have been received on the ground that they were but parts of a continuous act which showed the intention of the person or persons whose motives were in question and as explanatory of the act. The rule in this respect is well stated in *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706:

"Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury."

And it is also said that, from whatever point of view a given circumstance is regarded in connection with its admissibility as one of the *res gestæ* it is absolutely essential that the claim shall be founded on its being one of the immediate family of facts which relevantly constitute the real subject-matter. Does it belong to it, or has it only a distant relation and relevancy? If it is no part, then the admissibility, if at all, must be based on ground other than that of *res gestæ*. Although, as we have seen, different tribunals do not agree as to the degree of strictness or liberality with

which they apply the rule that the declaration should be contemporaneous with the transaction in issue, there is no doubt but that the declaration must be a part of such transaction, and that it must illustrate or explain it. The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction, of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of coexisting motives. These declarations, especially when in the form of instantaneous or contemporaneous outcries, or exclamations, are admitted as evidence upon the idea that they are natural and spontaneous utterances, which are prompted by no intention to suppress or conceal the truth, the declarant having no opportunity for deliberation or the fabrication of evidence. This kind of proof is not only very persuasive, but, nearly always, very convincing in its probative force.

In any view we can fairly take of this case and the court's ruling, we find that the trial was entirely free from errors, and that the prisoner's rights have been fully protected. The charge of the court was a remarkably clear, accurate, and forceful one.

[4] The question whether Judge Bryson had lawful authority to preside over the court in which the prisoner was tried and convicted has been fully considered and decided against the prisoner's contention at this term in *State v. Harden & Beale*, 98 S. E. 782, and *State v. Simmerson*, 98 S. E. 784, and no further discussion would seem to be necessary. It may be well to state, though, that Judge Lane acted properly and discreetly in abstaining from attendance at the court, as there were only two days for him to preside (December 30th and 31st), because Judge Bryson's term commenced on the 3d day of January 1, 1919, when he duly qualified and was ready to proceed with the business of the court. Judge Bryson acted properly in notifying the sheriff to adjourn the court from day to day for four days until he could qualify and appear to hold the court, although the sheriff had the power, under the statute, to do this without any notice. *State v. Wood*, 175 N. C. 809, 95 S. E. 1050. That case decides the principal question involved here as to the power of Judge Bryson, as there it was held:

(1) "The provision that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done 'unless the sheriff shall be sooner informed that the judge, from any cause, cannot hold the term,' which im-

plies the power of the judge to order an adjournment to a later day in the term. Revisal, § 1510."

(2) "Where the sheriff has not continued a term of the superior court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. Revisal, § 1510." (If the sheriff had not already adjourned the term under the statute.)

(3) "Where the judge of the district is prevented from holding a term of court, as in case of detention by a trial in another county extending over into such term, the Governor may designate and appoint another judge to hold such term, or a part thereof, though within the same district, and by virtue of his commission he is a judge both de facto and de jure, while so acting."

No error.

(177 N. C. 564)

STATE v. EVANS. (No. 273.)

(Supreme Court of North Carolina. March 26, 1919.)

1. HOMICIDE ¶268 — PREMEDITATED KILLING—INTENT—NONSUIT.

In prosecution for murder, resulting in conviction of murder in second degree, there being evidence to justify finding that defendant was aggressor in quarrel with deceased, went home to get his pistol, and did so with purpose to engage in a fight with and slay deceased at the first opportunity, motion for nonsuit was properly overruled.

2. HOMICIDE ¶334, 340(4)—HARMLESS ERROR—RULINGS AND CHARGE.

Where defendant was acquitted of murder in the first degree, and convicted in the second degree, any error in the rulings or the charge relating solely to murder in the first degree was harmless to him.

3. CRIMINAL LAW ¶720(2) — TRIAL — REMARKS OF SOLICITOR—REFERENCE TO EVIDENCE.

In prosecution for murder, remarks of solicitor, in contrasting state's evidence with defendant's, that there was one disinterested white witness whose evidence should be believed, and that it was not necessary to trust to memory for what the witness said, for he had the typewritten evidence of the court stenographer's notes, etc., from which he then read, were proper, though the cross-examination had not been typewritten, he having had the right to refer to the notes for greater accuracy.

4. CRIMINAL LAW ¶1144(12) — APPEAL — PRESUMPTION — CORRECTNESS OF STENOGRAPHER'S NOTES.

It will be presumed, at least prima facie, and in the absence of any showing to the contrary, that notes of the evidence taken by an official stenographer, appointed under authority given by statute, were correct.

5. CRIMINAL LAW ⚡741(1), 742(1)—**WEIGHT AND CREDIBILITY OF EVIDENCE—QUESTIONS FOR JURY.**

The weight of evidence and the credibility of witnesses in a prosecution for murder are solely questions for the jury's determination.

6. CRIMINAL LAW ⚡730(14)—**CURE OF ERROR—REMARKS OF STATE'S ATTORNEY DRAWING COLOR LINE.**

The remark of the solicitor that there was one disinterested white witness whose evidence should be believed, if erroneous, was cured by the court's statement that in the administration of the law every citizen stands upon an equality before the bar of justice, irrespective of his color.

7. CRIMINAL LAW ⚡1043(3)—**APPEAL—OBJECTION BELOW—RAISING NEW OBJECTION.**

Where defendant objected to solicitor's remarks in argument, on ground that it was improper to refer to stenographer's transcripts of testimony, which did not embody cross-examination, defendant cannot raise on appeal objection that remarks were also erroneous as drawing color line adversely to defendant, a negro.

8. HOMICIDE ⚡151(1) — **KILLING WITH DEADLY WEAPON—BURDEN TO SHOW MITIGATION OR EXCUSE.**

A killing with a deadly weapon, admitted or proven, requires the prisoner to satisfy the jury as to the existence of all matters of mitigation or excuse relied on by him.

9. HOMICIDE ⚡35, 43—"MANSLAUGHTER."

Manslaughter is the unlawful killing of another without malice, as where one unlawfully kills another by reason of the anger suddenly aroused by provocation deemed sufficient in law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manslaughter.]

10. HOMICIDE ⚡23(1)—**MURDER IN SECOND DEGREE—MALICE.**

Where defendant, after quarreling with deceased, cursed him, and went home and got a pistol, returned, and shot deceased, though the latter had a cant-hook with him as a weapon, defendant was guilty at least of murder in the second degree, having killed with malice.

11. CRIMINAL LAW ⚡730(14) — **TRIAL — CAUTION AGAINST RACE PREJUDICE.**

Even though exception was not properly taken to the solicitor's remarks in argument possibly injecting the race issue into the case, defendant being a negro, it was proper for the trial court fully to caution the jury against the influence of all prejudice.

Appeal from Superior Court, Cumberland County; Lyon, Judge.

Dave Evans was convicted of murder in the second degree, and appeals. No error.

The prisoner was indicted for the murder of Vivian L. Bundy, and was convicted of murder in the second degree.

The state's evidence tended to show that Bundy, the deceased, was woods boss of a gang of sawmill hands, of whom the defendant, Dave Evans, was one. W. M. Dixon, paymaster and general manager of the mill, had loaned the defendant \$2.50 the Saturday before, and had told Bundy and Walker, who ran the sawmill, to get the checks for it when Evans came for settlement the following Saturday. The state's witness R. T. Walker testified:

"The defendant worked out enough to pay back the \$2.50, and Bundy asked Dave for his checks. Dave said he would give them to Mr. Dixon or pay him the money. Bundy said it was no use to do that, as the others had given him their checks. Bundy told Dave three times to get out of the commissary. Witness thought it was over with, and went into the back part of the store. Dave picked up a bottle. Dave said, 'God damn him, I'll get him; he thinks he is the only bully around here.' Dave then left in his wagon in which there was sawdust. He lives about a mile and a half from the mill. He came back in a short time. He had a brick. The witness talked with him, and Dave gave him the checks. The witness told him he had better go off and not have any trouble about the matter, and Dave walked off. This was outside the commissary. When the witness went in Bundy asked him if he would be there awhile, and Bundy went out. Bundy said, 'You've got a brick for me, have you?' and Bundy came back, picked up a cant-hook, and went out. Witness heard three shots, and went to the door to see what was the matter. He saw Bundy walking away, when Dave shot him again. He heard three shots before he went to the door. Dixon was paymaster at the mill, and Bundy woods boss. It was a new cant-hook handle, with no hook on it."

W. M. Dixon testified as follows:

"He lives eight miles from Dunn, and is general manager of the sawmill, and saw part of the homicide. He was driving a Ford car, and, as he turned in towards the mill, he saw two men who seemed to be in combat. Then he had to look at his car, and heard a shot. Looking up, he saw smoke. Both men were in down position. He saw one of the men shoot again and again. The white man straightened up and started to run off, timid-like, as though he was weak. He got off something like 25 or 30 feet from the other man, and another shot was fired when Bundy was near the logs on the tramroad. The witness was then 60 or 70 yards from the main road. He saw Evans look back and start running down the tramroad. Bundy called to him, saying that he was dying, and came meeting him, and told him to take him to the hospital as quick as he could. The witness told Bundy maybe he was not so bad off, and the witness jumped out of the car and helped Bundy in. He did not see the first shot; at the second shot the men were a few feet apart, and the same at the third shot. He saw nothing in Bundy's hand when he threw up his arms. Bundy got off 30 or 40 feet at the fourth shot. The witness was then about 200 yards away from them. Bundy's back or left side was

towards Evans when he shot the last time, Bundy having turned to the left to catch on the logs, and nearly all of the mill hands were at the store during the shooting."

N. H. McGeachy, sheriff of the county, testified that—

"he arrested defendant at his sister's house, and his sister had locked the doors and told him not to enter the house. Dave's pistol was under the pallet on which he was lying, and three bullets had been shot out of it"

Dr. Parker testified that—

"there were three wounds in Bundy's body, one at the left nipple, which in his opinion went straight in, for if it had ranged to the right it would have perforated the heart, and the heart was not perforated; one through the left forearm, which went straight through; and the third, and last, in the left flank, and this ranged to the right, making three perforations in the intestines. This wound, in his opinion, was the chief cause of Bundy's death."

There was evidence on the part of the prisoner tending to show, as it is correctly stated by the counsel of the prisoner, the following facts:

"The deceased and the defendant were working at a sawmill of which W. M. Dixon was paymaster. Dixon had loaned defendant \$2.50, which was due the day of the homicide. On being given his time checks deceased asked defendant for his checks, and he replied that he was going to give them to Mr. Dixon when he came. Deceased cursed defendant and ordered him out of the commissary. Evans went home after other checks. While eating dinner his wife called him and told him she heard a car going down the road, which defendant thought was Mr. Dixon's, so he went on back to the mill to pay him, but found he had not arrived. He joined some of the other hands in throwing bricks at other bricks thrown in the air. R. T. Walker, who ran the sawmill, then came out of the commissary, and defendant asked him about turning over the checks to Mr. Bundy, and defendant gave them to Walker, who went back in the commissary, when Bundy asked Walker if he would be there awhile, and Bundy went out to defendant, and he and defendant talked together. Deceased cursed defendant, and ran back in the commissary and got a cant-hook handle and came out again. Defendant ran and deceased ran after him. Defendant ran 75 yards, when deceased knocked him down with the cant-hook handle, near a tramroad. Deceased ran by him, and turned and came back, and was striking defendant, who was on the ground. Defendant pulled out his pistol while on the ground, and shot three times, and at the third shot Bundy had the handle drawn back to strike again. Deceased had three bullet wounds. He died on Monday after the shooting on Saturday."

There was also evidence from which the jury might reasonably infer, if they believed it, that the prisoner, after the first colloquy with the deceased, went to his home, one and a half miles distant from the sawmill, to get his pistol, having picked up the bottle,

cursed the deceased, and sworn that he would get him; that he did get the pistol, and returned in a short time to the mill, when the affray took place, the deceased using the cant-hook and the prisoner the pistol; and the jury might also have properly inferred that the prisoner acted with express malice, deliberation, and premeditation, and that his purpose was to arm himself, and then to return to the mill and provoke the fight, with the intent to slay the deceased when he had the chance.

The solicitor, in the course of his argument, was contrasting the evidence of the state with that of the prisoner, and in doing so stated that there was one disinterested white witness whose evidence should be believed, Mr. Dixon's; that it was not necessary to trust to memory as to what this witness said, for he had the typewritten evidence of the court stenographer's notes, which he would read. Upon objection, the court stated that the typewritten evidence had been handed to him by the court stenographer. Defendant again objected and excepted. The solicitor again proceeded to read to the jury from said papers a portion of Dixon's evidence, and again defendant objected and excepted. He also excepted for the further reason that it was incomplete in that only the notes of the direct evidence of the state's witnesses Walker and Dixon had been written out, and not their cross-examination, nor the evidence of any other witness.

Several witnesses testified that the prisoner's character is bad, but the most of them stated that they had not heard anything against him until the other shooting affair, which occurred six months ago.

There was other evidence in the case not necessary to be now stated. The prisoner's testimony tended to show a clear case of self-defense, and this was admitted to be so by the Attorney General in his brief and argument.

The court charged the jury, in part, as follows:

"The defendant, Dave Evans, is indicted for murder. There has been something said about his being a negro and the deceased a white man. I want to say to you, gentlemen of the jury, that it would be a sad day for North Carolina if, in the administration of the law, juries or courts would have two laws—one for the colored man and one for the white man. There is but one law known and recognized among the people of the state, and that law is administered the same for the white man as for the colored man, and the same for the colored man as for the white man, and no brave man, under his oath, will permit the fact that the defendant is a colored man to influence his verdict one way or the other. Only a coward would be guilty of such cowardly perjury. As I have said to you, the defendant is indicted for murder, charged with the murder of Vivian L. Bundy, and every person charged with crime is presumed to be innocent until his guilt is proven, and the de-

defendant in this case cannot be convicted unless the state satisfies you from the evidence of his guilt. The law of this state does not permit me to express, either directly or indirectly, to the jury an opinion upon the facts of the case, weight of the evidence, or the credibility of the witnesses. These are matters exclusively for the jury, and the court has not consciously done or said anything to influence you one way or the other. It is the duty of jurors to take the law from the court and the evidence from the witnesses. You are to determine what facts have been established by the evidence, and to such facts apply the rule of law given by the court, and return a verdict accordingly, regardless of consequences either to the state or to the defendant. There are four verdicts that you can render in this case: First, a verdict of murder in the first degree; second, a verdict of murder in the second degree; third, a verdict of manslaughter; and, fourth, a verdict of not guilty."

The court then stated the facts of the case as the jury might find them to be, and explained the law fully and carefully, dwelling upon every phase of the testimony.

The jury found the prisoner guilty of murder in the second degree. Judgment and appeal by him.

W. C. Downing and Sinclair & Dye, all of Fayetteville, for appellant.

James S. Manning, Atty. Gen., and Frank Nash, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] The motion for a nonsuit was properly overruled. As we have said in our statement of the case, there was evidence upon which the jury might well have concluded that the prisoner was the aggressor in the quarrel with the deceased; that he went to his home for the purpose of getting his pistol, and thereby preparing himself for the combat, so that he would have the advantage of his adversary; and that this was done with the purpose and intent of engaging in the fight and slaying the deceased at the first opportunity. He was willing and ready for the fray, and entered into it with deadly purpose. But the jury, it seems, took the lenient view, and convicted him of the lesser crime. There being ample evidence of murder and of manslaughter, the assignment of error, which is based upon the allegation that there was none, cannot be sustained.

[2] The first, second, seventh, eighth, eleventh, thirteenth, and fourteenth exceptions assign errors in the rulings or the charge, relating solely to murder in the first degree; but the prisoner was acquitted of this offense, and therefore error, if there was any, proved to be harmless. *State v. Bryson*, 173 N. C. 808, 92 S. E. 698; *State v. McCourry*, 128 N. C. 594, 38 S. E. 883; *State v. Casey*, 159 N. C. 472, 74 S. E. 625. If there was any error in respect to murder in the first degree, it was favorable to the prisoner, as the charge

did not, upon the facts to be inferred from the state's testimony, comply fully with the principle as stated in *State v. Brittain*, 89 N. C. 481; *State v. Garland*, 188 N. C. 675, 50 S. E. 853; *State v. Kennedy*, 169 N. C. 326, 85 S. E. 42; *Foster's Crown Law*, p. 277; and the rule as formulated by Lord Hale, and quoted by Justice Ashe, in *State v. Brittain*, supra. There may not have been any positive or affirmative error, even in favor of the prisoner, in this part of the charge, but the court made no distinct reference or application to the principle just stated, and we think there was evidence to warrant it. But, as has been seen, if there was error in this respect, the prisoner assuredly has no reason to complain of it.

[3-5] The exception as to the remarks of the solicitor is without merit. He had the right to refer to the evidence in his argument for the sake of greater accuracy. The notes of the evidence were taken by an official stenographer appointed under the authority given by a statute, and it will be presumed, at least prima facie, and in the absence of any showing to the contrary, that they were correct. There is no suggestion that they were not, but the ground of objection is that the cross-examination had not been typewritten. There is no proof that the solicitor misquoted the testimony, but every reason to believe that he did not. He was careful of the prisoner's rights, and would not trust to his own memory, but, to be just to the prisoner, he referred to the notes, as a safer and more reliable source from which to draw an accurate reproduction of what the witness had said, using his own language. There was nothing wrong in this. The court correctly instructed the jury as to how they should pass upon the evidence, as follows:

"These, weight of evidence and credibility of witnesses, are matters exclusively for the jury, and the court has not consciously done or said anything to influence you one way or the other. It is the duty of jurors to take the law from the court and the evidence from the witnesses. You are to determine what facts have been established by the evidence." (Italics ours.)

[6, 7] If the solicitor should not have attached more importance to the testimony of the witness, W. M. Dixon, because he was a white man, and thereby drawn the color line, as the prisoner's counsel contended, the court very fully, and in emphatic language, counteracted any prejudice that could have been engendered thereby, even to the extent of telling the jury that it would be "cowardly perjury" to be influenced by such consideration. We have no idea that the solicitor intended to arouse any prejudice against the prisoner by his remark. The word was incidentally used rather than intentionally or designedly. The point was that his only witness to the material part of

the transaction, who had a clear view of the scene of the tragedy, happened to be a white man, who was entirely disinterested. But, if there was any evil in the argument, as drawing the color line, the court swept it from the case by his trenchant reference to it. In the administration of the law by the courts of this state, every citizen stands upon an equality before the bar of justice, and the judge so stated. It may be further said that the objection to the remarks of the solicitor were general, and there were two distinct propositions, the exception to one of which we have already overruled. *State v. Ledford*, 133 N. C. 714, 45 S. E. 944; *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 714; *Caldwell County v. George*, 176 N. C. 602, 97 S. E. 507. The ground of objection, based upon drawing the color line, was not distinctly assigned until the brief of the prisoner's counsel was filed. The court had the right to infer from the form of the objection when first taken, and the same inference also is to be drawn from the assignment of error, that the sole ground of objection was to the reading of the typewritten notes of the witness' testimony. The objection, therefore, comes substantially within the rule that an appellant is restricted to the ground of objection to evidence stated below (*Kidder v. McIlhenny*, 81 N. C. 123; *Rollins v. Henry*, 78 N. C. 342; *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228); and also within the rule stated in *State v. Tyson*, 133 N. C. at page 699, 45 S. E. 838, where we said that a party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant, not those who sleep upon their rights. He who would save his rights must be prompt in asserting them. We do not think, in the most favorable view to be taken for the prisoner, in the present case, that there was any such abuse of the judge's discretion, if there was any at all, to require a reversal.

"The conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege

at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice, and to secure a fair and impartial trial of the facts, it is not his duty to do so in the sense that his failure to act at the time, or to caution the jury in his charge, will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objection must be entered at least before the verdict." *State v. Tyson*, 133 N. C. at page 698, 45 S. E. 838; *Knight v. Houghtalling*, 85 N. C. 17.

The trial was perfectly fair and impartial, and the verdict was fully justified by the evidence. There is not the slightest appearance of prejudice or bias, but, on the contrary, it would seem that the jury was merciful to the prisoner.

The charge of the court covered the entire case, in every phase of it, and the instructions were correct and in accordance with the most approved precedents. It was not only an adequate charge, but, in all essential respects, an excellent one. If there was any defect, there was none which prejudiced the prisoner's case in the least degree.

[8] 1. A killing with a deadly weapon, admitted or proven, requires the prisoner to satisfy the jury as to the existence of all matters of mitigation or excuse relied on by him. The latest applications of this doctrine are to be found in *State v. Atwood*, 176 N. C. 704, 97 S. E. 12; *State v. Johnson*, 176 N. C. 722, 97 S. E. 14, where the authorities are collected.

[9] 2. Manslaughter is the unlawful killing of another without malice, an instance of the crime so defined being, where one unlawfully kills another by reason of the anger suddenly aroused by provocation, which the law deems sufficient; the anger being naturally aroused from such provocation, and the killing being done before time has elapsed for passion to subside and reason to resume its sway. *State v. Merrick*, 171 N. C. 788, 88 S. E. 501, and cases there cited.

3. The legal effect of "beginning the fight willingly" and "cooling time" have been recently elaborately discussed in *State v. Kennedy*, 169 N. C. 326, 85 S. E. 42, and in *State v. Crisp*, 170 N. C. 785, 87 S. E. 511.

These principles were all fully explained to the jury, and all others pertinent to the case on this appeal. The doctrine of reasonable doubt was correctly stated and applied, and the jury could not have misunderstood the law in regard to it.

[10] The prisoner had no reason to complain of the verdict. He had threatened the deceased upon trivial grounds, saying that he would show him "that he was not the only bully around here," and he cursed him with the imprecation, "God damn him, I will get

him," and immediately left the mill, riding to his home in a wagon, and procuring his pistol, which he concealed, and returning to execute his threat "that he would get him" the deceased, which he so quickly did. This may not be true, and the prisoner's version may be the right one, but there was sufficient evidence for a finding that it was true. If so, the prisoner fought, not upon the principle of self-defense, but from malice pre-conceived, and with a definite intent to kill when he engaged in the fight, which, as the testimony shows, he did willingly, if not eagerly. He first secured to himself the safer side of the contemplated affray by arming himself beforehand with a deadly weapon, and then proceeded to the field of the conflict, where the second quarrel occurred which he must have been seeking, and there did his deadly work. It is like *State v. Hogue*, 51 N. C. 381, 384, where Chief Justice Pearson says for the court:

"The deceased committed a violent assault upon the prisoner as he entered the room. This was legal provocation, and, if the case stopped there, the killing would be manslaughter, and the character of the deceased as a quiet or violent man would be immaterial; but the case did not stop there, for the jury, under instructions of which the prisoner has no right to complain, find that he killed 'of his malice aforethought'—that he had formed the deadly purpose—prepared the weapon, and sought that particular time and place to do the deed. So the character of the deceased was immaterial. It is surely murder to kill with malice, express or aforethought, no matter how violent or wicked the deceased may be. His honor laid down one proposition which we think too favorable to the prisoner, and it is referred to, lest it may mislead. It assumes that the prisoner 'had prepared a deadly weapon with an intention to use it in case he got into a fight with the deceased, and went into the dining room for the purpose of meeting with the deceased, and with an expectation of having a conflict with him,' and the killing is held to be manslaughter. Killing under these circumstances would be murder, because of the preconceived malice, although the deceased made the first assault;" citing *State v. Martin*, 24 N. C. 101.

It is true the deceased had a cant-hook, which is a wooden lever with a movable iron hook near the end, used for canting or turning over logs; but, according to *Hogue's Case*, this does not relieve the prisoner of all guilt, or necessarily mitigate the guilt of murder. He fought with malice and a purpose to slay the deceased if he got the chance, and not in self-defense, so the jury found, and there was ample evidence of the fact.

There also was evidence, and, too, strong evidence, that his purpose to kill was pre-conceived, premeditatedly and deliberately formed; but the jury, as we have said, gave the prisoner the benefit of the doubt as to this feature of the case, and acquitted him

of murder in the first degree, and convicted him only of slaying the deceased with malice.

[11] We may add that we commend the charge of the court as to race prejudice. It was proper, even though exception was not properly taken, that the jury should have been fully cautioned against the influence of all prejudice. There is but one law, as he stated, for all citizens, and our judges have always been careful to guard against any prejudice, if it exists, on account of racial antipathies. We do not believe such prejudice exists, and our records show that it does not. Our judges will be prompt, as they have been, to eradicate all such evil considerations from the jury box, which are calculated to poison the fountain of truth, and prevent even and exact justice to all men, of whatever state, race, or persuasion. We have striven to this end persistently, and will continue to do so whenever necessary. The presiding judge did not too strongly denounce a juror who would be swayed by any bad motive to do wrong by preventing justice and corrupting his verdict.

Our conclusion is that no error is disclosed by the record.

No error.

(111 S. C. 499)

PENN v. ATLANTIC COAST LINE R. CO.
(No. 10172.)

(Supreme Court of South Carolina. March 22, 1919.)

1. CARRIERS \S 277(5) — PASSENGERS — REFUSAL TO CARRY ON TICKET SOLD — DAMAGES.

Where the defendant carrier's agent sold a ticket, and the conductor refused because of the routing of the ticket to carry the purchaser, and she sued for the resulting damages, testimony held not at all suggestive of the willful conduct of the conductor, but to merely suggest negligence of the ticket seller for which plaintiff was compensated by a verdict for actual damages.

2. CARRIERS \S 278(1)—CONTRACT OF TRANSPORTATION — BREACH — ACTION FOR NEGLIGENCE AND WILLFULNESS.

In a passenger's action against a railroad company for actual and punitive damages, where there is evidence of negligence in the routing of the ticket but none of the conductor's willfulness in refusing to carry the passenger, the court should so direct the jury, and a nonsuit on the whole case would be improper.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Maggie B. Penn against the Atlantic Coast Line Railroad Company. Directed verdict for the plaintiff for actual damages and for defendant on the question of punitive damages, and plaintiff appeals. Judgment affirmed.

It is agreed that due notice of appeal to the Supreme Court was served with the following exception:

It is respectfully submitted that his honor, Judge M. S. Whaley, erred in directing a verdict as to punitive damages and directing, on motion of defendant's attorney, a verdict for actual damage in the sum of \$2.20, in that:

(a) There was but one cause of action and not separable; (b) it should have been submitted to the jury under proper instruction to say whether the action of the ticket agent was willful and not mere inadvertence, and (c) whether the refusal of the conductor to carry plaintiff after her explanation and the circumstances surrounding was willful and wanton.

N. J. Frederick, of Columbia, for appellant.

Barron, McKay, Frierson & Moffatt, of Columbia, for respondent.

GAGE, J. Action by passenger against a carrier for actual and for punitive damages.

Direction of a verdict for the plaintiff on so much of the action as was for actual damages, and for the defendant on so much of the action as was for punitive damages.

Appeal by the plaintiff.

Let the one exception be reported.

The circumstances of the case are these: The plaintiff bought at the Union Station in Columbia a ticket from Columbia to Florence. Betwixt these termini there are two routes by the carrier; the one in common from Columbia to Sumter, and from that point the one diverging directly to Florence, and the other diverging Southward via Manning and Lanes' junction, thence Northward to Florence. For expedition the plaintiff intended to take the latter route, and she testified thus about the transaction:

"Plaintiff testified that she asked the ticket agent of defendant for a ticket to Florence, S. C., her destination, inquiring at the same time the price of the said ticket by way of Lanes, and being told the price by that route, purchased same, paying full fare as demanded by defendant's ticket agent; that being the only route by which plaintiff could go to Florence that hour of the morning. Plaintiff testified substantially as follows: That she did not read the ticket given her by the agent and was not aware that said ticket was not what she had asked for and paid for until her attention was called to it by the conductor on train between

Columbia and Sumter, who told her she would have to wait at Sumter for the evening train. That knowing she had paid the proper fare to be carried to her destination that morning by way of Lanes, she boarded defendant's train at Sumter to go on to Florence. That after having put her baggage down, she went out of the car onto the ground and exhibited her ticket to the conductor of said train, who was standing there.

"Q. When you told the conductor that you had your ticket and had paid your fare, what did the conductor say to you? A. He said that he did not have anything to do with that; he could not carry me on it, because it was not routed. Q. And did you show the conductor your ticket? A. I did. Q. And he said it was not routed and he could not take you on it? A. Yes, sir."

[1] The carrier was represented by two agents, the conductor and the ticket seller. The testimony does not at all suggest willful conduct by the conductor; and the most it suggests by the ticket seller is negligence, and for that the plaintiff was compensated by the verdict.

[2] But the appellant contends that the complaint stated but one cause of action and the court had no right to split it; and she cites *Griffin v. R. R.*, 65 S. C. 125, 43 S. E. 445.

It is true that if the complaint alleges both negligence and willfulness, and there be testimony tending to prove the former, then non-suit is not proper on the whole case. *Machen v. W. U. T. Co.*, 72 S. C. 260, 51 S. E. 697; *Carter v. Western Union Telegraph Co.*, 73 S. C. 434, 53 S. E. 539. But when there is some evidence of negligence and no evidence of willfulness, it is the duty of the court to direct the jury that there is no evidence of willfulness. Plainly, a party is not entitled to relief for a wrong unless there be testimony tending to support the allegation of a wrong.

The further contention of the appellant, that the conductor was bound to heed the reasonable explanation of the passenger (*Smith v. R. R.*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. [N. S.] 708), had no application to the facts of this case.

Judgment affirmed.

HYDRICK and FRASER, JJ., concur.
GARY, C. J., and WATTS, J., did not sit.

(111 S. C. 514)

HONEYCUTT v. PACIFIC MILLS.
(No. 10176.)

(Supreme Court of South Carolina. March 29, 1919.)

MASTER AND SERVANT ⇨ 279(5) — **INJURY TO SERVANT—FELLOW SERVANTS—FURNISHING INSTRUMENTALITIES FOR WORK—QUESTION FOR JURY.**

In an action by a servant for injuries caused by a fellow servant in moving a heavy box by hand, evidence held to sustain finding that proximate cause of injury was moving of box without suitable machinery under direct command of a representative of master.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by D. J. Honeycutt against the Pacific Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. Elliott and James H. Fowles, both of Columbia, for appellants.

James S. Verner and James H. Hammond, both of Columbia, for respondent.

FRASER, J. This is an action for personal injury. The plaintiff, Honeycutt, was a mechanic in the employ of the defendant mills. The plaintiff was engaged in removing some boxed machinery from the elevator to the floor of the mill. The plaintiff and his collaborators were using trucks in moving the machinery. The trucks were provided for the purpose. The plaintiff testified that while he was at work moving the machinery by the trucks, Mr. Boling, the master mechanic, came up and ordered them to discontinue the use of the trucks and to move the machinery by hand. That while moving a heavy box of machinery, one of the negro hands was moving another box of machinery, without the use of a truck, in obedience to the order of Mr. Boling, and the negro's box struck the box the plaintiff was moving and injured the plaintiff. The plaintiff admitted that moving the machinery by hand was more dangerous than moving it by use of the trucks. The defendant denied that any such order was given. By its answer the defendant made a general denial, and pleaded that the injury was the act of a fellow servant, contributory negligence, and assumption of risk. The defendant moved for a nonsuit and a direction of a verdict, both of which were refused. The jury found a verdict for the plaintiff, and the defendant appealed upon four exceptions, but all are based upon the one proposition that there was no evidence to sustain the verdict. The proposition cannot be sustained. There was evidence that the proximate cause of the injury was the improper handling of another box of machinery by a fellow servant who

was moving his box without suitable machinery, and that he was doing his work in this improper manner under the direct command of the representative of the master. It is true that the command is denied by the master but this made a question for the jury, and the presiding judge could neither grant a nonsuit nor direct a verdict.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(111 S. C. 460)

RHEA v. MAXWELL. (No. 10158.)

(Supreme Court of South Carolina. Feb. 10, 1919.)

SUBROGATION ⇨ 31(1) — **CORPORATE STOCK—PAYMENT BY ONE OF BORROWERS.**

Where corporate stock owned by one of two brothers was put up as collateral for loan to both brothers, the one not owning the stock, upon paying the debt, was subrogated to the rights of the lender in the stock certificates until payment to him by the one owning the stock of his part of the debt.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Hal H. E. Rhea against Dora Maxwell, as administrator of the estate of Samuel W. Rhea, deceased. Judgment for plaintiff and defendant appeals. Reversed.

Halcott P. Green, of Columbia, for appellant.

Paul A. Cooper, Cole L. Blease, and Geo. A. Alderman, all of Columbia, for respondent.

FRASER, J. This is an action in claim and delivery. In some respects the testimony in the case for appeal is not entirely clear. In some respects it is clear.

That part of it that is clear and undisputed is: There were three brothers, Samuel, Thomas, and Hal Rhea. Samuel and Thomas owned stock in the Rhea Live Stock Company. Thomas owned the four certificates of five shares each, now in dispute. When the company was organized, Mr. W. S. Reamer loaned to Thomas and Samuel some money, and took as security, in part, the four certificates of stock owned by Thomas, assigned in blank. Samuel paid the debt to Reamer, and Reamer returned to Samuel the collateral security. When Thomas was on the stand, he was asked:

"Q. Mr. Rhea, you have never paid for your shares of stock, have you? A. I have never paid any cash, but I executed a note for it. Q. You have never paid the note? A. No, sir; I still owe the note."

In 1914 Samuel borrowed \$1,000 from the Carolina National Bank of Columbia, and gave his note for it, secured, among other things, by the note of Thomas, and these shares of stock. The proceeds of the Samuel Rhea note were put to the credit of Hal Rhea. Samuel died, and his administratrix, the defendant herein, was required to pay the note. When the note was paid the bank returned all the collateral (including the stock in dispute) to Mrs. Maxwell, the administratrix of Samuel Rhea. In 1916 Thomas Rhea assigned the stock in dispute to Hal Rhea. When the note was paid Hal Rhea demanded the four certificates of stock from the administratrix. This demand was refused, and this action was brought to get possession of the certificates of stock. Mr. Hal Rhea knew at the time of his purchase that the stock was held by the bank as collateral to the Samuel Rhea note.

When the plaintiff, Hal Rhea, was on the stand, he said the consideration was "\$1,000 in money and other consideration, of which I have paid him, from month to month, between \$700 and \$800, and still owe him a little." There are other things in the case that make it doubtful as to whether the witness was referring to a debt to Samuel or Thomas. Be that as it may, when Samuel paid the debt to Reamer and took the collateral indorsed in blank, Samuel was subrogated to the rights of Reamer to hold the certificates of stock until Thomas paid his debt to Samuel. The stock was pledged as security for that debt, and in the absence of an agreement to the contrary Samuel was entitled to hold it until the debt was paid. The undisputed evidence is that that debt has not been paid. Thomas could not have recovered it from Samuel. Thomas could convey no higher right than he had. The assignee of Thomas cannot recover it from the administratrix of Samuel.

The verdict should have been directed for the defendant. This is merely a possessory action. What the ultimate right and equities may be are not affected by this action.

The judgment is reversed.

HYDRICK and GAGE, JJ., concur.
GARY, C. J., and WATTS, J., did not sit.

(111 S. C. 507)

CUDD v. ROGERS. (No. 10174.)

(Supreme Court of South Carolina. March 22, 1919.)

1. PLEADING ¶8(3) — CONCLUSIONS OF LAW—ESTOPPEL.

An allegation of the answer, in a suit for the possession of an automobile, that the conduct of the plaintiff in impliedly permitting his

mortgagor to sell the car amounted to estoppel, is immaterial, and a mere legal conclusion.

2. CHATTEL MORTGAGES ¶136—TRANSFER OF PROPERTY BY MORTGAGOR—CONSENT OF MORTGAGEE TO SALE.

One who loans an automobile dealer money with which to buy cars for resale, and takes a mortgage on the cars as security, in the absence of a stipulation to the contrary, impliedly consents to the sale of any such automobile to any buyer thereof, and cannot claim a lien as against such buyer, regardless of whether the buyer knows of the mortgage or not.

3. CHATTEL MORTGAGES ¶157(3)—ACTION AGAINST THIRD PARTY FOR POSSESSION — QUESTIONS FOR JURY.

Whether the holder of a mortgage upon an automobile authorized his mortgagor to sell it held, under the evidence, a question for the jury.

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Action by J. N. Cudd against J. W. Rogers. From a judgment for defendant, plaintiff appeals. Affirmed.

Carson, Boyd & Tinsley, of Spartanburg, for appellant.

Sanders & De Pass and C. M. Drummond, all of Spartanburg, for respondent.

GAGE, J. Action to recover the possession of an automobile. There are pending several actions of a like character as this, and dependent upon the decision of this one. The defendant had a verdict, and from the judgment thereon the plaintiff has appealed here.

These are the circumstances of the transaction: Cudd is a citizen of substance at Spartanburg; Johnston is a vendor of cars. Johnston had no money. Johnston purchased six cars, and when the cars arrived at Spartanburg Cudd loaned Johnston the money to pay the drafts drawn against them. In order to secure himself from loss, Cudd took from Johnston a mortgage on the cars. Johnston's practice was to sell the cars, and he sold one to Crimm, and from that person Rogers bought the car.

The defense, inter alia, was:

"That the plaintiff authorized the sale and disposal of the said automobile to the defendant, or to any one else that it could be sold to, and therefore plaintiff has no claim over said car, and is estopped from asserting his lien."

That allegation makes the real issue in the case; for the appellant's brief declares that—

"The issue in this appeal is on the law of mortgagee's consent to sale of mortgaged property, and the exceptions are to the court's rulings on that issue, in charge and on motion for new trial."

Thereabout the court charged the jury in these words:

"Therefore, gentlemen, I charge you this: That if the mortgagee, Mr. Cudd, consented for the mortgagor, W. J. Johnston, to dispose of and sell the automobiles covered by this mortgage, and if Rogers bought the automobile through Johnston, or those acting for W. J. Johnston, then Rogers gets a good title to the automobile. If you find that Mr. Cudd consented to the sale of these automobiles, or to the sale of any one of them, because all of them are in the same condition—what applies to one applies to all, because the condition of the mortgage is the same as to all. If Mr. Cudd consented, either before he took the mortgage or after, that Johnston could sell the property, and in the course of business Johnston did sell the property, a good and complete title, and is entitled to keep the automobile; but the defendant must prove by the preponderance of the evidence, by the greater weight of the evidence, not beyond a reasonable doubt, and not necessarily by the greater number of witnesses, but by the greater weight of the evidence, that Mr. Cudd did so consent for Mr. Johnston to sell."

And thereabout the court refused to charge the jury, at the plaintiff's request, these words:

"I will define to you the issue for your consideration as to the consent of plaintiff to a sale and the release of this automobile from the mortgage. It is this: Did the plaintiff tell the defendant or his predecessors in possession of the automobile that he would not claim the same under his mortgage, or was his conduct toward the defendant or his predecessors in title such as would lead an ordinary prudent man to the belief that he had released the automobile from his mortgage? And you will leave out of consideration anything that Cudd told anybody else, unless it was carried to the defendant or his predecessors in possession before they purchased the car; and you will also disregard anything that anybody other than Cudd or his agent may have told the defendant or his predecessors in possession."

There are eight exceptions, but the brief and the argument at the bar concerned only the issue which arises out of the above charge and refusal to charge.

[1] It is true the before-quoted allegation of the answer, after describing the conduct of Cudd which is set up to defeat his lien, defines that conduct as estoppel. But that is immaterial. The substantial thing is, What did Cudd do? and not what the legal terminology of the act is. The allegation is that Cudd authorized the sale of the automobile to the defendant or to any one else that it could be sold to; the rest of the allegation is

a legal conclusion, and it had as well not been recited.

[2] But, if Cudd did so authorize the sale, then he waived his right to claim lien upon the thing sold. Waiver and estoppel are close akin; but their likes and unlikes are not now material. The instant conduct more favors waiver than estoppel; but the conduct is effective without any nomenclature.

No argument is needed to prove that if a mortgagee permits his mortgagor to engage in trade, and to sell the incumbered property to whoever comes to buy, then the buyer takes his goods free from the lien of the mortgage. The charge only stated so much, but in different words.

[3] Indeed, appellant's counsel admitted at the bar that so much was true; his contention was that the testimony did not make such a case. That, though, was a matter for the jury under all the circumstances of the transaction. And in the case stated it is immaterial whether the buyer knew of the existence of the mortgage and relied on the mortgagee's implied consent to the sale.

The mortgage lien is lost, because the lienor consents to a transaction betwixt the lienor and the buying public which implies the lienor's consent to the transaction and consent to the loss of the lien. And the consent by the mortgagee to a sale by the mortgagor to the buying public may be imputed to the mortgagee, without the inference that to conclude otherwise would operate as a fraud on the buyer.

Fraud involves evil intent. In the case supposed a sale by the mortgagor may have been properly intended by the mortgagee. Indeed, it is not uncommon practice for a mortgagee to expressly agree in the mortgage instrument itself that sales by the mortgagee may be had to the public. See *Marshall v. Crawford*, 45 S. C. 189, 22 S. E. 792, cited by the appellant, and numerous other cases.

In such instances the incumbered property is, as it were, in a state of fluid; all the circumstances indicate that the mortgagor and mortgagee intended that it should move out into the channels of trade. The only way such a mortgagor can get his money is from the proceeds of sale of the incumbered property. The mortgagee in such cases consents to the sale, and trusts to the debtor to apply the proceeds thereof to the mortgage debt.

The judgment is affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 511)

DANIEL et al. v. DANIEL et al. (No. 10175.)

(Supreme Court of South Carolina. March 28, 1919.)

APPEAL AND ERROR ⇐1022(4)—REVIEW OF FINDING—SUFFICIENCY OF EVIDENCE TO SUPPORT.

In an action tried on the law side of the court on an issue of title, a finding of the trial court adverse to the findings of the master who made the report will not be disturbed on appeal, where there is sufficient evidence to warrant the court's findings.

Appeal from Common Pleas Circuit Court of Spartanburg County; T. J. Mauldin, Judge.

Suit by R. E. Daniel and others against E. C. Daniel and S. S. Daniel. From a decree in favor of S. S. Daniel, plaintiffs and E. C. Daniel appeal. Affirmed.

Carlisle & Carlisle, Ralph K. Carson, and Jesse W. Boyd, all of Spartanburg, for appellants.

C. E. Daniel, R. A. Hannon, and I. C. Blackwood, all of Spartanburg, for respondents.

WATTS, J. This action was commenced in the usual form for partition. S. S. Daniel was made a party, under the allegation that he claimed some interest, and answered and claimed 175 acres of land under the provisions of his father's will and deed thereof made to him by the surviving executor. The case was referred to the master, who made his report, holding that S. S. Daniel had no interest in the premises. Exceptions were taken to the master's report. The circuit court sustained the exceptions and overruled the master's report and reversed his findings, and found that S. S. Daniel had fee-simple title to 175¼ acres, conveyed to him by the surviving executor, without any liability to account in any way.

From this decree appellants appeal, and by 22 exceptions impute error and seek reversal. These exceptions challenge the finding of fact of the circuit court, and present two questions; that under the evidence in the case the plaintiffs either have title by adverse possession, or the plaintiffs are mortgagees in possession. The pleadings in the case allege title in plaintiffs in common with E. C. Daniel, and the answer of S. S. Daniel sets up title in himself in severalty. E. C. Daniel by consent was eliminated from the contest, leaving the issue between the plaintiffs and S. S. Daniel as to the land claimed by him. The issue narrowed down to a legal issue of title between the parties, and this court will not review the findings of the circuit court, if there is testimony warranting the court's finding. In this case the circuit court tried the issue of title on the

law side of the court, and, no doubt, took into consideration all of the issues involved, and considered the testimony from the various angles as affecting the case, whether the executor was not the trustee until the death of his mother, the life tenant under the will, and whether or not he was not at all times carrying out the provisions of the will, and whether or not there was sufficient evidence at any time that he threw off the trust, and no doubt considered the question whether he, being in possession as executor and trustee, could acquire title by adverse possession, or whether there was evidence of ouster. The evidence before the master was vague and unsatisfactory in many particulars on important issues in the case, but the case was a law case referred to the master, and finally tried by the judge, and his findings are not reversible by this court, as there is evidence to warrant his findings. All exceptions are overruled.

The judgment is affirmed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(111 S. C. 502)

BIBER v. DILLINGHAM. (No. 10173.)

(Supreme Court of South Carolina. March 22, 1919.)

1. LANDLORD AND TENANT ⇐310(1)—NOTICE TO VACATE—SUFFICIENCY—EVIDENCE—JUDGMENT.

In an action to eject a tenant, a judgment reciting that "the evidence not only fails to show that notice (to vacate) was given, but, on the contrary, shows that it was not," is not subject to the contention that the court did not decide that no notice was given, but only that sufficient notice was not given, since the words are plain, and, besides, insufficient notice in such case is no notice.

2. LANDLORD AND TENANT ⇐37—RENTAL CONTRACT—TERMINATION—PROCEEDINGS.

Where landlord and tenant have entered into a contract as to the time and mode of terminating tenancy, their rights are to be determined by the fair construction of the contract, and not by technical rules applying only to termination of a tenancy at will under statutory provisions.

3. LANDLORD AND TENANT ⇐84(1)—CLOSE OF TENANCY—NOTICE TO VACATE—AGREEMENT—STATUTORY PROCEDURE.

Where landlord and tenant had a rental agreement by which the property was held by the month, requiring on the part of each, 30 days' notice for termination, there could be no termination until the procedure provided by the parties was practiced to end the tenancy, notwithstanding the landlord's procedure under Civ. Code 1912, § 3509.

4. LANDLORD AND TENANT ¶308(1)—PROCEEDING TO EJECT TENANT — BURDEN OF PROOF.

In a landlord's proceeding to eject a tenant, the burden was upon the landlord to prove by a preponderance of the evidence that he had given the notice to vacate required by the rent contract.

5. LANDLORD AND TENANT ¶94(3)—NOTICE TO VACATE—INTENTION—CONTRACT—STATUTE.

It is ordinarily true that landlord's notice to vacate tenancy is not to be strictly construed, it being sufficient if the intention to exercise the option is fairly communicated, but it must amount to a demand to vacate at the time after notice fixed in the rent contract, or, if a tenancy at will, it must conform to statute.

6. LANDLORD AND TENANT ¶308(3)—NOTICE TO VACATE TENANCY — EVIDENCE—SUFFICIENCY.

In an ejection proceeding by a landlord, evidence held not to warrant the conclusion that the landlord had proceeded under the contract by giving notice to quit tenancy 30 days after notice, as required by rent contract.

7. LANDLORD AND TENANT ¶297(2) — EJECTMENT—EXPIRATION OF CONTRACT—NOTICE—STATUTE.

Civ. Code 1912, § 3509, providing for ejection of tenant after notice becomes operative only "after the expiration of . . . contract for rent," so that a statutory demand by the landlord, made in an interview with the tenant before the expiration of such contract, did not entitle the landlord to put in force the remedies of the statute.

8. LANDLORD AND TENANT ¶94(1) — NOTICE TO VACATE TENANCY—CONTRACT RIGHT TO NOTICE—WAIVER—EVIDENCE.

Where a tenant was entitled under a rent contract to 30 days' notice of the termination of tenancy, and with knowledge of such right offered to vacate the tenancy, but did not set a date for so doing, such action did not amount to a waiver of right to 30 days' notice.

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sease, Judge.

Suit by Rosalie A. Biber as landlord against W. R. Dillingham, tenant, brought before a magistrate under Civ. Code 1912, § 3509, to eject the defendant, tenant. Judgment for the landlord, which the circuit court, upon appeal, reversed, and the plaintiff appeals. Judgment of the circuit court affirmed.

I. A. Phifer, of Spartanburg, for appellant.
Lyles, Daniel & Drummond, of Spartanburg, for respondent.

GAGE, J. Proceeding before a magistrate, under section 3509 of the Code of Laws, by a landlord to eject a tenant. The magistrate decided the case for the landlord; the circuit court reversed that judgment;

and the appeal here is from the judgment of the circuit court.

[1] The pith of the judgment below is that "the evidence not only fails to show that notice was given, but on the contrary shows that it was not," and that is the only issue in the case; and it is largely an issue of fact.

The appellant suggests at the outset that the circuit order does not evidence that which the court decided; that the court in fact did not decide that notice was not given, but only that sufficient notice was not given. But the words of the order constitute the only evidence of what the court decided, and the words we have quoted are plain. Besides that, insufficient notice in a case like this is not notice at all.

[2] The appellant admits that the tenant held "by the month on thirty days' notice; Dillingham (the tenant) to notify Scruggs [the landlord] thirty days, or Scruggs to notify Dillingham thirty days." Such then was the contract betwixt the parties. "As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy, their rights are to be determined by the fair construction of that contract, and not by the technical rules which apply to the termination of a tenancy at will where there is no contract on the subject." *May v. Rice*, 108 Mass. 152, 11 Am. Rep. 328.

[3-5] The general issue of fact is, was the contract carried out by the landlord? and the particular issue of fact is, did conduct of the landlord, when he went to see the tenant to get possession, amount to a notice by the landlord to the tenant to vacate the house within 30 days after the day of such interview? It is not pretended that the landlord gave to the tenant formal notice in writing that the house must be given up within 30 days from the giving of the formal notice. It is not pretended that at the interview betwixt the parties, set up by the landlord for notice, that the landlord by word of mouth expressly told the tenant to vacate within 30 days thereafter. The only contention is that what was said at the interview was a substantial and sufficient notice of the landlord's demand that the tenant should vacate within 30 days thereafter. Whether that be so is a mixed question of law and fact. The burden was upon the landlord to prove the contention by a preponderance of the evidence. 16 R. C. L. § 628.

It is true that ordinarily a notice is not to be strictly construed; it being sufficient if the intention of the party to exercise the option is fairly communicated. 16 R. C. L. § 629.

The plaintiff had two witnesses, Scruggs, a son of the former landlord, and Biber, the husband of the then present landlord.

It is true the landlord told the tenant she wanted possession of the house, and what

was said amounted to a demand for the present possession of the house. But that was not pursuant to the contract which the landlord sets up; by it the landlord was not entitled to possession until 30 days after notice. It was the landlord's duty under the contract to notify the tenant that at least 30 days after such notification the contract would terminate. That procedure would have left no room for the tenant to parley; and, until that procedure (provided by the parties) was practiced, the tenancy continued in force.

[8] It is true Scruggs testified, "I gave 60 days' notice as a matter of courtesy," and "I don't remember the date I gave him notice to vacate." But in the same connection, in answer to his own counsel, he testified that "a day or two after that" he went with the new landlord (Biber) to the tenant's place of business, and told him "he had sold the house and wanted possession, and asked him how soon he could have it; he said he would not say; said he would get out as soon as he could, but would not name any date." And on the cross-examination the witness said the tenant told him "he would get out as quick as he could. I pressed him for a date. He just said he would not set a date. * * * The gist of the reply was that he was going to get out as soon as he could, but would not set any date."

It is true, also, that Biber testified:

"I heard Scruggs give him notice on that occasion, a very heated argument."

But the witness immediately said:

"Scruggs told him he had sold the house, and wanted to know when Dillingham would give up. * * * Dillingham would not tell just when he would give up the house; said he would give it up, but would not say when. Mr. Scruggs said that was very unsatisfactory. In talking Dillingham, as I understood, said he had 30 days, and Charlie (Scruggs) had to give him 30 days."

It is manifest from the testimony of both the witnesses—and that quoted is the heart of it—that the demand and the parley was a notice to quit then, and for a then possession. The witnesses did not expressly or by implication define what was the substance of the notice to quit, whether now or 30 days hence. The testimony does not warrant the conclusion that, proceeding under the contract, the landlord noticed the tenant to quit 30 days after such notice.

[7] The landlord manifestly was proceeding to make the "demand for possession" referred to in the statute. But the "demand for possession" therein referred to becomes operative only "after the expiration of the * * * contract for rent." That contract had not expired; so the demand which the landlord made at the interviews referred to

did not entitle him to put in force the remedies of the statute.

[8] It is said, however, that even if the tenant was entitled to have at the hands of the landlord 30 days' notice of the termination of the contract, and the appellant does not deny so much, yet the tenant's conduct amounted to a waiver of such a right.

That amounts to saying that the tenant knew his right to have 30 days' notice, but, while conscious of it, he elected not to rely upon it.

The testimony shows the contrary; Biber expressly testified that the tenant declared to him that "Charlie (Scruggs) had to give him 30 days' notice."

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(83 W. Va. 612.)

FLORENCE W. MCCARTHY CO. et al. v. SAUNDERS et al. (No. 3674.)

(Supreme Court of Appeals of West Virginia. March 11, 1919.)

(Syllabus by the Court.)

1. QUERE.

Query: Is the written admission or accusation to a creditor by one partner after the dissolution of the partnership that another partner before dissolution fraudulently withdrew his money from the firm assets and conveyed away his land to defraud firm creditors admissible as evidence against such partner in a suit by creditors of the firm against him to set aside his deed?

2. FRAUDULENT CONVEYANCES §91—CONVEYANCE TO SECURE BARRED DEBT—EVIDENCE.

Where a debtor in failing circumstances conveys his property to a near relative in consideration of old debts then barred by the statute of limitations, such fact constitutes a strong circumstance tending to show fraudulent intent against creditors whose debts were not so barred.

3. FRAUDULENT CONVEYANCES §295(2) — FRAUDULENT INTENT—PROOF.

In a suit by a creditor to set aside as fraudulent a deed made by his debtor the circumstances attending the transaction are often not only sufficient to establish the fraudulent intent but the only available evidence, and it is not essential that the fraud be proved thereby beyond a reasonable doubt.

4. FRAUDULENT CONVEYANCES §14 — BADGES OF FRAUD—FAILURE TO CALL WITNESS.

In a suit by a creditor to set aside as fraudulent a deed made by his debtor, the failure of the debtor to call important witnesses to his transaction relating to such deed constitutes a badge of fraud.

5. FRAUDULENT CONVEYANCES ¶14—BADGES OF FRAUD.

Circumstances indicating excessive effort to show appearances of fairness or regularity not observed in other transactions by a debtor are to be regarded as badges of fraud.

6. FRAUDULENT CONVEYANCES ¶300(1) — PAYMENT OF CONSIDERATION—AFFIRMATIVE DEFENSE.

Where fraud on the part of a debtor in the conveyance of his property is established, the payment of a full, fair, and adequate consideration for the property is an affirmative defense for the purchaser to be established by clear proof, and when payments are large, if unaccompanied by receipts, memoranda or other documentary evidence, the evidence must be clear, positive, be fully consistent with all the evidence offered by him and free from self-contradiction.

Appeal from Circuit Court, Greenbrier County.

Bill by the Florence W. McCarthy Company and others against W. H. Saunders and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

J. H. Crosier, of Ronceverte, and S. N. Pace, of Lewisburg, for appellants.

S. M. Austin, of Lewisburg, for appellees.

MILLER, P. Upon the bill of numerous creditors of W. H. Saunders & Bro., the separate demurrers and answers of the defendants W. H. Saunders and T. B. Green, the depositions and proof taken and filed on their behalf, and the final decree below denying the relief prayed for, two principal questions are presented. The first is whether as alleged the deed of April 4, 1917, from W. H. Saunders and wife to T. B. Green for a tract of twelve acres of land near Ronceverte, Greenbrier county, belonging to said Saunders, for the purported consideration of fifteen hundred dollars was fraudulent and made with intent to hinder, delay and defraud the creditors of said firm, a mercantile co-partnership then doing business in Ronceverte in said county. The second question is whether, if said deed was made with the fraudulent intent alleged, the grantee Green participated therein, had notice of the fraud or was an innocent purchaser for value and without notice and took good title to the land free from the claims and the demands of said creditors.

On the first question, of course if there was no fraud practiced on the part of the grantors, the grantee, if a purchaser in good faith and for a consideration deemed valuable in law, took good title to the land free from the claims of the plaintiffs. Was W. H. Saunders guilty of fraud? No evidence to establish fraud was taken by plaintiffs, and fraud is denied by him in his answer. No

denial of his liability for plaintiffs' debt is interposed. To establish the fact of fraud plaintiffs rely solely upon the facts and circumstances disclosed by the pleadings and the evidence of the witnesses examined on behalf of the defendants, namely, T. B. Green, W. H. Saunders, W. A. Bratton and P. H. McGrath. The record thus composed shows that the firm of W. H. Saunders & Bro. consisted of W. H. Saunders and H. L. Saunders, the former about thirty-six, the latter about twenty-five years of age. The firm apparently began business in March or April, 1916, succeeding the firm of Dudding & Dudding. It does not appear what actual capital, if any, was invested by the members of the new firm, in the business, but it does appear from a statement by A. L. Saunders, who was constituted and remained the manager of the firm, made to Bradstreet's commercial agency on June 13, 1916, as a basis for credit, that the firm owed then all told for merchandise \$100.00, and a mortgage on real estate \$250.00, and had assets as follows: merchandise at cost, \$600.00; notes receivable, \$250.00; cash in bank, \$400.00; other assets, \$2625.00, which latter item apparently included fixtures, \$125.00, and real estate, \$2500.00, and altogether aggregating \$3875.00. In another statement for credit made on behalf of the firm by A. L. Saunders to the Baltimore Bargain House, July 12, 1916, the assets were listed as follows: merchandise, \$900.00; cash in bank, \$630.00; real estate, \$2500.00, subject to mortgage, \$390.00. The liabilities given were, for merchandise, \$200.00, Dudding & Dudding note due Nov. 24, 1916, \$190.00. In another statement to the Baltimore Bargain House, made on behalf of the firm, purporting to be dated March 3, 1916, and signed by W. H. Saunders, the assets were stated as follows: Merchandise on hand, \$600.00; notes and accounts, \$500.00; cash on hand, \$100.00; real estate, \$2500.00. No liabilities were listed. In this statement it is represented that the last inventory was made July 12, 1916, and that the statement was based on that inventory. So that it appears from this statement that the date at the heading thereof, March 27, 1916, must be an error, and that although Saunders in his pleadings and evidence professes ignorance of the actual condition of his firm from the beginning, nevertheless when on April 4, 1917, he made the deed to Green he had knowledge of the affairs of the firm as of July 12, 1916. Just what date the statement was made cannot be determined, but it must have been made after the inventory of July 12, 1916. These statements, though somewhat loosely made up, disclose the fact that the tract of land referred to, constituted the principal asset made the basis of credit. And W. H. Saunders must have had sufficient

knowledge of the condition of the business to know that a small concern like his could not have been making much money, and that outside of the land it had little basis for credit. And with firm debts thus accumulated, amounting in the aggregate to over \$3000.00, he undertook, on April 4, 1917, to sell and dispose of the land to his brother-in-law Green for a cash consideration acknowledged in the deed, of \$1500.00, or one thousand dollars less than the value placed upon it in the several statements for credit, and five hundred dollars less than he swears it was really worth of any man's money, for he says the property including buildings cost \$2500.00.

[1] Another piece of evidence made an exhibit with the bill is a letter from A. L. Saunders addressed to the Baltimore Bargain House, dated July 9, 1917, which volunteers the information in effect that his brother had drawn out of the bank all the money he had involved in the firm, and had deeded his land to his brother-in-law Green, and calling his attention to the previous statement made and signed by his brother in regard to the real estate. This letter is objected to as a self-serving declaration and as being incompetent evidence against W. H. Saunders. The facts charged therein are denied in the answer, and upon the introduction of the letter in evidence it was objected to. A. L. Saunders, though a party to this suit, made no appearance, and was not called as a witness. Whether admissions or accusations of this kind, made long after the dissolution of the firm, self-serving as they are, at least against the other defendants, are admissible, is doubtful; indeed we think the great weight of authority is against it. *Burdett v. Greer*, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019, 129 Am. St. Rep. 1014, 15 Ann. Cas. 935, and elaborate note at page 938. The case relied on by plaintiffs' counsel is *Dickinson's Executors v. Clarke*, 5 W. Va. 280. We have not thought it necessary to decide this question, for in our view of the record there is ample other evidence to establish fraud on the part of W. H. Saunders in the disposition of his land to Green. True, he says he did not know the financial condition of the firm, but he knew the small capital invested, he knew the firm had been in existence but a few months, and he knew that the principal asset included in the statements as a basis for credit was this tract of land. Before undertaking to withdraw what land he had from the reach of the firm's creditors was it not his duty to know, if he did not know, the financial condition of his firm? It certainly was. He could not shut his eyes to the facts existing and escape the responsibility incurred to creditors. The proposition seems too plain for controversy. Moreover, his conveyance to Green at once precipitated actions by creditors, as was to be expected. And in a

few days after his deed to Green he took the business in his own hands, put his brother out, and on April 21, 1917, procured the execution of a general assignment of the firm's assets to McGrath, trustee. There is no doubt in our minds that before making the deed to Green he had received information from some source of the impending collapse of the firm, for the firm had bought goods from many sources in the few months preceding, and since the last statement sent out for credit. According to the inventory of July 12, 1916, the merchandise on hand was only \$600.00, with notes and accounts amounting to \$500.00, and cash \$100.00. After the assignment the inventory showed in stock and fixtures over \$3000.00, no cash, and liabilities to merchandise creditors of about the same amount. Saunders says he thought the assets would pay out, but what ground had he for his belief, considering the natural depreciation in the stock and the necessary expenses? The fact was that the assets realized gross only about \$2000.00; the expenses were about \$1000.00; preferred debts several hundred dollars, leaving for creditors a sum sufficient for a dividend of only fifteen to twenty per cent. If as ignorant as he professes, Saunders could have had no such opinion based on facts on April 4, 1917, when he deeded his land to Green.

[2] That W. H. Saunders so disposed of his land to hinder, delay and defraud his creditors, we have not the slightest doubt. He conveyed it for one thousand dollars less than he represented it to be worth, and though he acknowledged the receipt of fifteen hundred dollars in cash, the facts admitted are that \$585.00 represented an old debt to Green, how old is not disclosed, but part of it was more than ten years old, another part more than five, much of it of later origin, but none of it was represented by any evidence of indebtedness, note, book account, or otherwise, and neither his own nor the memory of any witness would serve to give any definite date, though items ran as high as one and two hundred dollars. If these items had any real existence, and, as seems likely, were over five years old, they were barred by the statute of limitations. Debts so barred may constitute a sufficient moral consideration to support a deed, but when the debtor is insolvent the fact of the transfer of all his property in consideration of such debts constitutes a strong circumstance tending to show fraudulent intent against creditors whose debts were not barred. *Crawford v. Carper*, 4 W. Va. 56; *Bank v. Atkinson*, 82 W. Va. 203, 212, 9 S. E. 175; *Sturm v. Chalfant*, 88 W. Va. 248, 18 S. E. 451; *Knight v. Capito*, 23 W. Va. 639, 651.

[3-5] Of the residue of the consideration, according to the evidence, \$315.00 was paid to W. H. Saunders, not on the date or delivery of the deed but a few days afterwards,

and the remaining sum, \$600.00, was not paid to W. H. Saunders, but to his wife on April 5, 1917, but whether before or after the delivery of the deed, which according to the evidence of Saunders was about April 5, 1917, does not appear, for he says these sums were paid between the 4th and 10th of April. And we pause to inquire, if any such payments were made, what became of the money? The deed it is claimed was delivered about April 5th, the day after its date. No receipts for prior or subsequent payments were given. There is not a syllable of evidence to show what became of the money, whether deposited, spent, and by whom nowhere appears. It is not pretended that any of it was paid to firm creditors. We think the proof of fraud satisfies every requirement of the law. It comes out of the conduct and the mouths of the defendants themselves. While the burden is on the one charging fraud to prove it, it need not be made out by direct evidence. To impeach a conveyance the fraudulent action of the parties may be shown by the circumstances attending the transaction. And it is said in our books that circumstantial evidence is not only sufficient but often the only evidence that can be adduced. *Richardson v. Ralphsnyder*, 40 W. Va. 15, 20 S. E. 854. The fraud need not be proved beyond a reasonable doubt. *Knight v. Nease*, 53 W. Va. 50, 44 S. E. 414.

Fraud on the part of the grantors being shown, the next question to be answered is, did the grantee Green participate in or have notice of the fraud, or was he a purchaser for a valuable consideration and without notice of the fraudulent intent? On this question we have the patent facts that the consideration named was little more than half the actual value as reported by Saunders; that Saunders made and had the deed prepared and recorded before delivery, and before payment of any of the purchase money; that no receipts were taken therefor other than the acknowledgment of the whole sum recited in the deed as cash; that more than one-third of this sum was old debts, and if ever owed, probably barred by the statute of limitations; that \$315.00 thereof, professedly cash paid to W. H. Saunders, had a very dim existence, Green claimed he had it but could not say how long, where he got it, or how long he had been accumulating it; that the \$600.00, the balance which it is claimed was paid Mrs. Saunders in the absence of W. H. Saunders from home, was borrowed from a Mrs. Baxter. Mrs. Baxter was not produced as a witness to this fact. Failure to call her as a witness constituted a badge of fraud. *Knight v. Capito*, supra. It borrowed from her, upon what terms of payment or on what security is not disclosed.

Another fact tending to show fraud on the part of both parties is that Saunders continu-

ed to occupy the property for six months or more after his deed to Green, although he gives it as his reason for selling so suddenly that he had secured a position which would take him away, and that he wanted to get to a place where he could educate his children. His remaining in possession of the property after his deed, if unexplained would constitute a badge of fraud. He and Green do undertake to explain by swearing that it was agreed at the time that Saunders should remain in possession at the rate of \$5.00 per month, and the only paper writing offered of any of their transactions besides the deed for the property, is a receipt signed by Green, dated September 20, 1917, a few days before this suit was brought, for thirty dollars, covering the rent to September 1st, the full term of occupancy. The lack of documentary evidence of previous and more important transactions, and the production of written evidence of the alleged payment of rent, suggest, if they do not constitute, strong circumstances tending to show fraud. Circumstances indicating excessive effort to show appearance of fairness or regularity, which are not usually found in such transactions, are to be regarded as badges of fraud. *Hart v. Sandy*, 39 W. Va. 644, 20 S. E. 665.

Green, it appears, was a young man employed as railroad agent and telegraph operator at Marlinton for about nine years at the rate of from \$70.00 to \$103.00 per month. He had been married a couple of years, had one child, and had assisted in supporting his father and mother. In the meantime he claims to have purchased the interests of his brother and sister in his father's home farm of 44 acres in Greenbrier county for about \$620.00, and claims to have loaned money to Saunders. But not a record book, not a note, not a receipt, nor memorandum of any kind is shown evidencing such transactions.

[6] The rule of law in cases of this kind is that the payment of a full, fair and adequate consideration for the property is an affirmative defense on the part of the purchaser, to be established by clear proof, and when payments are large the testimony of the grantees, if unaccompanied by receipts, memoranda or other documentary evidence, must be clear, positive, be fully consistent with all the evidence offered by him and free from self-contradiction. *Colston v. Miller*, 55 W. Va. 490, 47 S. E. 268; *Bland v. Rigby*, 73 W. Va. 61, 65, 79 S. E. 1013; *Milling Co. v. Read*, 76 W. Va. 557, syl. 9, 85 S. E. 726; *North Amer. Coal & Coke Co. v. O'Neal et al.*, 95 S. E. 822. We do not think Green has made good his defense. Witnesses to some of his alleged transactions were not called. This was of itself a badge of fraud. *Knight v. Capito*, supra.

Our conclusion is to reverse the decrees and remand the cause.

(83 W. Va. 578)

BRUCETON BANK v. ALEXANDER.
(No. 3599.)(Supreme Court of Appeals of West Virginia.
March 11, 1919.)*(Syllabus by the Court.)***1. DEEDS ⇐149—TRUSTS ⇐12—WILLS ⇐649—"SPENDTHRIFT TRUSTS"—RESTRAINT OF ALIENATION.**

Though restraints upon the alienation, voluntary or involuntary, of equitable life estates, commonly designated "spendthrift trusts," are valid, a grantor or deviser may not restrain the alienation, voluntary or involuntary, of a legal life estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Spendthrift Trust.]

2. TRUSTS ⇐21(1)—SPENDTHRIFT TRUSTS.

But even where an equitable estate is created in favor of another, in order to constitute it a spendthrift trust, the intention to do so must be expressly stated or clearly disclosed by a reasonable construction of the instrument taken as a whole.

3. WILLS ⇐781—ELECTION.

The provisions of section 11, c. 78, Code (sec. 3911), apply equally to curtesy and dower estates.

4. WILLS ⇐783—ELECTION—PROVISIONS FOR HUSBAND—BAR OF CURTESY.

If a widower fail to renounce the will of his wife, which makes provision for him, within one year from the time of its admission to probate, and it clearly appears from the true construction of the will, and the attendant facts proper to be considered in connection with it, that the provision in his favor was intended by the testatrix to be in lieu of curtesy, his curtesy will be barred, and he shall take no more of her estate than is given him by the will.

5. WILLS ⇐781—ELECTION.

Though section 11, c. 78, Code (sec. 3911), does not expressly require a husband or wife, as the case may be, to elect between rights under a will and under the general law, yet such is the plain spirit and intention of the statute, at least where the provisions of the will were clearly intended to be in lieu of curtesy or dower.

6. APPEAL AND ERROR ⇐880(3) — REVIEW — PARTIES.

Where a debtor and another jointly own a life interest in certain property, and a decree is entered in a judgment creditors' suit directing the sale of the entire life interest in satisfaction of the debts of the debtor, it will not be reversed, though erroneous, where the owner of the other half interest is a party to the suit and does not join in the appeal from the decree.

7. CASE OVERRULED.

The case of *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139, is overruled to the extent that it is inconsistent with this opinion.

Appeal from Circuit Court, Pocahontas County.

Creditors' suit by the Bruceton Bank against John Alexander. Decree for plaintiff, and defendant appeals. Affirmed.

F. R. Hill and L. M. McClintic, both of Marlinton, for appellant.

Andrew Price, of Marlinton, for appellee.

LYNCH, J. John Alexander, appellant here, seeks by this appeal to reverse the decree in a judgment creditors' suit subjecting to sale the life estate jointly vested in him and his son Dwight by the will of Elisa Alexander to satisfy the liens of the plaintiff and others against him. The appellant was the husband of Elisa Alexander, who died testate March 17, 1916, the material provisions of whose will are:

"To Samuel John Alexander [and] Dwight Ingram Alexander I give possession, use and profit of all I die possessed of every kind and wheresoever placed—excepting thirty-five hundred dollars due me by David Lavie, 182 Beverly street, Toronto, Canada—to share and share alike as long as both shall live. If Dwight Alexander is alive at his father's death, all and everything I give to him absolutely and unconditionally. If Dwight Alexander is dead at his father's death, absolutely all and everything is to be divided equally between the children of my sister, Emily Kackham. * * *

Thus the testatrix devised to her husband and their son jointly all her property, except \$3,500 which by another clause she bequeathed to her son absolutely.

[1, 2] This language, appellant says, imports the creation of a spendthrift trust to provide for an aged and indigent husband, and that as such it is beyond the reach of his creditors. The power of a testator to create such an equitable life estate by express devise with restraints upon its alienation, voluntary or involuntary, was settled in this state in *Guernsey v. Lazear*, 51 W. Va. 328, 41 S. E. 405, and later still further broadened in *Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968. For in the latter case, point 2 of the syllabus, it is said:

"To create a spendthrift trust it is not essential that the instrument should denominate the beneficiary a spendthrift, or give reasons for creating the trust, or contain all restrictions and qualifications incident to such trust, or contain an express declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of creditors, if the intention of the testator or donor to create such a trust is clearly disclosed by the instrument as a whole."

But it has been held that, though a grantor or deviser may impose such restraints upon equitable life estates, he cannot restrain the alienation, voluntary or involuntary, of a legal life estate. A spendthrift trust is an

equitable, not a legal, interest or estate. *Kerns v. Carr*, 82 W. Va. 78, 95 S. E. 600, L. R. A. 1918E, 568, and note. The estate created by the will of Mrs. Alexander is purely legal. The devise was direct and personal. Between the testatrix and the devisees there is no intermediary; no one named or designated to hold the property for them, thus vesting in them an equitable interest, as in *Guernsey v. Lazear* and *Hoffman v. Beltzhoover*, supra. The estate is the possession of the lands of the testatrix for the joint lives of the husband and son, with remainder over.

As further evincing the unsubstantial character of the contention of the appellant, even if the will had created an equitable interest in his favor, the total absence of language indicating an intention to place it beyond the reach of creditors must be noted. To create a spendthrift trust the intention either must be expressed clearly, as in *Guernsey v. Lazear*, or, as in *Hoffman v. Beltzhoover*, clearly disclosed by the instrument read as a whole. Here there is nothing to show such an intention; no language from which to infer that the alienation, voluntary or involuntary, of the life estates was restrained. The will involved in the *Hoffman* Case provided that the property should be "for the sole use and support, and for no other purpose, of James William Kerney during the term of his natural life," and that language, it was held, was sufficient to disclose an intention to bar creditors. There is no such language here.

[3-5] It may also be urged by John Alexander that, since he failed to renounce the will providing for him, as apparently required by section 11, c. 78, Code (sec. 3911), he takes no more of the estate than was given him by that instrument, namely, a life interest in one-half, and, therefore, that the court below erred in holding that regardless of the will defendant had a life interest by curtesy in the whole of the real estate which was liable to be sold for his debts. Section 11 provides:

"When any provision for a wife is made in the husband's will, she may, within one year from the time of the admission of the will to probate, renounce such provision. * * * If such renunciation be made, or if no provision be made for her in the will, she shall have such share of her husband's real and personal estate as she would have had if he had died intestate, leaving children; otherwise she shall have no more thereof than is given her by the will. A husband may, in like manner, renounce a provision made for him in the will of his wife, and in such case, or if no provision for him be made in the will, he shall have such share of his wife's estate, real and personal, as he would have had if she had died intestate leaving children; otherwise, he shall have no more thereof than is given him by the will."

With respect to a widow's dower, that statute has been construed to mean that the failure of a widow to renounce the will of

her husband, which makes provision for her, does not bar her dower unless it clearly appears from the true construction of the will, and the attendant facts proper to be considered in connection with it, that the provision in her behalf was intended by the testator to be in lieu of dower; and if it does not so appear, then she may consistently take both dower and the benefit derivable from the provision of the will. *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S. E. 139; *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125; *Miller v. Miller*, 76 W. Va. 352, 85 S. E. 542.

In like manner it has been held that the husband is entitled, without renouncing the will, to take under it without impairing his marital right to curtesy, but with this distinguishing feature: That, unlike the widow's dower, the curtesy of the husband will not be barred by failure to renounce a provision for him in the will, even when expressed to be in lieu of curtesy. *Cunningham v. Cunningham*, supra. Such bar, it is said, can be made effective only by agreement between husband and wife *inter vivos*, by which the wife delivers to the husband an estate which he agrees to accept in lieu of his curtesy, not by a provision in her will to that effect.

The court reached that result in the case cited by construing section 11, c. 78, Code (sec. 3911), in connection with sections 4 and 16, c. 65, Code (secs. 3652, 3664), which are:

Section 4: "If any estate, real or personal, intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate or the residue thereof."

Section 16: "If any estate, real or personal, be delivered by the wife to the husband in lieu of his curtesy, and he accept the same, he shall be barred of his curtesy in the residue thereof."

Section 4, as construed in *Cunningham v. Cunningham*, supra, provides for a conveyance or devise of the husband's estate, real or personal, in lieu of the widow's dower, thus enabling him to bar the dower of his wife, or, at least, compel her to elect, under section 11, c. 78 (sec. 3911), whether she will take the provision substituted in lieu of dower, or renounce the will and take under the general law. But, in construing the terms of section 16, c. 65 (sec. 3664), the court concluded that it was only by an estate "delivered by the wife to the husband in lieu of his curtesy," and accepted by him, that she could bar his curtesy. In other words, such bar could be made effectual only by agreement between husband and wife *inter vivos*. For that reason the court held that the wife could not, by a provision in her will, bar the curtesy of her husband, or compel him to elect whether to take under the will or under the law, even though the instrument expressly stated that such was the intention of the testatrix.

We are unable to concur in this construc-

tion of the statute. Such a view does injustice to the language of section 11, c. 78 (sec. 3911), and places an undue stress upon section 16, c. 85 (sec. 3684). It may be conceded that the latter section, standing alone, was properly construed when it was interpreted to mean what its language plainly imports, namely, that a wife can during her life bar the curtesy of her husband by the delivery to him and the acceptance by him of part of her estate, real or personal, in lieu of curtesy. But the latter part of section 11, c. 78 (sec. 3911), gives her still a broader right, enabling her, by a provision in her will for her husband, clearly intended to be in lieu of curtesy, to compel him to elect between the will and the legal curtesy. If he renounces the provision of the will, the statute declares that he may take curtesy; if he does not renounce, he shall have no more of her estate than is given him by the will. True, section 11 does not expressly require the husband or wife, as the case may be, to elect between rights under the will and under the general law, but such is within the plain spirit and intention of the statute, at least where the provision in the will was clearly intended to be in lieu of curtesy or dower.

"A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter." *Hasson v. City of Chester*, 67 W. Va. 278, 282, 67 S. E. 731, 733.

[7] In other words, our construction of section 11 applies its provisions equally to curtesy and dower estates, and to the extent that *Cunningham v. Cunningham*, 30 W. Va. 590, 5 S. E. 139, is inconsistent with this opinion it is overruled. As held in *Sperry v. Swiger*, 54 W. Va. 283, 46 S. E. 125, and *Miller v. Miller*, 76 W. Va. 352, 85 S. E. 542, that a widow is not required to elect between the provision for her in the will and the law, unless it clearly appears from the true construction of the will and the attendant facts proper to be considered in connection with it that the provision in the will was intended by the testator to be in lieu of dower, so a widower is not put to his election, unless it appears in a similar way that the provision in his favor was intended to be in lieu of curtesy.

Such an intention clearly appears from the true construction of the provision of the will of Mrs. Alexander. By providing that defendant should receive a life estate in one-half of her property, with the exception of

the \$3,500 bequeathed to their son, when under the law his curtesy interest would have been a life estate in all of her lands and a share in her personalty, she clearly evinced an intention that such provision should be in lieu of curtesy. It was squarely counter to his rights under the law and inconsistent therewith, and utterly meaningless if she also intended him to take his curtesy. If she desired the latter, then there was no occasion for the provision she made, for without it the law would have accorded him double the estate she left for him. Therefore we are compelled to think that it was her intention to curtail his legal estate in her lands, and provide that the other one-half which he otherwise would have taken should go to their son. That being so, he was put to his election. It was not decided in *Cunningham v. Cunningham*, supra, whether the husband, like the wife, was required by the statute to renounce within one year from the time of the admission of the will to probate. Its language is, "A husband may, in like manner, renounce, * * *" clearly referring to the manner specified in the first part of the section for the wife's renunciation. Therefore we are of opinion that the husband, like the wife, has but one year in which to make his renunciation in the manner specified therefor. Having failed to elect within one year, John Alexander is limited to a life interest in one-half of the estate of his wife.

[8] The decree complained of was erroneous in directing the sale of all of the estate for his debts, since only one-half thereof was his and as such subject to sale in satisfaction of plaintiff's liens. Despite that fact, we are compelled to affirm the ruling of the lower court, because the decree is not prejudicial to John Alexander, his life interest being subject to sale in any event. Dwight Alexander, whose life interest in the other one-half also is being held subject to sale, does not complain of the decree, though prejudicial to him. The former is not hurt by it in any manner. If the decree subjects to sale land in which he has no interest, that is a matter of which he cannot be heard to complain, because not in any wise prejudicial to him. Nor does he assign that as ground for reversal. He claims to be aggrieved only by the finding against the claim of a trust in his favor beyond the reach of his creditors. This claim, as we have seen, rests upon no sound foundation of law or fact.

Decree affirmed.

(83 W. Va. 590)

NESTOR v. NESTOR et al. (No. 3641.)

(Supreme Court of Appeals of West Virginia.
March 11, 1919.)*(Syllabus by the Court.)***1. HABEAS CORPUS ~~§~~99(4) — CUSTODY OF CHILDREN—AWARD.**

In a habeas corpus proceeding by the wife against the husband for the custody of their three year old child, which the husband forcibly carried away from their home in another state to this state, when no divorce had been obtained nor divorce suit pending in either state, the court is justified in awarding the custody of the child to the mother, when the evidence does not show she is morally unfit and does show she is more able to care for it than the father.

*(Additional Syllabus by Editorial Staff.)***2. HABEAS CORPUS ~~§~~99(1)—CUSTODY OF INFANT CHILDREN—RIGHTS OF FATHER.**

The law recognizes the father as the natural guardian of his infant children, and generally prefers him to the mother as the one entitled to their custody, though the rule is not inflexible.

Error from Circuit Court, Tucker County.

Habeas corpus by Carrie Nestor against Thurman Nestor and others for the custody of a minor child. From a judgment for plaintiff, defendants bring error. Affirmed.

J. W. Harman, of Parsons, for plaintiff in error.

Chas. D. Smith, of Parsons, for defendants in error.

WILLIAMS, J. This writ of error, awarded on the petition of Thurman Nestor and Jasper Nestor, his father, is to a vacation order of the judge of the circuit court of Tucker county, awarding to Carrie Nestor, the wife of said Thurman Nestor, the custody of their three year old son, Kenneth Nestor, in a habeas corpus proceeding instituted by her. There has been no decree of divorce, and no suit for divorce is pending. The parties were married in Tucker county, W. Va., in May, 1912, and for some time thereafter continued to reside in said county, living a part of the time on the farm of the husband's father and a part of the time on the farm of the wife's father. They then moved to Canton, Ohio, rented some rooms, and did light housekeeping for a while, and later rented a house, and the wife kept boarders and the husband worked and earned from \$18 to \$27 per week, which, he says, he turned over to his wife. Apparently they lived together amicably until he began to suspect her of improper relations with one of the boarders by the name of John Larson, and, on two occasions, ordered her to leave the house. The

second time he ordered her out, she says, she left and stayed at a hotel that night, secured employment, and started to work, but that, in about three days, he came after her and persuaded her to return, which she did, thinking it would be better for the child and themselves. She says he then treated her well until after she had signed his claim of exemption from military duty, and then he again began to mistreat her. He was not feeling well, and she says she persuaded him to come to his father's home in West Virginia on a vacation. He did so, and remained for ten days or two weeks, returned to Canton about the 1st of September, and went to work for the Sanitary Milk Company, and continued working for said company until about the 1st of October, when he left her and returned to his father's home in West Virginia, bringing the child with him. They are living separate and apart, and he and the child were at his father's when this proceeding was begun. He works on his father's farm, but receives no wages, and when he is at work he says his mother takes care of the child. Petitioner swears that, at the time she brought this proceeding, she was earning \$10 per week in a restaurant in Canton, is promised \$12 per week when she returns, and is able to provide for herself and child. He says he brought the child to his father's because she was not a fit person to raise it. He accuses her of infidelity and of communicating to him the gonorrhea. She denies this, and there is no other evidence to prove the fact. His testimony respecting this charge is wholly inconsistent with his conduct, for he thereafter returned to Canton, and they cohabited as man and wife for a month before he brought the child to West Virginia. He files a letter, purporting to have been written to his wife by John Larson while he was in a military training camp, which he says a friend of his clandestinely procured and sent to him. She denies receiving such a letter. It is not identified as a letter written by Larson, nor is there any evidence to prove she received it, and, of course, it cannot be read as evidence against her.

[1, 2] The welfare of the child is the guiding principle by which the court must be governed, and although the law recognizes the father as the natural guardian of his infant children, and generally prefers him to the mother as the one entitled to their custody, still this is not an inflexible rule. If the mother is better qualified, morally and physically, than the father to perform the trust, the court may properly intrust the child to her. *Carlens v. Carlens*, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930; *Dawson v. Dawson*, 57 W. Va. 520, 50 S. E. 618, 110 Am. St. Rep. 800; *Buseman v. Buseman*, 98 S. E. 574.

If the testimony of the mother in this case is to be taken as true, the father is not morally fit to raise the child; and, on the other hand, if his testimony is true, the mother is equally unfitted for so sacred a responsibility as the proper rearing of a child. But his charges of her immorality are denied by her and are not sustained by him, as he bears the burden of proving them. But her charges against him are, in part at least, admitted by him. He admits he had a loathsome disease, which, generally, originates from immoral habits. True he accuses her of giving him that disease. But she denies it, and there is no other evidence that she ever had such disease.

Furthermore, he has failed utterly to prove his financial ability to provide for the child. He is living with his father and working on his place, and admits he is earning no wages. The mother of the child swears she has a good place to live in Canton, Ohio, the place where she and her husband last cohabited, and is earning \$10 per week, and can take good care of the child. It also appears that she is the more intellectual of the two, is fond of reading, and therefore the better qualified to give the child proper mental training.

In view of all these circumstances, the judge was justified in committing the care and custody of the child, Kenneth, to its mother, and we affirm the judgment.

(83 W. Va. 580)

HUTCHENS et al. v. DENTON et al.
(No. 3543.)

(Supreme Court of Appeals of West Virginia.
March 11, 1919.)

(Syllabus by the Court.)

1. PARTITION — 338 — BY PAROL—SEVERANCE OF COMMON TITLE.

A parol partition of land does not effect a severance of the common title, unless it is followed by actual possession of the parcels in severalty in such manner and to such an extent as to effect ousters of the parties by one another, and for such time as is sufficient to vest title by adverse possession.

2. TAXATION — 338, 734(3) — LAND OWNED BY TENANTS IN COMMON—ASSESSMENT.

A tract of land owned by cotenants cannot lawfully be assessed to them separately by undivided interests, or separately by aliquot parts representing such interests, and a tax sale and deed depending on such an assessment are void.

3. TAXATION — 670—TAX DEED—UNDIVIDED INTEREST IN LANDS.

A tax deed purporting on its face to convey an undivided interest in land, other than a town lot, is unauthorized by law, and not conclusive as to any one.

4. TENANCY IN COMMON — 14 — CONVEYANCE—DISSEIZIN.

The deed of one cotenant for the entire property, held under a common title, to a stranger, who takes and holds possession thereunder for the statutory limitation period claiming title to the whole property, may work a disseizin of the ousted tenant.

5. REMAINDERS — 17(3) — CONVEYANCE BY COTENANTS — RIGHT OF ENTRY — LIMITATIONS.

Though such a deed by one cotenant conveying the entire tract may for some purposes work an ouster of the other, a life tenant of an undivided moiety, yet it does not so conclude the right of entry by the remainderman, or set in motion against him the statute of limitations, until his right of entry accrues by the termination of the preceding estate.

6. TENANCY IN COMMON — 14 — STATUTE — LIMITATIONS—PARTITION.

Such ouster does not necessarily mean physical eviction, but simply marks the time when the statute of limitations begins to run, and does not, within the statutory period, destroy the cotenancy, or affect the right of the ousted cotenant to recover possession of the land, or maintain a suit for its partition.

(Additional Syllabus by Editorial Staff.)

7. WILLS — 495 — CONSTRUCTION — "CHILDREN."

Unless a different intent plainly appear, "children" in a devise is a word of purchase, not of limitation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Children.]

Appeal from Circuit Court, Randolph County.

Suit by John Hutchens and others against Iantha Denton and others. From a decree dismissing the cause, plaintiffs appeal. Reversed and remanded.

Strader & Tallman and Arnold & Arnold, all of Elkins, for appellants.

A. J. Valentine, of Parsons, and W. B. Maxwell, of Elkins, for appellees.

LYNCH, J. The adjudication of the issues raised upon this appeal awarded plaintiff below from the decree dismissing the cause as developed by the pleadings and proof involves to some extent the interpretation of the will of Benjamin Denton, made and probated in Rockingham county, Va., in 1855, and recorded in Randolph county, then in Virginia, now in this state, in 1876, the land devised being in the last-named county. The plaintiffs are the children and heirs at law of Thomas and his wife, Margaret E. Hutchens, the daughter of the testator, and the defendants are Iantha Denton, the widow of Benjamin Denton, and Julia Denton, Louvena Rolsberry, Tabitha A. Gibson, Cornelia

E. Van Eaton, Mattie Moore, Vera Denton, and Eleanor Denton, the children and heirs at law of Lorenzo Denton, a son of the testator. The object of the suit is to partition between the plaintiffs and the defendants, except Iantha Denton, the 200 acres of land devised by Benjamin Denton to Margaret E. Hutchens and Lorenzo Denton. Benjamin Denton died in Rockingham county, Va., in 1855, Thomas Hutchens in 1903, and Margaret E. Hutchens in 1909, both in Nebraska, and Lorenzo Denton in Randolph county in 1911.

The eleventh paragraph of the will, the only paragraph necessary to examine, is embodied in the following language, except as to the words in parentheses substituted or changed to render intelligible its meaning:

"(To) my daughter Margaret E. Hutchens and my son Lorenzo Denton I will a certain tract of land lying in the county of Randolph, Virginia, on the west side of Leading (creek). I will one-half of this tract of land to my daughter Margaret E. Hutchens and her children forever. Then after the death of her and her husband Thomas Hutchens (the land) to be sold and the money to be equally divided amongst her children; but should she (die) without heirs (children surviving), after the death of her husband, to go back to her lawful heirs; and to my son Lorenzo Denton the other half to him and his heirs forever."

[1-3, 7] Severed from other parts of the paragraph and considered alone, the clause, "I will one-half of this tract of land to my daughter Margaret E. Hutchens and her children forever," would, if she had no children living at the death of the testator when the will became effective, seem to confer upon her an unqualified fee in an undivided moiety of the land. The latter died the same year the plaintiff John Hutchens was born, but whether the death of the one or birth of the other first occurred does not appear. If the birth of John Hutchens occurred while the testator was living, he and his mother took a joint estate in equal portions, and not she alone a fee. Because, unless a different intent plainly appear, "children" in a devise is a word of purchase, not of limitation, as held in *Wills v. Foltz*, 61 W. Va. 262, 56 S. E. 473, 12 L. R. A. (N. S.) 283, and comprehensive note. See, also, 1917B, L. R. A. 49, note. But in view of the conclusion reached in this case it is not important whether the son was born before or after the death of the testator. In either event he has such estate as entitles him to have partition, unless the right thereto is barred by limitation.

It is not necessary, however, to prolong the discussion upon this phase of the will, because of the thorough discussion of the subject in *Wills v. Foltz*, supra, and because other provisions of the will are determinative of the intention of the testator in the devise to his daughter and son, when it is read and

considered in its entirety. For when so read and considered, its meaning seems quite obvious. It manifests itself in the provision for the sale of the moiety or undivided half devised to Mrs. Hutchens and the equality of the division of the proceeds among any children born to her, provided she survived her husband and had children living at the date of her death. She did survive her husband, and the plaintiffs are her children. Compliance with the conditions does not in any manner affect the estate devised to her, for the will expresses a purpose not to confer a fee simple absolute in the moiety other than Lorenzo's, the largest and most extensive interest that can be enjoyed in land, an interest marked by the unrestricted power of alienation by the possessor. Such an interest was not created by the will. This power to alienate the land in fee the testator did not grant unto her. She took, subject to the restraint so imposed, not an unlimited or unrestricted freehold estate, but a life estate. Of course she could, with the consent of her husband given as required by law, voluntarily dispose of it by sale, but she could not with or without such consent dispose of the fee in the land, because to do so would not be consistent with the inhibition plainly implied in the instrument creating an estate in the land as to her. The *jus disponendi* is wanting in that respect. A purchaser from her would take only the title conferred by the will. No language except that contained in the second clause purports to empower her to make a complete fee title to the land. It was hers to grant an interest in it only so far as the law, not the will, gave her that power, the power to sell and convey, not the land itself in the sense that the purchaser would acquire the fee simple absolute, the unlimited and permanent dominion over it, but a control limited by the estate she held; that is, subject to sale under the terms of the will. Any other estate in the land, if granted by her, would be inconsistent with the intent declared by the testator. This intent clearly was to limit her interest to a freehold for her life, that is, merely a life estate, with remainder over to her children, or, if there were no children surviving her, then to her heirs. She had only a temporary dominion over the land, a dominion which terminated with her death. This seems to be the only just and reasonable interpretation of the will.

Then we come to the claims set up by the heirs of Lorenzo Denton to an ownership of the whole tract, which they base upon two propositions: (1) An oral partition of the land between him and Mrs. Hutchens; (2) the acquisition of her undivided half interest at a delinquent tax sale on October 27, 1879, and a deed therefor by the clerk of the county court of Randolph county September 25, 1884, and possession under both the partition and tax deed. The proof to support the alleged partition, as the circuit court

found, falls far short of establishing an agreement to that effect. There was some discussion between the coparceners respecting a division of the land into two equal parcels, according to some of the witnesses, who at the time of the negotiations detailed must have been quite young and possessed of retentive memories, a thing not impossible, it is true, but extraordinary, if they could after the lapse of more than 60 years, as they seemed to do, recall what was said in 1855 as regards the severance of the common title. It is not improbable that they may have heard some desultory and inconclusive discussion of the subject, but the circumstances disprove the execution of an agreement to partition. "A parol partition of land does not effect a severance of the common title, unless it is followed by possession of the several parcels, in such manner and to such an extent as to effect ousters of the parties by one another, and for such time as is sufficient to vest title by adverse possession." *Williamson v. Wayland Oil & Gas Co.*, 79 W. Va. 754, 92 S. E. 424; *Martin v. Clark*, 76 W. Va. 115, 85 S. E. 62; *Justice v. Lawson*, 46 W. Va. 183, 33 S. E. 102. If there was an agreement to partition, there was nothing done under it to give it effect, nothing that would excite the suspicion of a purpose to exclude the right of Mrs. Hutchens to resume possession of the land at any time she might elect to do so. Nothing further need be said regarding the alleged partition, except in so far as the discussion of the statutory bar may also be relevant to possession under the partition, the tax deed, and Denton's deeds to his children.

Furthermore, the claim of title set up by the heirs of Lorenzo Denton to his sister's moiety of the land, predicated solely upon the tax deed, has no inherent merit, barring for the present the discussion of the applicability of the statute of limitations pleaded and relied on by appellees. The tax sale and deed had for a foundation nothing other than a faulty or unauthorized assessment. The law in this state does not recognize an assessment of an undivided interest in land, though otherwise as to a town lot. If any undivided interest should be omitted from the land books for a period of five successive years, the title to the entire tract would become forfeited and vest in the state. *Toothman v. Courtney*, 62 W. Va. 167, 183, 184, 58 S. E. 915. The same result naturally follows the tax delinquency of a like interest, and, though not working a forfeiture, it does render the entire tract liable to sale by the sheriff, unless previously paid or the land redeemed before the tax deed is made to the purchaser. "A tax deed purporting on its face to convey an undivided interest in land other than a town lot is unauthorized by law, inoperative, and not conclusive as to any one." *Cafetta Railway Co. v. Fisher*, 74 W. Va. 115, 81 S. E. 710. *Toothman v.*

Courtney, supra. Nor will a payment by one owner of a portion of the taxes assessed against the whole of a tract of land in which he is interested, corresponding with his interest therein, prevent the delinquency of the entire tract, as we recently held in *State v. Central Pocahontas Coal Co.*, 98 S. E. 214.

To evade or avoid the consequences likely to result from the application of these principles, and to give the semblance of regularity to what ensued, Lorenzo Denton in 1860, without the knowledge and concurrence of his sister or her husband, procured the separate entries of half the acreage of the tract on the land books in his name, and the other half in the name of his sister's husband; and thereafter the taxes were assessed thereon accordingly, though from 1855 to 1860 the land was charged and taxes assessed in the name of and against both Lorenzo Denton and Thomas Hutchens, the former of whom paid the taxes and demanded return of half the amount so paid. This he did, the bill charges, pursuant to an arrangement entered into by Lorenzo Denton and Thomas Hutchens before the departure of the Hutchens for Illinois in 1855. This allegation the appellees deny. But, notwithstanding the denial, it is significant that, until the tax sale relied on by the appellees to defeat partition, Lorenzo Denton did what the bill charges he agreed to do during the absence of his sister. Performance by him to this extent clearly appears from the testimony of his son Douglas A. Denton. The testimony of this witness goes far towards establishing the alleged agreement, though also the breach thereof by the Hutchenses. For he says:

"He [Lorenzo Denton] simply looked after it [the land] and paid it [the taxes] with the understanding that they [the Hutchenses] were to pay him, not because he felt he needed to; and Mr. Hutchens never would pay the taxes [clearly meaning the reimbursement of his father], and that's the reason that he [Lorenzo] let it [the land] go eventually."

A further corroborative fact, testified to by the same witness on cross-examination, is the repayment by the Hutchenses of part at least of the taxes paid by Lorenzo. To that extent his testimony is inconsistent, not to say contradictory. Apparently there was some agreement regarding taxes chargeable to the entire tract, the disregard of which by the Hutchenses did not warrant the course adopted by Lorenzo Denton without the least pretense of legal formality or regularity. There was available for him recourse to approved legal methods by which to enforce repayment of moneys expended for the benefit of his sister. There may indeed be some question whether there was default by the Hutchenses in reimbursing appellees' ancestor. Certainly the extent of the failure on their part is not established. But if it were, that fact alone did not warrant the tax sale

or render legal the procedure through which it is claimed Lorenzo Denton acquired the title to the whole tract.

The alteration in the mode of assessment so long acquiesced in by the parties, and the assignment as cause therefor of the oral partition effected in 1855, if at all, is out of harmony with the tax deed. Though its recitals are of a delinquency occasioned by the failure to pay taxes on 100 acres in the name of Thomas Hutchens, the deed describes the land sold, purchased, and conveyed as being the undivided one-half of a tract of 200 acres, the half willed to Margaret Hutchens by Benjamin Denton. And as if to avoid misapprehension, the deed sets out at length the calls of the 200-acre tract as they appear in the conveyance to the testator.

In furtherance of the attempt to sustain the decree, appellees in their answer filed in the cause pleaded and relied on the possession of Lorenzo Denton taken and held under the tax deed, and their possession under his deed to them in 1801. The combined possession of the father and children under these deeds, if the possession so combined had the requisites necessary to constitute an adverse holding, exceeds the statutory 10-year limitation period required to effect an ouster. Upon this phase of the case the proof introduced to show title by operation of the statute is directed exclusively to possession under the alleged partition without regard to the tax deed. This dissociation of the sources of the entry on the land may not be material. Granting that it is not, what of the acts done indicative of an intent to assert a claim hostile to the life tenant, and of which she lawfully was bound to take notice? These acts consisted of the removal and sale of timber, the clearing and fencing of a boundary containing not to exceed 3 acres in a tract of 200 acres not partitioned between the parties interested. Until the severance of the land into two equal parcels, or the acquisition of Mrs. Hutchens' half by some method recognized by law as valid and sufficient to bind the remaindermen, each of the co-owners could lawfully cut and remove such timber as their necessities demanded for use on the land itself, subject, however, to be called to account for an abuse of the privilege. Such are the rights of joint owners of an undivided tract of land, a right as old as the doctrine of tenancies itself. Each tenant is seised "per my et per tout," according to the old Norman-French expression. Nothing done in the cutting and removal of the timber, the quantity cut and removed not being disclosed by the testimony, except by the vague statement, "a good bit," warranted the assumption of a design to create an estate under the statute of limitations; nothing to bar the right of the life tenant or the remainderman after her death to resume possession of the undivided interest, when set off to them as proposed in the suit. For it

must be remembered that it is not what Mrs. Hutchens failed to do to protect her rights and the rights of her children, but what Lorenzo Denton did or caused or permitted to be done that counts under the statute. *Guthrie v. Beury*, 82 W. Va. 443, 96 S. E. 514.

[4-6] Thus far, however, we have spoken only of the abortive partition and tax deed. But what we have said applies with equal force to the alleged possession of the children of Lorenzo Denton under his deeds to them. Their execution, the appellees contend, set in motion the statute of limitations, and their possession thereunder, continued for 10 years, operated to oust her and her children and vest complete title in them before the institution of this suit in 1914. In this connection the character of the land has an important bearing. It is wild and uninclosed, except here and there in small parcels not identified, and it is undivided and uninclosed except as to the parcels cleared and cultivated. With these exceptions and some residences erected by appellees it is in its natural state or condition, we must assume, because there is no evidence to show the contrary. Had the fact been otherwise, certainly the proof to establish it would have been produced. So vital a matter would not have been overlooked.

It is undoubtedly true that if one coparcener or cotenant conveys the entire tract to a stranger, who takes actual possession claiming the whole, it is an ouster of the other coparcener or cotenant. The stranger's possession is adverse to them, and the statute of limitations runs in his favor. *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *Lloyd v. Mills*, 68 W. Va. 241, 69 S. E. 1094, 32 L. R. A. (N. S.) 702; *Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016. But in this case the deed relied on as constituting the ouster and beginning the adverse possession was not made to a stranger, but to privies in estate, who later at the death of their father would have become tenants in common with their aunt, and after her death with her children, the plaintiffs. Had Lorenzo Denton not made a deed to his children, they at his death would have become subject to the duties owed by him to his sister and her children respecting the land. A stranger in title would not be bound. A deed to him and possession thereunder would operate as adverse and sufficient to put the statute into operation. But a deed by a cotenant to his heirs who are under such prospective duties is of a different character, and is not presumed to be adverse, for the relations between tenants in common are presumed to be amicable rather than hostile, and the acts of one affecting the common property done for the common benefit.

However, it unnecessary to decide whether the deeds of 1801 and possession under them in fact effected an ouster of Mrs. Hutchens. As we have construed the will under which the parties claim, she took a life estate in one-

half only, with remainder over to her children to be sold and the proceeds to be divided among them. Under no circumstances could the statute of limitations run against them, for they had no right of entry until the termination of the life tenancy. "As to rights in land there can be no ouster or the running of the statute of limitations against one until he has right of entry." *Lynch v. Brookover*, 72 W. Va. 211, 77 S. E. 983; *Titchenell v. Titchenell*, 74 W. Va. 237, 81 S. E. 978. Hence as to appellants the statute did not begin to run until her death in 1909, even on the assumption that the deeds of 1901 and the possession of the appellees thereunder did disseize the life tenant. From that date, and not before, the ouster became operative against appellants. Such ouster does not necessarily mean physical eviction, but simply marks the time from which the statute begins to run; nor within the period thereby prescribed does it destroy the cotenancy, or affect the remedies of the disseized cotenant to recover possession of the land, or its proceeds, by a suit for partition. *Cecil v. Clark*, 44 W. Va. 659, 80 S. E. 216; *Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016.

For the reasons stated, our order will reverse the decree, and remand the cause for further proceedings according to the principles herein enunciated.

(83 W. Va. 598)

JOHNSON'S EX'RS v. JOHNSON'S HEIRS
et al. (No. 3541.)

(Supreme Court of Appeals of West Virginia.
March 11, 1919.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM \S 8(2) — **INDEBTEDNESS AGAINST INSOLVENT ESTATE — SURETYSHIP FOR DECEASED.**

A debtor of an insolvent estate may, in a court of equity, set off his liability as surety for the deceased, and is entitled to withhold payment of his debt until the amount of such liability is determined.

2. EXECUTORS AND ADMINISTRATORS \S 416 — **TRUSTS** \S 136½ — **MINGLING TRUST FUNDS — INSOLVENCY OF TRUSTEE — DISTRIBUTION.**

One, receiving money from another to be invested for the latter's benefit, who mingles it with his own funds and lends the whole to a third person ignorant of the trust, taking his note therefor payable to himself, thereby becomes a trustee for the person advancing the fund to the extent of the latter's interest, whose equity therein is superior to the rights of general creditors of such trustee; and, in case the trustee dies leaving an insolvent estate, is entitled to prorate, on the full amount of his claim, in the distribution of the assets with other general creditors, provided the trust

fund and such pro rata distribution, together, do not result in overpayment of his claim.

3. TRUSTS \S 356(2) — **LOAN OF TRUST FUND — RIGHTS OF BORROWER.**

The equitable right of the borrower of such funds to set off his liability as surety for the trustee is superior to the equity of the cestui que trust in the fund.

4. EXECUTORS AND ADMINISTRATORS \S 416 — **INSOLVENCY — CLAIM AGAINST ESTATE OF DECEASED TRUSTEE — STATUTES.**

Trust funds, which a deceased trustee has mingled with his own and consumed or dissipated in his lifetime, are not a preferred claim against his insolvent estate. Clause 3, \S 25, c. 85, Barnes' Code (Code 1913, \S 4013), does not embrace such claims; they fall in class 4 with general demands.

(Additional Syllabus by Editorial Staff.)

5. SET-OFF AND COUNTERCLAIM \S 8(1) — **ACTIONS AT LAW — COMMON AND STATUTE LAW.**

The right of set-off in actions at law was not recognized by the common law, and exists only by virtue of statutes, but a different rule has always obtained in equity, where the doctrine, derived from the civil law, is generally applicable where party seeking its benefit can show some equitable ground entitling him to protection against adversary's demand.

Appeal from Circuit Court, Greenbrier County.

Suit by A. E. Johnson's Executors against A. E. Johnson's Heirs, and others, to judicially determine testator's debts with petition in the cause by May Irons and answer to petition in nature of a cross-bill by W. E. McClung and wife. Decree for May Irons against W. E. McClung, and dissolving an injunction awarded in vacation restraining the trustee's sale, and McClung and wife appeal. Reversed in part and affirmed in part and cause remanded.

See, also, 80 W. Va. 497, 92 S. E. 795.

Thos. N. Read, of Hinton, for appellants.
S. N. Pace, of Lewisburg, and Jno. L. Rowan, of Union, for appellee.

WILLIAMS, J. This appeal by W. E. McClung and Relda McClung, his wife, from a decree made on the 14th of September, 1917, in the suit of A. E. Johnson's executors against A. E. Johnson's heirs and others, for the purpose of having the testator's debts judicially determined and the lands devised by him sold to pay the same, presents the following questions, viz.:

(1) Can a debtor of an insolvent estate set off a debt owing by the estate for which he is liable as surety?

(2) Where the deceased, in his lifetime, accepted money from another to be invested for the latter's benefit and lent it to a third person, taking his note therefor payable to

himself, which after his death is listed and appraised as an asset of his estate, is the person advancing the money entitled to the proceeds of such note as against the general creditors of the estate?

(3) The borrower of such fund being also surety for the deceased on a note made in his lifetime, and ignorant of the trust, is his right of equitable set-off superior to the right of the cestui que trust?

All these questions must be answered in the affirmative. In order to understand their relevancy it is necessary to state the facts to which the principles are applicable. Miss May Irons, a niece of A. E. Johnson, deceased, mailed to him her unfilled check, about the 1st of April, 1913, and on the 2d of April he wrote her as follows:

"Your letter with check received—I filled it for \$1,000.00. I am going to let McClung have about \$1,500.00 and will take trust deed for \$2,500.00 and will let you hold note when I get it and will send you check for commission along with note. This will be your receipt for check until the matter is adjusted."

The Mr. McClung mentioned in the letter is W. E. McClung, the appellant. Mr. Johnson did not, apparently lend Mr. McClung as much money as he stated in his letter he intended to lend him, but did lend him \$2,000, \$1,000 of which was Miss Irons' money, and took McClung's note for \$2,000, payable to himself and also a trust deed from McClung and wife on McClung's farm of 100 acres to secure it; and on the 6th of June, 1913, again wrote Miss Irons as follows:

"I received your letter some days ago, I have Mr. McClung's note for \$2,000.00 two thousand dollars secured by deed of trust and the trust deed recorded, one-half of the note is yours and one-half is mine. There is still in my hands something over \$100.00 belonging to Mr. McClung. I have waited for him to call for it but he does not seem to need it badly. The note is in the Farmers' Bank of Union and I will arrange it to suit you. Either give you my note for \$1,000.00 and let you hold the McClung note as collateral or fix you a paper and pin it to the note to show that $\frac{1}{2}$ of it is yours."

Mr. McClung was surety for said Johnson on a note for \$2,000 payable to Jesse F. Bright. But whether he became surety before or after he borrowed the \$2,000 from Johnson does not appear, nor do we think the time is material. On the face of the note to Bright, McClung appears to be maker and Johnson indorser, but McClung proved by competent witnesses that Johnson was the principal debtor, and that he was accommodation maker, and his suretyship is not now questioned. It is admitted that McClung's note should be credited with the following partial payments made to Johnson in his lifetime, viz.: \$1,200 as of April 1, 1914, and \$50 as of April 5, 1915. There is no evidence that McClung ever knew Miss Irons had fur-

nished part of the money he borrowed from Johnson, until after the latter's death.

A. E. Johnson died testate, and by his will disposed of a considerable amount of property, real and personal, and his estate is insolvent. His executors brought this suit to settle his estate, and the cause was referred to a commissioner for the purpose of convening the creditors, taking an account of the assets and liabilities of the estate and reporting thereon to the court. The commissioner reported Miss Irons' claim as a debt of the general class against the estate, and she excepted to the report, and also filed her petition in the cause, setting up a trust in the debt due from McClung, based on the facts above stated. The executors waived process and appeared to the petition, and the court sustained Miss Irons' exception to the commissioner's report, and held her to be an equal owner with Johnson's estate in the fund loaned to McClung, and decreed that the executors execute to her a writing acknowledging her right to \$1,000 in said McClung debt, with interest thereon from April 1, 1913, and also authorized her to have the McClung trust deed foreclosed for the collection thereof. This decree was entered December 23, 1916, before McClung had appeared to the petition. He was not made a party to it nor served with process thereon, and, of course, the decree as to him was void. The trustee had advertised his property for sale, under the deed of trust. He then presented to the judge, in vacation, his answer to said petition, which answer is also in the nature of a cross-bill, denying the allegations of the petition, averred payment of the note, and prayed for an injunction to restrain the trustee from selling, and also claimed the right to set-off the debt due from Johnson's estate to Jesse F. Bright, on which he was surety, against the debt he owed the estate. Mrs. Relda McClung, wife of W. E. McClung, having acquired title to the land since the execution of the trust deed, is also made a party to the cross-bill answer. On the hearing of the issues thus presented, the court, on the 14th of September, 1917, decreed that there was \$1,061.54 of the McClung note unpaid, and gave Miss Irons a decree therefore against W. E. McClung, with interest from that date, and decreed it to be a lien upon 80 acres of the 100-acre tract of land covered by the deed of trust. It appeared that McClung had previously sold and conveyed 20 acres thereof and applied the proceeds, to wit, \$1,200, derived therefrom on his debt to Johnson, the latter then releasing his trust lien to that extent. The court also dissolved the injunction previously awarded in vacation restraining the trustee's sale. From that decree McClung and wife have taken this appeal.

[1-3] That Miss Irons was the equitable owner of one-half the McClung debt is fully established by Mr. Johnson's letters to her

above quoted; and that she has a right to her portion of the fund, provided so much remains unpaid, as against the general creditors of Johnson's estate, is well settled by our decisions. *Hogg v. McGuffin*, 72 W. Va. 86, 77 S. E. 552. Her situation is similar to that of a principal who furnishes money to an agent with which to buy land for him, and the agent invests it in land and takes title to himself. There a constructive trust arises in favor of the principal. The same rule is applicable here, and, while Johnson appears on the face of the note to be the owner of the whole of the fund, he was in fact absolute owner of one half only and trustee for Miss Irons for the other half, which gives her an equity in the particular fund, which is superior to the claims of general creditors.

[5] Not having paid the debt to Bright on which he is surety, McClung would not be entitled to set it off against his debt to the estate; in an action at law, it is still his mere liability. *Minor v. Minor's Adm'r*, 8 Grat. (Va.) 1; *Mercein v. Smith, Adm'r*, 2 Hill (N. Y.) 210; and *Granger's Adm'r v. Granger*, 6 Ohio, 35. The right of set-off in actions at law was not recognized by the common law, and it is only by virtue of statutes that the right exists in actions in courts of law. But a different rule has always obtained in equity. The doctrine is derived from the civil law, and is generally applicable whenever the party seeking its benefit can show some equitable ground entitling him to protection against the demand of his adversary. 3 Story's Eq. Jur. (14th Ed.) § 1872.

The insolvency of Johnson's estate, in this instance, supplies the necessary equitable grounds, entitling McClung, who is only surety for the estate, to protection, so far as he can be protected, against the debt due to Mr. Bright. The amount McClung may have to pay Bright on account of his suretyship is not known, as the record does not disclose what per centum of its indebtedness the estate will be able to pay; and McClung has a right to stay collection of his note until that matter is ascertained. He is liable to Bright only for the unpaid portion of Bright's debt, after he has received his pro rata share of the proceeds from the assets of the estate. This principle is established by numerous well-considered cases. *Feazle v. Dillard*, 5 Leigh (Va.) 30; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Scott v. Timberlake*, 83 N. C. 382; *Tuscumbia, etc., R. R. Co. v. Rhodes*, 8 Ala. 206; *Coffin v. McLean*, 80 N. Y. 560; *Smith v. Felton*, 43 N. Y. 419; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Beaver v. Beaver*, 23 Pa. 167; *Becker v. Northway*, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; *Merwin v. Austin*, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84.

Washington v. Castleman, 31 W. Va. 832, 8 S. E. 603, in which the court denied a

creditor of an insolvent estate the right of set-off, is distinguishable from the cases above cited. There it appears that the decedent had, in his lifetime, leased his farm to his son for a term of five years, reserving rent payable annually in a certain portion of the crops. The decedent owed the lessee at the time of his death, which amount the lessee sought to set off against the rents accruing subsequently, and was not permitted to do so, apparently on the ground that rents, accruing subsequently to the death of the lessor, passed with the land to the heirs, and was therefore not a debt due to the estate. Moreover, in that case the rents had been sequestered by the appointment of a receiver who had collected them.

It is a condition of the right of equitable set-off against an insolvent debtor's estate that the liability must have existed at the time of decedent's death, and that is the case here. As between McClung and Johnson, the latter acted for himself and an undisclosed principal, and took McClung's note payable to himself. Hence payment to Johnson without knowledge of the secret trust in favor of Miss Irons would have discharged the debt. McClung did in fact pay a little more than half of it, which Miss Irons' counsel admits. We perceive no reason why his right of equitable set-off is not of equal dignity with payments made to Johnson, the liability to be set off having been contracted before he learned of Miss Irons' latent equity, and we think this rule furnishes a correct solution of the controversy. McClung's situation is analogous to that of a person dealing with a factor selling goods for an undisclosed principal. In such cases it is held that, in a suit by the undisclosed principal for the price, the purchaser may set off against his demand a debt due him from the factor. *Hogan v. Shorb*, 24 Wend. 458; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159, 28 Am. Dec. 286; *Waterman on Set-Offs* (2d Ed.) § 291. Lord Mansfield, in *Rabone, Jun., v. Williams*, cited in a note to *George v. Clagett*, 7 Term Rep. 361, says:

"Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled."

[4] Miss Irons has a right also to participate in the funds belonging to Johnson's estate as a general creditor only. Johnson having taken the note for the whole sum of money lent to McClung in his own name, one-half of which was hers, he thereby became her trustee, and she has a right to participate in the distribution of the assets

among the general creditors, on the whole amount of her trust debt, without abandoning her right to pursue the particular fund in McClung's hands, and thereby obtain whatever portion of the fund, if any, that remains in his hands after the set-off has been applied in his favor, provided such sum is not more than sufficient to pay her claim. *Williams et al. v. Overholt*, 46 W. Va. 339, and cases cited at page 340, 33 S. E. 226. But her claim against the estate is in no sense a preferred one. While it is true her debt is a trust obligation upon the estate, it is not favored any more than general unsecured debts. Section 25, c. 85, Barnes' Code (Code 1913, § 4013), providing for the administration of an insolvent estate, does not prefer debts owing by the deceased in the capacity of trustee. Such debts are not embraced in the terms of clause 3 of said statute. *Price's Ex'rs v. Harrison's Ex'rs*, 31 Grat. (Va.) 114; and *Brown v. Lambert's Adm'r*, 33 Grat. (Va.) 256. The statute in Virginia has been amended since 1860, so as to include among preferred claims of the third class debts owing by a trustee, and this has been construed by the Virginia court to mean trustees created by an express trust. But our statute is practically the same as the Virginia statute was in 1860.

So much of the decree appealed from as dissolved the injunction and denied appellant W. E. McClung the right to set off his liability to Bright against the balance due on his note to the estate of A. E. Johnson, deceased, and decreed Miss Irons a recovery against McClung for \$1,061.54, will be reversed, and in other respects it will be affirmed, with costs to appellant, and the cause remanded for further proceedings therein according to the principles herein announced, and further according to the rules and principles governing courts of equity.

(83 W. Va. 609)

DAVIS COLLIERY CO. et al. v. TOWN OF HARDING et al. (No. 3631.)

(Supreme Court of Appeals of West Virginia. March 11, 1919.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — § 697(2) — VACATION OR OBSTRUCTION OF STREET — INJUNCTIVE RELIEF — DAMAGES.

To entitle a property owner to injunctive relief against the vacation or obstruction of a public street or road by public authority, his property must abut on that part of the road so vacated or obstructed, or he must show that he will thereby suffer special or peculiar damage or inconvenience not common to all.

Appeal from Circuit Court, Randolph County.

Bill for injunction by the Davis Colliery Company and others against the Town of Harding and others. From a decree dissolving preliminary injunction and dismissing bill, plaintiffs appeal. Affirmed.

Samuel T. Spears and W. E. Baker, both of Elkins, for appellants.

MILLER, P. The decree appealed from dissolved the preliminary injunction and dismissed the bill, and plaintiffs have appealed.

The bill asking no other relief sought to perpetually enjoin the defendants, the town of Harding, a municipal corporation, and its mayor and common council, and Otho O. Hayes, from obstructing a part of one of the public streets, once a part of one of the county roads of Randolph county, and to compel them and each of them to remove obstructions already placed in said road, and there was also a prayer for general relief.

Plaintiffs do not claim to be owners of any of the tracts or lots of land abutting on that part of the road alleged to have been obstructed, but they do allege and prove that they are each owner of a lot or tract abutting on other parts of the road so obstructed or on another street reached thereby, and are entitled to the free and unobstructed use thereof in traveling to and from their respective properties.

The bill alleges that defendants seek to justify their interference with the rights of plaintiffs by an ordinance of the common council of said town, passed on April 14, 1916, whereby it was ordered that part of the road in question, further described as "leading across lots of Tony Leber and O. Hayes" should be closed up "on account of the same being declared a nuisance."

It is conceded that section 28 of chapter 47 of the Code (sec. 2400) gives the town council of said town "plenary power and authority therein to * * * vacate, close, open, alter, * * * and keep in good repair, roads, streets, alleys, sidewalks, * * * for the use of the public," and that the action of the town council was had pursuant to this provision of the law. But the claim of counsel for appellants is that the power of the council is limited by the statute to cases where its action will result in a public benefit and not alone in the interest of and for the benefit of a private individual. For this proposition we are cited to *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275, points 6 and 7 of the syllabus.

Conceding for the moment that the action of the town council in closing the road was void for the reasons alleged, the question confronting plaintiffs is, have they any right to enjoin the action of the council or the acts of the other defendants done under it? The general rule obtaining everywhere is that to entitle a property owner to any injunctive

relief against the vacation of a street or highway by public authority, he must show that he will suffer some special or peculiar injury or inconvenience not common to all other persons in that neighborhood, and generally he must show that his property joins or abuts on that part of the road or street sought to be vacated, or that the part sought to be vacated furnishes the only means of access to his property, for if he has some other means of access thereto by other streets and public highways he is simply one of the general public suffering an inconvenience common to all. 13 R. C. L. p. 75, § 67; Bryant v. Logan, 56 W. Va. 141, 145, 49 S. E. 21, 3 Ann. Cas. 1011; Fowler v. N. & W. Railway Co., 68 W. Va. 274, 278, 69 S. E. 811.

To bring themselves within the rule of peculiar and special injury not sustained by the public in general, the bill alleges that the town council has provided another road or street in the same vicinity and leading to and from their respective properties, but that the new road or street is not so convenient or useful because of the differences in grade in favor of the old road and that they are not able to haul as large loads over the new as over the old road, the grade of the old road being 6.21 per cent., that of the new 15.27 per cent., and, according to the witnesses, plain-

tiffs can haul double the amount over the vacated road that they are able to haul over the new road; and other inconveniences of the new road over the old are shown, but they are common to all and not special or peculiar to the plaintiffs, albeit the plaintiffs may be inconvenienced in a different degree.

The answer denies that the action of the council is void for the reasons alleged, or that the plaintiffs have sustained any actual injury or inconvenience not common to the public in general, and affirm that the new road or street was used by the plaintiffs often in preference to the old road when it was still in use; they allege also that the new road has advantages over the old in point of roadbed, etc. But we need not deal with these controverted facts, for in our view of the case plaintiffs neither by pleadings nor proof have made out a case of special damages and for that reason are not entitled to the injunctive relief prayed for. The authorities relied on by them are all inapplicable to the case presented by the bill. All, like that of Pence v. Bryant, *supra*, either involve the claim of an abutting owner or of one having some right or title to the land occupied by the street or road, or in private easements, and are inapplicable.

Our conclusion is to affirm the decree.

(23 Ga. App. 522)

SWICORD v. CRAWFORD et al. (No. 7787.)

(Court of Appeals of Georgia, Division No. 2.
April 4, 1919.)*(Syllabus by the Court.)***1. BANKS AND BANKING** \S 47(1)—**STOCKHOLDERS' LIABILITY TO DEPOSITORS.**

"Stockholders in a bank incorporated under the laws of this state since the passage of the act of 1893, * * * whether original subscribers, or purchasers of stock from the corporation, or transferees of such stockholders, are individually liable equally and ratably (and not one for another as sureties) to depositors of said corporation for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock." *Crawford v. Swicord*, 147 Ga. 548, 94 S. E. 1025.

2. BANKS AND BANKING \S 49(4)—**INSOLVENCY—SUIT AGAINST STOCKHOLDERS—SET-OFF.**

"(1) In a suit brought by the receivers of an insolvent bank, chartered under the laws of Georgia since the act of 1893 (Acts 1893, p. 70), against a stockholder thereof upon his statutory individual liability to depositors of the bank (Civil Code 1910, § 2270), the defendant cannot set off the amount of his individual deposits which he had in the bank when it became insolvent and ceased to operate. (2) Nor can he set off an amount of money which, subsequently to the insolvency and closing of the bank, but prior to the commencement of such suit against him, he voluntarily paid to other depositors of the bank to reimburse them for the loss of their deposits." *Swicord v. Crawford et al.*, 148 Ga. 719, 98 S. E. 343.

3. RULING ON GENERAL DEMURRER.

The ruling in the first headnote was made by the Supreme Court when this case was carried there by certiorari, and the contrary ruling (20 Ga. App. 35, 92 S. E. 394) was thereby reversed and overruled. Under the ruling of the Supreme Court, the trial court did not err in overruling the general demurrer to the plaintiff's petition. The contrary ruling by this court is on review hereby expressly overruled.

4. TRIAL BY COURT—JUDGMENT.

Under the ruling in paragraph 2, *supra*, the judge, sitting without the intervention of a jury, did not err in rendering a judgment for the plaintiff for the full amount sued for.

5. VACATION OF FORMER JUDGMENT.

The former judgment of reversal rendered by this court and reported in 20 Ga. App. 35, 92 S. E. 394, is ordered vacated, and the plaintiff in error is taxed with all costs of the proceedings in the trial court and in the reviewing courts.

Error from City Court of Cairo; W. J. Willie, Judge.

Suit by W. T. Crawford and others, receivers, against S. P. Swicord. Judgment for plaintiffs, and defendant brings error. Affirmed in conformity to instructions of the Supreme Court (98 S. E. 343), on request for instruction.

S. P. Cain, of Cairo, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiff in error.

M. L. Ledford and Claude Christopher, both of Cairo, for defendant in error.

BROYLES, P. J. Judgment affirmed.
BLOODWORTH and STEPHENS, JJ., concur.

(23 Ga. App. 535)

CARSON v. STATE. (No. 10337.)

(Court of Appeals of Georgia, Division No. 2.
April 4, 1919.)*(Syllabus by the Court.)***1. CRIMINAL LAW** \S 1064(1)—**MOTION FOR NEW TRIAL—SUFFICIENCY.**

The first and second special grounds of the motion for a new trial being so incomplete within themselves as to require a reference to each other and to the brief of the evidence, to ascertain the errors complained of and their materiality, under repeated rulings of the Supreme Court and of this court these grounds cannot be considered.

2. ASSAULT WITH INTENT TO MURDER.

Under the facts of the case the court did not err in charging the jury upon the law of assault with intent to murder.

3. CRIMINAL LAW \S 1064(4)—**MOTION FOR NEW TRIAL—ADMISSION OF DOCUMENTARY EVIDENCE.**

The special ground of the motion for a new trial which complains of the admission of certain documentary evidence cannot be considered, as the evidence is not set forth in the ground, either literally or in substance, or attached thereto as an exhibit. *Gaskins v. State*, 17 Ga. App. 807, 88 S. E. 592 (2).

4. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Squire Carson was convicted of an offense, and brings error. Affirmed.

O. M. Duke, of Flovilla, for plaintiff in error.

E. M. Owen, Sol. Gen., of Zebulon, for the State.

BROYLES, P. J. Judgment affirmed.

BLOODWORTH, J., concurs.

STEPHENS, J. (specially concurring). I concur in all but the ruling announced in the first paragraph of the decision. I am of the opinion that the first and second special grounds of the motion for a new trial are

complete within themselves, but possess no merit. I therefore concur in the judgment of affirmance.

(177 N. C. 323)

COBLE et al. v. WHARTON. (No. 390.)

(Supreme Court of North Carolina. April 15, 1919.)

**SALES §472(2) — CONDITIONAL SALES —
"PURCHASER FOR VALUE."**

Defendant trustee under an assignment for benefit of creditors was a "purchaser for value," within Pell's Revisal, §§ 982, 983, and his title under assignment recorded prior to contract of conditional sale should be preferred to that of seller.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchaser for Value.]

Appeal from Superior Court, Guilford County; H. P. Lane, Judge.

Controversy without action between H. M. Coble and another, partners trading under the firm name of the Coble & Starr Motor Company, and E. P. Wharton, trustee. Judgment for defendant, and plaintiffs appeal. No error.

From the facts submitted, it appears that on March 16, 1918, plaintiff bargained, to Richardson Hay & Grain Company, a motor-truck for \$2,950, and that \$2,000 of the price remains unpaid; and on February 7, 1919, plaintiffs bargained to same firm another motortruck for \$2,500, and that \$1,125 of this price remains unpaid; that, in evidence of the contract and in security of the balance due, the plaintiff took from the purchaser, in each case, a written instrument, constituting a conditional sale of the property to secure the respective amounts due, and the property was at the time delivered to the purchaser, who had the same in possession and use till the time hereinafter set forth; that these instruments were duly proved and recorded in said county on March 3, 1919; that on March 1, 1919, said company, having become insolvent, executed to defendant in proper form, etc., a general deed of assignment for the benefit of creditors for all property, real and personal, of the company, including said trucks; that on the same day, March 1, 1919, the said instrument was duly proved, recorded in said county, and the property delivered to defendant, according to its terms, who still has the same in possession; that the assets of the company, the grantor in said deed of assignment, are largely insufficient to pay off and discharge the indebtedness of the company, and the question is as to the ownership and right of possession of the trucks included in the conditional sale to plaintiff.

C. R. Wharton and Chas. A. Hines, both of Greensboro, for appellants.

King & Kimball, of Greensboro, for appellee.

HOKE, J. Since 1883, it has been the law of this state that, in order to be available against creditors or purchasers for value, a conditional sale must be reduced to writing and registered as in case of chattel mortgages. Pell's Revisal, §§ 982, 983. And, in numerous decisions on the subject, it has been held that a trustee, in a general assignment for the benefit of creditors, is a "purchaser for value" within the meaning of the statute; some of them being directly to the effect that such a trustee, when the instrument under which he acts is first registered, will take precedence over the rights of a vendor whose interests are protected and embodied in a conditional sale prior in date but subsequently registered. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526; Bank v. Cox, 171 N. C. 76-81, 87 S. E. 967; Odom v. Clark, 146 N. C. 544-552, 60 S. E. 513; Drill Co. v. Allison, 94 N. C. 553; Brem v. Lockhart, 98 N. C. 191; Potts v. Blackwell, 57 N. C. 58; s. c., 56 N. C. 449.

In Observer Co. v. Little, the court said:

"By the express terms of the law, * * * and under various decisions construing the same, these conditional sales are to be regarded as chattel mortgages and void as to creditors and purchasers except from registration"—citing Clark v. Hill, 117 N. C. 11, 23 S. E. 91. 53 Am. St. Rep. 574; Brem v. Lockhart, supra. etc.

In Bank v. Cox, supra, it is said:

"They contend that plaintiff was not a purchaser for value within the meaning of the registration laws, because its mortgage was made to secure an antecedent debt; but we have decided otherwise in numerous cases. Odom v. Clark, 146 N. C. 544, 552 [60 S. E. 516], where it was said that 'Claimants who now object to the judgment are holders of pre-existing debts provided for in these deeds. It has been held with us that such debts are sufficient to constitute the holders purchasers for value, within the meaning of our registration laws. Brem v. Lockhart, 98 N. C. 191, cited with approval in Moore v. Sugg, 114 N. C. 292 [19 S. E. 147].'"

See, also, Brown v. Mitchell, 168 N. C. 312, 84 S. E. 404, Ann. Cas. 1917B, 933; Southerland v. Fremont, 107 N. C. 565-572, 12 S. E. 37; Potts v. Blackwell, 57 N. C. 58. And in Brem v. Lockhart, a case decided not long after the enactment of the statute and involving the precise question presented in this record, on an issue between a trustee under a general assignment for creditors and the holders of a conditional sale in writing but not registered, in upholding the title of the trustee, the court said:

"The statute applicable to chattel mortgages or deeds conveying personal property in trust to secure debts, to facilitate the making of which a form is given, thus extended to conditional sales or contracts in which the title remains in the vendor as a security for the purchase money, declares them to be 'good to all intents and purposes when the same shall be duly registered according to law.' Section 1274.

"These instruments are thus brought under the operation of the previous general law, which refuses any validity to deeds of trust or mortgages of real or personal estate as against creditors and purchasers for a valuable consideration from the bargainor and mortgagor until they are registered. Section 1254. The effect produced by this legislation upon conditional sales of personal goods is to render inoperative so much of the contract as undertakes to reserve property in the vendor as a security for the purchase money, unless and until the contract is registered, and, so far as creditors and purchasers for value are concerned, the transfer must be absolute and unconditional."

Under the principle recognized in these cases, and many others could be cited, the court below correctly ruled that the title of the defendant, the trustee, under a general assignment for creditors, registered March 1, 1919, should be preferred to that of the vendor whose interests were secured and embodied in a contract of conditional sale, executed some time before but not registered until March 3d, two days thereafter. It is earnestly contended for plaintiff that *Brem v. Lockhart* is in such conflict with other decisions of the court, and has been so modified by later cases on the subject, that it can no longer be regarded as authoritative in support of defendant's claim, citing for the position, among others, *Bank v. Bank*, 158 N. C. 238, 73 S. E. 157; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. 892; *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237; *Day v. Day*, 84 N. C. 408; *Small v. Small*, 74 N. C. 16. But we do not so interpret the decisions relied upon. They all hold, as plaintiff contends, that, in order to constitute one a purchaser for value, affording protection for his estate against equities, there must be a new consideration moving between the parties and, for such purpose, an existent or antecedent debt will not suffice. But the equities referred to in these and other similar cases are those inherent in the property itself, which antagonize the estate or interest of the alleged or present owner and are superior to it when and to the extent they may be established, and the position does not extend or apply to deeds coming under our registration laws and which expressly provide that priority of right shall depend on the time of registration. A reference to some of the cases to which we were cited by plaintiff will serve to illustrate the kind of equities properly calling for application of the principle upon which he relies. Thus, in *Wallace v. Cohen*, supra, it was held that a vendor of goods, who had

been induced to sell the same by fraudulent representations on the part of the purchaser, was allowed to recover the same or their value from an assignee for the benefit of existent creditors; an equity for rescission of the contract of sale on the ground of fraud. In *Day v. Day*, a father, induced by the fraud of his son to make the latter a deed in fee without reservation of a life estate as the parties had intended, was allowed to have the deed reformed so as to express the true agreement as against a trustee for the benefit of the son's creditors; the distinction we are discussing being stated as follows:

"A third person to whom the son conveys such land in trust to pay his debts is a purchaser for value [both under 13 and 27 Elizabeth], but takes the land subject to the equity which had attached to it in the hands of his grantor"—an equity for reformation.

And in *Small v. Small*, where a grandson had purchased and taken title to his ward's land at a sale procured by him and conveyed the same in trust to secure antecedent debts, it was held that such conveyance afforded no protection against the claim of the wards in equity to ingraft a trust on the vendor's title. And in *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. 237, a case on which plaintiff greatly relies, and which he insists is in direct conflict with *Brem v. Lockhart*, two cosureties had signed an obligation for the payment of money with a third and primary surety, under an agreement between them that the latter should indemnify the cosureties as to one-half of the debt. In pursuance of such agreement, the primary surety executed a deed of trust on the property to one of the cosureties for the benefit and protection of both. Later, the surety, trustee, wrongfully, without the knowledge of the cosurety and without consideration, so far as appears, executed a deed of release to primary surety, relieving the property from the terms of the deed. The primary surety then mortgaged the land to his wife to secure an antecedent debt. It was held that the facts gave the cosurety an equitable right to have the release set aside, thus restoring his rights under the deed of trust made for his benefit. Here again the principle is stated as follows:

"The mortgages of land * * * to secure a pre-existing debt is a purchaser for value, under * * * 13 and 27 Elizabeth, but he takes subject to any equity that attached to the property in the hands of the debtor."

And in *Bank v. Bank* a similar ruling was made, the rights of the claimant in the property being made available to him under the equitable doctrine of subrogation.

While some of the expressions in *Brem v. Lockhart* have been commented on as being too broad, the decision in that case has been in no way modified or disturbed and is to the effect, as stated, that an assignee for benefit

of creditors, whether present or antecedent, is a "purchaser for value" within the meaning of our registration acts, and, when such an instrument is first recorded, the title of the assignee will be preferred to that of the original vendor of the property whose rights therein are evidenced and secured by a conditional sale unregistered or which has been registered subsequently to the deed. There is no error, and the judgment for defendant must be affirmed.

No error.

(177 N. C. 300)

MCINTYRE v. MURPHY, City Manager, et al.
(No. 385.)

(Supreme Court of North Carolina. April 15, 1919.)

1. MANDAMUS ⇨87 — DISCRETIONARY ACTS OF CITY COUNCIL—REFUSAL OF LICENSE.

Where, after petition against granting plaintiff a license to conduct a meat market was presented, city manager referred application for license to city council, pursuant to ordinance and city council, not acting arbitrarily or in abuse of its discretion, refused license under ordinance providing that license shall not issue if business will become a nuisance, court will refuse to order license to issue.

2. LICENSES ⇨20—LICENSE FOR MEAT MARKET—DISCRETION.

City manager and city council were vested with a sound legal discretion in refusing to grant plaintiff a license to conduct a meat market at a designated place.

3. LICENSES ⇨5½ — POLICE POWER — LICENSE FOR MEAT MARKET—REFUSAL.

The granting or refusing of a license to retail meats is an exercise of the police power of the city.

4. LICENSES ⇨20—LICENSE FOR MEAT MARKET—DISCRETION.

While there must be no arbitrary exercise of police power vested in city to refuse license to retail meats, the city is authorized to say where the market may be located, having due regard to appropriateness of locality, and whether it would be a nuisance at the point desired.

5. MANDAMUS ⇨87 — DISCRETIONARY ACTS OF CITY COUNCIL—REFUSAL OF LICENSE.

While court will compel an officer to exercise his discretion in passing upon an application for a license, or, if his action is found to be capricious or arbitrary, set it aside and require a reconsideration, it will not direct that city authorities shall locate a meat market at any designated point, which will be a nuisance.

Appeal from Superior Court, Guilford County; Adams, Judge.

Action by W. M. McIntyre against T. J. Murphy, City Manager, and the City Council of High Point, for a mandamus to require the issuance to plaintiff of a license

to operate a meat market upon the payment of the amount required in the ordinances for such license. Mandamus refused, and plaintiff appeals. Affirmed.

T. J. Gold, of High Point, and W. P. Bynum and R. C. Strudwick, both of Greensboro, for appellant.

Dred Peacock, of High Point, for appellees.

CLARK, C. J. [1] The plaintiff applied to the defendant Murphy, the city manager, for license to conduct a meat market at No. 115 South Main street in High Point. A petition against the grant of said license was filed by 76 citizens of the town, and the city manager referred the application to the city council as authorized by the city ordinance. The judge finds as a fact that the city council, at a meeting regularly and duly held, and after hearing the evidence, refused to grant the license. The judge finds that the plaintiff is a man of good moral character, and is an experienced and efficient market man. The city council refused the license under the provisions of section 6 of the Ordinances, which provides that no license shall issue to engage in any trade or business, mentioned in that section, if the applicant does not possess a good moral character or if the business will be a nuisance. The council evidently found the latter point against the applicant.

The court further found as a fact that—

"Neither the city manager nor the city council acted arbitrarily, or in abuse of the discretion vested in them, as officers of said city."

There was evidence in the record supporting such finding.

[2] The judge held properly, as a conclusion of law, that the city manager and city council were vested with the sound legal discretion to grant or refuse the license applied for, and that, having refused in the exercise of such discretion to issue a license to the plaintiff to conduct a meat market at the point desired by him, the court, in the absence of evidence of arbitrariness, would not compel them to issue the license.

The charter of High Point, Laws 1909, c. 395, § 5, authorized that town to enact and enforce all ordinances necessary to protect the health, life, and property of the inhabitants of that city, not inconsistent with the laws of the state. The ordinances vested the power to grant or refuse licenses for the purpose asked by the plaintiffs in the city manager with authority to refer an application in case of doubt to the city council.

[3,4] The granting or refusing license to retail meats is an exercise of the police power of the city. State v. Bean, 91 N. C. 554. While there must be no arbitrary discrimination in the exercise of such power, the

city is authorized to say where the market may be located, having due regard to the appropriateness of the locality, and whether or not it would be a nuisance at the point desired. *Hutchins v. Durham*, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706. The city would also be authorized to reject an application if the party was not of good character or was inefficient for the business, but no question of that kind occurs in this case.

The plaintiff places his appeal chiefly upon the ground that Ordinance 6 provides that no permit shall issue unless the city manager is satisfied that the applicant is of good moral character and that the business will be conducted in such a manner as not to create a nuisance, and contends that, as the plaintiff is a man of good character and the business is legitimate, it cannot be conducted as a nuisance. This is erroneous, for the city council found upon the protest of a large number of citizens that the location of the meat market in the very heart of the retail business district of the city would be a nuisance, notwithstanding the good character of the applicant and the necessary nature of the business.

[5] While the courts will compel an officer to exercise his discretion in passing upon an application, or, if his action is found to be capricious or arbitrary, the court will set his action aside and require a reconsideration, it will not direct that the city authorities shall locate a market at any designated point which will be a nuisance. That would be to substitute the courts for the duly elected authorities of the city.

Upon the findings of Judge Adams, the mandamus was properly refused.

Affirmed.

(177 N. C. 585)

STATE et al. v. BUTLER. (No. 377.)

(Supreme Court of North Carolina. April 15, 1919.)

1. INTOXICATING LIQUORS ⚡227—WITNESSES ⚡248(2)—EVIDENCE AS TO REPUTATION—RESPONSIVENESS OF ANSWER.

Where one prosecuted for selling spirituous liquor introduced evidence to show his good character, and a witness for the state was asked if he knew the general character of accused and replied that he did, the court properly refused to strike out, as unresponsive and incompetent, an answer of the witness that "it is bad for selling whisky," to the question, "What is it?"

2. INTOXICATING LIQUORS ⚡242—ILLEGAL SALE—SENTENCE.

The law authorizes sentence imposing imprisonment with leave to work upon the public roads upon one convicted for selling spirituous liquor.

Appeal from Superior Court, Guilford County; Shaw, Judge.

Walter Butler was convicted for selling spirituous liquors, and he appeals. No error.

W. P. Bynum and R. C. Strudwick, both of Greensboro, for appellant.

The Attorney General and Frank Nash, Asst. Atty. Gen., for the State.

CLARK, C. J. The defendant introduced evidence to show his good character. The chief of police of Greensboro, Horace Foushee, witness for the state, was asked if he knew the general character of Walter Butler, and replied that he did. He was then asked, "What is it?" The witness replied, "It is bad for selling whisky." The defendant's counsel objected to the answer and moved that it be stricken out as incompetent and not responsive to the question. This the court declined to do, and the defendant excepted.

[1] This is the only question presented by the appeal. The witness doubtless could not answer broadly that the defendant's character was bad. He was on oath, and it was competent for him to state of his own motion, as he did, "It is bad for selling whisky." He doubtless gave the only answer that his conscience permitted. The state could not ask whether it was bad or good for a particular offense, but the witness in the interest of truth could qualify his answer as he did. The witness could not say that the defendant's character was good. Doubtless he could not say it was bad, altogether. He therefore gave the only answer that he could. In the interest of the administration of justice and in the investigation of the truth of the charge before the court, the answer could not be stricken out. The jury were entitled to the information.

This is plain, practical, common sense, and it has been held too often to be questioned. In *State v. Summers*, 173 N. C. 780, 92 S. E. 328, Hoke, J., for the court said:

"Objection is also made that the court refused to strike out the answer of certain other witnesses as to character, Dr. John R. Erwin and others, who, after saying they knew the character of defendant, qualified their further answer by saying in what respect it was bad. It is the accepted rule that a witness may do this of his own volition, and these exceptions also must be disallowed. *Edwards v. Price*, 162 N. C. 243 [78 S. E. 145]; *State v. Hairston*, 121 N. C. 579-582 [28 S. E. 492]."

In *State v. Cathey*, 170 N. C. 794, 87 S. E. 532, the sheriff in answer to the same question as to the general reputation of the defendant replied, "It is bad for dealing in liquor." It was held by Allen, J., that there was no error.

The state did not introduce evidence of particular acts of misconduct and asked

only as to the defendant's general character. It was open to the witness having stated that he knew the defendant's general character to qualify and explain his answer as to what it was by saying it was bad for selling liquor.

[2] The ruling of the judge is so well sustained upon reason and the authorities that doubtless the real ground of the appeal was objection to undergoing the sentence upon the public roads for eight months. The violation of the law in selling intoxicating liquors is deliberate, not impulsive, as is the case in regard to many offenses, and the motive is the large profits accruing from the contemptuous violation of the law. The imposition of fines in such cases in practice amounts to granting license by the courts upon payment by the culprit of a very small part of the illegal profits obtained. The law authorized the sentence imposed of imprisonment with leave to work upon the public roads.

Certainly the taking back by the state of a part of the profits made by violation of its laws can never repress the evil which is the object of the trial and punishment. In fact, it puts the state in the more than questionable attitude of sharing with the criminal the profits derived from the deliberate violation of its own laws, and it is thus in effect a partner suing for a share in the proceeds of the illegal business. The fines imposed always give the state a very minor share in the illicit receipts. This is not the object to be sought by the courts. Such sentences should be imposed as will prevent the repetition of the offense by the defendant and all others offending in like manner.

No error.

(177 N. C. 308)

BRYAN v. HARPER et al. (No. 285.)

(Supreme Court of North Carolina. April 15, 1919.)

1. WILLS §601(3)—INTEREST OF LEGATEES—INCOME.

Where the residuary clause of a will bequeathed to testator's wife and his three children all the residue of the estate, each taking a one-fourth share, and by a codicil providing that, should the wife remarry during the minority of the children, her share should be equally divided among the children, the widow was not entitled to have her share of the personal estate turned over to her; she being merely entitled to the income thereof during the minority of the children or until her remarriage during such time.

2. WILLS §647—BEQUESTS—VALIDITY—RESTRAINT OF MARRIAGE.

A condition in a will providing that a bequest to the testator's widow be equally divided among testator's children in the event that the widow should remarry during the minority of either of the children is not void as a restraint upon marriage.

Appeal from Superior Court, New Hanover County; Calvert, Judge.

Action by E. K. Bryan, executor of J. W. Harper, deceased, against Ella C. Harper and others. From the judgment, the named defendant appeals. Affirmed.

This is an action instituted by the executor of John W. Harper against certain of the beneficiaries under his will to ascertain their respective interests in the estate of their testator and for instructions to the executor, and the only question presented by the appeal is as follows: Has the widow of John W. Harper the right under his will to have paid over to her the share bequeathed to her, or should it be held in trust, giving her only the income during the minority of her children, or until such time as she might remarry during such minority?

The material parts of the will with the codicil thereto are as follows:

"I give, bequeath and devise all of the residue of my property of whatsoever kind and character or wheresoever situated, to my wife, Ella Chitty Harper, and my three children, Catherine, Ella and James, each to take a one-fourth share thereof."

The will containing this item was subsequently changed by the codicil, a section of which is in the following words:

"In the event my wife, Ella C. Harper, shall remarry after my death, and during the minority of either of my children by her, then the share of my estate given to her by my said will shall be equally divided among my three children, Catherine, Ella and James, in addition to the share given them by my said will."

The property consists of real, personal, and mixed property.

His honor held and rendered judgment accordingly, that the executor should not pay to the widow her share of the personal estate, and that she was only entitled to the income therefrom during the minority of the children of the said John W. Harper, and then only upon her remaining unmarried, but that upon remaining unmarried until the youngest child became 21 she was entitled to her share absolutely, and the widow appealed.

W. B. Campbell, of Wilmington, for appellant Ella C. Harper.

E. K. Bryan, of Wilmington, for appellee. Carr, Polsson & Dickson, of Wilmington, for guardian ad litem.

ALLEN, J. Two cases in our reports (*Simmons v. Fleming*, 157 N. C. 390, 72 S. E. 1082, and *Braswell v. Morehead*, 45 N. C. 28, 57 Am. Dec. 586) are decisive of the appeal.

The court said in the first of these cases, citing *Ritch v. Morris*, 78 N. C. 377, and *Britt v. Smith*, 86 N. C. 308:

"The rule seems to be that, whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder, * * * but when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman."

And in the second, which is approved in *Williams v. Smith*, 57 N. C. 256, *Gordon v. Lowther*, 75 N. C. 195, and *Peterson v. Ferrell*, 127 N. C. 170, 37 S. E. 189:

"Owners of executory bequests and other contingent interests stand in a position, in this respect, similar to vested remaindermen, and have a similar right to the protective jurisdiction of the court."

[1] The bequest to Mrs. Harper is in a residuary clause, is contingent upon her remaining unmarried until the youngest child becomes 21, and falls directly within these authorities.

The case of *Williams v. Cotten*, 56 N. C. 395, which contains expressions seemingly at variance with the decision in *Braswell v. Morehead*, is considered and distinguished in *Ritch v. Morris* and *In re Knowles' Estate*, 148 N. C. 461, 62 S. E. 549, and is shown to have rested upon the peculiar character of the property disposed of in the will then under consideration and on the language of the will.

[2] Nor is the condition or limitation in the will providing that the bequest to the widow be equally divided between the children of the testator in the event she shall remarry during the minority of either of the children void as a restraint upon marriage.

"It is very generally held that conditions against the remarriage of the testator's widow are valid, whether the property be real or personal, and whether there is an immediate gift over or not; and the same is true against the remarriage of a widower." 40 Cyc. 1702, citing in support of the text decisions from the Supreme Court of the United States and from the highest courts of 24 states and from the courts of England and Canada.

In the note to the *Matter of Seaman*, Ann. Cas. 1918B, 1144, after discussing the proposition that a condition in general restraint of marriage is void, the editor says:

"Where, however, a condition subsequent in total restraint of marriage is imposed on the wife or the husband of the testator, the courts will uphold the condition. *Daboll v. Moon*, 88 Conn. 387, Ann. Cas. 1917B, 164, 91 Atl. 646,

L. R. A. 1915A, 811; Nagle v. Hirsch, 59 Ind. App. 282, 108 N. E. 9; *Knost v. Knost*, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; *Matter of Schriever*, 91 Misc. [Rep.] 656, 155 N. Y. S. 826; *Littler v. Dielmann*, 48 Tex. Civ. App. 392, 106 S. W. 1137; *Haring v. Shelton* [Tex. Civ. App.] 114 S. W. 389; *Re Allen*, 7 Dominion L. Rep. 494; *Re Lacasse*, 24 Ont. W. Rep. 300, 9 Dominion L. Rep. 831, 4 Ont. W. N. 986."

It will be noted that these authorities make no distinction between the widow and the widower, and that the wife has the same right as the husband to make her gift conditional upon remaining single.

The case of *In re Miller*, 159 N. C. 124, 74 S. E. 888, goes much further, because there a condition attached to a devise of realty to a daughter that upon her death or marriage the estate should go to a son was sustained as a valid conditional limitation, and, commenting on this case in *Gard v. Mason*, 169 N. C. 508, 86 S. E. 303, *L. R. A. 1916B, 1077, Ann. Cas. 1917D, 281*, the court says that the fact that there is a limitation over upon marriage, as in this case, is "determinative," "controlling" in favor of the validity of the provision in bequests of personal estate, and "is always allowed much weight in cases of real estate."

In our opinion, his honor properly held that the widow was not entitled to have her share of the personal estate turned over to her, and the judgment is affirmed.

Affirmed.

HOKE, J., concurs in result.

CLARK, C. J., concurs in result, but not in sustaining the validity of the forfeiture clause added by the codicil to the devise to the widow. The will provides:

"I give, bequeath and devise all the residue of my property of whatsoever kind and character, or wheresoever situated, to my wife, Ella Chitty Harper, and my three children Catherine, Ella, and James, each to take a one-fourth share thereof."

A section in the codicil provides:

"In the event my wife, Ella C. Harper, shall remarry after my death, and during the minority of either of my children by her, then the share of my estate given to her by my said will shall be equally divided among my three children, Catherine, Ella and James, in addition to the share given them by my said will."

I cannot concur in so much of the opinion as holds that the forfeiture imposed by the codicil upon the devise above set out to the wife, should she marry before the youngest child becomes of age is valid.

First. It is not necessary to pass upon the point in this case, and therefore it is obiter, and cannot have any valid force and effect as a precedent.

Second. The precedents in declaration of a sound public policy are quite uniform that, while a devise to a wife "during widowhood" or "so long as she shall remain unmarried" is valid, a devise to her absolutely with a clause of forfeiture in event of her remarriage is a nullity. The difference is not a mere technicality, or an attenuated distinction, but is founded upon sound reason and public policy. In *re Miller*, 159 N. C. 123, 74 S. E. 888. When the devise is made to the wife with the limitation that it is during widowhood or so long as she shall remain a widow, she can make her election whether to take the devise or her dower, whichever is the larger provision, but when possibly a larger amount is devised to her absolutely, with a provision of forfeiture in case of remarriage, she will be induced to take the devise, not having at that time naturally any thoughts of remarriage. But, should circumstances alter, or if she should subsequently find her affections engaged, the forfeiture will then be called into existence. It is not public policy to discourage marriages, but the contrary. The authorities making the above distinction are numerous.

"A gift in general restraint of marriage is void whether a gift over accompanies it or not." *Schouler on Wills* (2d Ed.) § 603, and notes; 2 *Jarman, Wills*, § 45.

To same purport 40 Cyc. 1699, and numerous cases there cited in notes. The distinction is made between a conditional limitation, which is held valid, and a forfeiture, which is invalid.

That this distinction is founded upon a sense of natural justice and a sound public policy is shown by the fact that, while the statutes allotting dower to the widow for her support generally restrict the allowance to her life, there has been not a single country or state which has ever been cruel enough to women or deemed it sound public policy to provide for the forfeiture of dower on remarriage of the widow. What has ever been considered contrary to public policy and unjust in the statute must be the same in a devise, and therefore the decisions which have held that, where the devise is taken in lieu of dower, any provision for forfeiture upon remarriage is invalid, are in accordance with public sentiment of justice to the women and the welfare of the state.

Restraints upon marriage are disfavored because of the tendency to restrict increase of population and encourage immorality; besides, there is the injustice of the imposition upon the living of the will of the dead as a guide of conduct. This is so held in *Gard v. Mason*, 169 N. C. 508, 86 S. E. 302, L. R. A. 1916B, 1077, Ann. Cas. 1917D, 281; *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218.

There is no decision in this state contrary to what is said above. Decisions on both sides pro and con, as on nearly every prop-

osition, can be found elsewhere, but no statute can be found anywhere validating a forfeiture of an estate by the widow for remarriage.

The history of the law shows that in nearly every instance discriminations against women have been created by the courts, especially by the purely judge-made law styled the "common law," and rarely by statute.

The poet of the democracy of justice and equality of opportunity and right to all, Robert Burns, said: "Man, to man so oft unjust, is always so to woman." In India, where the wife was deemed entitled to existence only as an attendant and appanage of the husband, she was doomed to suttee—to be burnt alive upon the funeral pyre of the husband—till this was abolished by the British. There is but a difference in degree, not in principle, if the dead hand of the husband can reach out of the grave and can take from her by a clause of forfeiture the property he devised his wife in fee, in lieu of the dower the law gave her, without liability to forfeiture, for the offense of marrying again.

WALKER, J. (concurring). My view of this case is that the question as to the validity of the clause providing that, in the case of the widow's remarriage during the minority of the children the estate should go to them, is directly involved, and that the opinion of the court upon its legality is not a mere dictum. We are called upon to construe the clause and to decide that very question, as Justice ALLEN says at the outset, in the statement of the case, his language being as follows:

"This is an action instituted by the executor of John W. Harper against certain of the beneficiaries under his will to ascertain their respective interests in the estate of their testator and for instructions to the executor, and the only question presented by the appeal is as follows: Has the widow of John W. Harper the right under his will to have paid over to her the share bequeathed to her, or should it be held in trust, giving her only the income during the minority of her children, or until such time as she might remarry during such minority."

So that we must determine whether the fund must be held by the trustee during the widow's life, or paid over to the children at the time of her marriage, if she does remarry. This is a question of moment, and invokes our decision upon the validity of the remarriage clause. If she does marry, and the clause is valid, the executor or trustee will pay it over to the children at once, and she loses her share of the income of the fund thereafter. If she does not marry, her share does not go to the children. I can perceive no substantial difference between giving her a part of the fund during widowhood (*durante viduitate*), which may mean

an estate for life (for an estate during widowhood is an estate for life, as stated by Blackstone and other writers), and giving it to her for life, or until she marries, for an estate during her widowhood would necessarily mean one for life, unless she remarries, in which event it would go over to others named in the will. The difference between the two expressions is in form, and not in substance. Blackstone (book 2, star page 121) says:

"There are some estates for life which may determine upon future contingencies before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally it may also determine by his civil death, as if he enters into a monastery, whereby he is dead in law, for which reason in conveyances the grant is usually made 'for the term of a man's natural life', which can only determine by his natural death."

(177 N. C. 294)

SHARPE et ux. v. BROWN. (No. 322.)

(Supreme Court of North Carolina. April 9, 1919.)

1. DEEDS ⇨127(2), 130—REVERSION AFTER FEE TAIL—EFFECT OF STATUTE.

Where a deed conveyed a fee tail and attempted to pass the reversion to others in default of heirs of the grantor's body, nothing passed by the reversion; estates in tail having been converted by Revisal 1905, § 1578, into estates in fee simple, and the reversion thereby cut off.

2. DEEDS ⇨130 — REVERSION AFTER FEE TAIL—EFFECT OF FAILURE OF HEIRS.

Where a deed conveys realty to one "and to the heirs of her own body," a reversion remains in grantor to be enjoyed upon failure of such heirs and which he can convey to others.

3. DEEDS ⇨127(2) — STATUTORY ABOLITION — EFFECT OF CONVEYANCE IN TAIL.

Where a deed conveys property to grantor's granddaughter "and to the heirs of her own body," the granddaughter takes a fee tail which Revisal 1905, § 1578, converts into a fee simple in her.

4. DEEDS ⇨126—ESTATES ON CONDITION — EFFECT OF BIRTH OF ISSUE.

Where property was conveyed to grantor's granddaughter "and to the heirs of her own body" and a child was born to such granddaughter, the conveyance passed an estate in

fee tail converted by Revisal 1905, § 1578, into a fee simple, defeasible if no child was born, but absolute on the birth of such child who was an heir of her body although not technically so.

5. DEEDS ⇨126—ESTATES ON CONDITION — CONSTRUCTION.

If a conveyance to grantor's granddaughter "and to the heirs of her own body" be construed to mean "children" instead of "heirs," no child of grantee's body having been born at the time of the execution of the deed, and there being no intermediate estate, after-born children could not take, and the conveyance would be to the granddaughter alone in fee without words of inheritance, the deed being executed since Revisal 1905, § 946, but defeasible if no child were born and absolute upon the birth of a child.

Appeal from Superior Court, Orange County; Devin, Judge.

Action by R. C. Sharpe and wife against N. W. Brown. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action to recover the purchase price of a certain tract of land; the plaintiffs having tendered to the defendant a deed pursuant to a contract of purchase, and the defendant having refused to accept the same upon the ground that the plaintiffs have not an indefeasible title in fee.

The plaintiffs derive their title under a deed from Manly D. Stroud and wife, Martha Stroud, of date the 30th day of December, 1893, which conveys the land described in the complaint upon the following considerations and conditions:

"For and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of the natural love and affection which we, the said Manly D. Stroud and his wife, Martha Stroud, hath and beareth towards our granddaughter, Margaret Wellons Stroud, and for other divers good causes and reasons we hereunto moving, and for the better maintenance and preferment, and by these presents hath given, granted, and by these presents do give, grant and convey unto our granddaughter, Margaret Wellons Stroud, and to the heirs of her own body; if she never have any heirs of her own body, then in that event she never does have any, then it is to go to M. M. Stroud and T. W. Stroud their life, and then to their children."

Margaret Wellons Stroud intermarried with R. C. Sharpe on the 1st of June, 1915, and she and the said Sharpe are the plaintiffs in this action. A child was born of said marriage on the 10th day of August, 1917, and is now living.

His honor held that the plaintiffs could convey an indefeasible title to the defendant, and rendered judgment in favor of the plaintiffs, and the defendant excepted and appealed.

S. M. Gattis, of Hillsboro, for appellees,

ALLEN, J. The deed before us, while similar in some respects, does not have its counterpart in any to be found in our reports, and, in the absence of controlling authority, we must have recourse to the principles of the common law, as "these things, though they may seem ancient, are necessary notwithstanding to be known." Coke.

It must be noted that the grantors do not purport to convey the land in controversy to their granddaughter for life and then, or after her death, to the heirs of her body; nor is the limitation over to M. M. and T. W. Stroud in the event of death leaving no heirs of her body, or leaving none surviving her; nor is a similar expression used, illustrations of which may be frequently found in the decided cases.

The conveyance is to "Margaret Wellons Stroud and to the heirs of her own body, if she never have any heirs of her own body, then in that event she never does have any, then it is to go to M. M. Stroud and T. W. Stroud their life, and then to their children."

At common law a grant to one and the heirs of his own body was an estate upon condition, called a fee conditional, which left in the grantor the right to re-enter, upon failure to have heirs of the body, as upon a condition broken.

"But the general propensity which then prevailed to favor a liberty of alienation induced the courts of justice to construe limitations of this kind in a very liberal manner. Instead of declaring that these estates were descendible to those heirs only who were particularly described in the grant, according to the manifest intention of the donors, and the strict principles of the feudal law, and that the donees should not, in any case, be enabled by their alienation to defeat the succession of those who were mentioned in the gift, or the donor's right of reverter, they had recourse to an ingenious device taken from the nature of a condition.

"Now it is a maxim of the common law that, when a condition is once performed, it is henceforth entirely gone; and the thing to which it was before annexed becomes absolute and wholly unconditional. The judge's reasoning upon this ground determined that these estates were conditional fees, that is, were granted to a man and the heirs of his body, upon condition that he had such heirs; therefore as soon as the donee of an estate of this kind had issue born, his estate became absolute by the performance of the condition; at least for these three purposes: (1) To enable him to alien the land, etc." 1 Greenl. R. P. title 2, c. 1, §§ 4 and 5.

In consequence of this construction, which prevented the perpetuation of lands in one family, which was the purpose of the creation of the estate, the statute de donis (13 Edw. 1) was adopted, which converted the fee conditional into a fee tail, which is described as "a particular estate in the donee, called an estate tail, subject to which the reversion in fee remained in the donor," and

this estate was one "of inheritance in the donee, and some particular heirs of his body to whom it must descend, notwithstanding any act of the ancestor." 1 Greenl. R. P. pp. 78 and 79.

This brief outline of the estates, which is substantially as stated in 1 Co. Litt. 19a, and Mod. Am. L. vol. 5, p. 66 et seq., shows that a fee conditional was created at common law, and a fee tail under the statute de donis when the estate was granted to one and the heirs of his own body, with reversion to the grantor upon failure of such heirs, and this is the legal effect of the deed before us.

[1] The estate is conveyed to "Margaret Wellons Stroud and to the heirs of her own body," which is clearly a fee tail, and the succeeding words, "if she never have any heirs of her own body then in that event she never does have any," merely gives verbal expression to the condition which would give rise to the operation of the reversion in the grantor, without these words as matter of law, and is no more than the law would declare if not expressed, and the further limitation to M. M. Stroud and T. W. Stroud is an attempt to pass the reversion after the conveyance of the fee tail; but, estates in tail having been converted by our statute into a fee simple and the reversion thereby cut off, nothing passed to them.

[2] In other words, if the deed had stopped at a conveyance to "Margaret Wellons Stroud and to the heirs of her own body," a reversion would have remained in the grantor to be enjoyed upon failure of such heirs, and which under our law he could convey to M. M. and T. W. Stroud (*Kornegay v. Miller*, 137 N. C. 664, 50 S. E. 315, 107 Am. St. Rep. 505), and if this is true the construction cannot be changed, because the parties saw fit to incorporate these terms in the deed.

[3] It follows that Margaret Wellons Stroud took a fee tail under the language of the deed, and, as this estate has been converted into a fee simple under our statute (Rev. § 1578), she has the right to convey an estate in fee.

There are several cases in our Reports, prior to the act of 1827 (Rev. § 1581), which give this construction to devises, in which the language was much more favorable to the contention of the defendant than that used in the present deed, and the statute has no bearing because the limitation over is not contingent "upon the dying of any person without heirs or heirs of the body, etc.," but upon having an heir of her body, which was met upon the birth of a child, under the authority of *Bank v. Murray*, 175 N. C. 64, 94 S. E. 666, in which it was held that in a devise to a son and "should he not marry—, or even marry and have no issue," then over, that the condition was performed and

the estate absolute upon marriage and birth of issue without regard to the time of the death of the son.

In *Sanders v. Hyatt*, 8 N. C. 247:

"Devise to A., and if he dies without any lawful begotten heir of his body, then to his brother and sisters. *Held* that the devise to A. is of an estate tail, which, by the act of 1784, is converted into a fee simple, and the ulterior limitation is therefore void."

In *Ross v. Toms*, 15 N. C. 376, it was held that—

"A devise of lands to A. for life and after her death to be equally divided among the male or female heirs begotten of her body, and for want of such heirs, then over, gives A. an estate tail in the land, which by the act of 1784 (Rev. c. 204) is converted into a fee."

In *Hollowell v. Kornegay*, 29 N. C. 261:

"A. by will, in 1786, devised to his son R. a tract of land and then proceeded as follows: 'And my desire is, if my son R. die without heir lawfully begotten of his body, for it to be sold, and equally divided between his own sisters.' *Held*, that the limitation over was too remote, and that estates tail having by the act of 1784 been converted into fee-simple estate, the son R. took an absolute estate in fee simple in the land devised."

In the last case, *Ruffin, O. J.*, after citing *Sanders v. Hyatt* and noting the difference in the language, says:

"But that difference is entirely immaterial, as in each case the disposition over is after the death of the first taker 'without heir lawfully begotten of his body,' that is, of a remainder after an estate tail in possession; which the act of '84 makes void. The fee vested in Richard, and is now in the defendant."

[4] Another and simpler method of reaching the same result is that the conveyance to the granddaughter and the heirs of her own body passed an estate in fee tail, which by our statute was converted into a fee simple, defeasible if no child was born to her, but which became absolute upon the birth of a child, who was an "heir" of her body as the term is generally understood, although not technically so, because of the rule that no one can be heir to the living.

[5] If, however, we construed the words "to the heirs of her own body," wherever they appear, to mean children, so that the deed would read "unto our granddaughter, Margaret Wellons Stroud and to her children, if she never have any children then in that event she never does have any," we would reach the same conclusion, because, there being no child born at the time of the execution of the deed and no intermediate estate, after-born children could not take (*Powell v. Powell*, 168 N. C. 562, 84 S. E. 860), and the conveyance would be to the granddaughter alone, which would be in

fee, without words of inheritance, because the deed bears date since the act of 1879 (Rev. § 946), but defeasible if no child was born, and absolute when a child was born, under the *Murray Case*, which event has taken place.

We therefore conclude in any view of the case the plaintiffs can convey a good title to the defendant, and this carries out and gives effect to the intent of the grantors, manifest on the face of the deed, which was executed 22 years before the marriage of the granddaughter when she was a small child, in consideration "of natural love and affection for her better maintenance and preferment"; the grantors having in mind that she might not reach womanhood, but desiring, if she did so and married, her estate should be absolute upon the birth of a child.

Affirmed.

(177 N. C. 337)

In re JONES' ESTATE. (No. 324.)

(Supreme Court of North Carolina. April 15, 1919.)

1. EXECUTORS AND ADMINISTRATORS — 37(3)
— RIGHT TO ADMINISTER — DETERMINATION AS BETWEEN APPLICANTS.

Where application for letters d. b. n. c. t. a. has been made within six months from the death of the first administrator with the will annexed, the rights of applicants for letters are to be determined as regulated by Revisal 1905, § 3, prescribing the order in which persons are entitled to administer without reference to the limitation of six months in section 12.

2. EXECUTORS AND ADMINISTRATORS — 37(3)
— RIGHT TO ADMINISTER — PREFERENCES.

Since Revisal 1905, § 11, contemplates that one having a right to administer can only be deprived thereof by renunciation, that a majority in number of those in the same degree of kinship have nominated a stranger as administrator d. b. n. c. t. a. does not deprive an individual member of such class who is the owner of a larger share of the estate than the others of his preference right to administration.

Appeal from Superior Court, Person County; Lyon, Judge.

Proceedings by J. Lacy Williams to be appointed administrator de bonis non cum testamento annexo of the estate of R. Jeff Jones. A decree confirming the appointment of S. P. Williams and dismissing the petition was reversed, and S. P. Williams appeals. No error.

This is a contest over the appointment of an administrator d. b. n. c. t. a. of the estate of R. Jeff Jones.

R. Jeff Jones died in Danville, Va., in 1902 testate, leaving his estate to his wife, Lenora Jones, with the power to sell all his

property and invest the proceeds in cotton mill, railroad, or bank stock; she to have the use of it during her lifetime as she wished. She qualified as his administratrix with the will annexed and wound up his estate, converting all the property into Riverside Cotton Mill stocks. Mrs. Lenora Jones, said widow, soon thereafter moved to Roxboro, N. C., and resided there until her death, on August 5, 1918. She had kept the stock, amounting to \$8,800 (par value) intact, only using the income.

Upon her death her brother, S. P. Williams, qualified as administrator upon her individual estate, and also applied for letters of administration c. t. a. de bonis non on the estate of R. Jeff Jones on account of said cotton mill stock which he found in the possession of Mrs. Lenora Jones belonging to R. Jeff Jones' estate. At that time none of the next of kin of R. Jeff Jones had applied for letters on his estate, the widow having then been dead five months.

The next of kin and distributees of R. Jeff Jones residing in this state were Hallie Jones, Reade Jones, Mrs. Etta Chambers, and Lacy Williams, and are of equal degree of kin to testator. Two nephews, Bernard Williams and Jack Jones, of same kin, are now in military service. The other next of kin are residents of Virginia.

Three of the next of kin, Hallie Jones, Reade Jones, and Mrs. Etta Chambers, renounced their right to qualify and nominated S. P. Williams, the appellant, and asked that he be appointed as administrator, and S. P. Williams, the appellant, was appointed and gave bond.

J. Lacy Williams, the only remaining next of kin residing in the state, then applied for letters, and asked that S. P. Williams be removed, and upon the hearing the clerk held "that, the three next of kin having filed their renunciation and having nominated S. P. Williams, the court, in the exercise of its discretionary powers to select and to appoint an administrator from among the applicants of equal degree of kin or right to administer, having found S. P. Williams competent and capable to perform the duties of the office," confirmed his appointment, and dismissed the petition.

Upon appeal to the court in term his honor reversed the decision of the clerk, and held that J. Lacy Williams had the right of administration in preference to respondent, and Williams appealed.

Luther M. Carlton, of Roxboro, for appellant.

F. O. Carver, of Roxboro, for appellee.

ALLEN, J. Two questions are presented by the appeal:

(1) Does the provision in section 12 of the Revisal giving discretionary power to the clerk to appoint some suitable person admin-

istrator, when no person entitled to administer has made application for letters within six months from the death of the decedent, control in an application for the appointment of an administrator de bonis non cum testamento annexo made more than six months after the death of the testator, and within six months of the death of the prior administrator or executor?

(2) Does the nomination of a stranger for appointment by two or more of the next of kin entitled to administer affect the right of another of the next of kin of equal degree who did not join in the nomination?

The statute, which confers jurisdiction on the clerk to appoint some suitable person administrator when no one entitled to administer has made application for letters within six months from the death of the decedent, is found in the second subdivision of chapter 1 of the Revisal, which is devoted to administration. This subdivision clearly recognizes the distinction between letters of administration, which issue in case of intestacy, and letters testamentary, issuing when there is a will.

In section 3 it is provided that "letters of administration, in case of *intestacy*, shall be granted to the persons entitled thereto and applying for the same, in the following order," and then follows the enumeration of the classes. Section 5: "The clerk shall not issue *letters of administration* or *letters testamentary* to any person who, at the time of appearing to qualify" is disqualified, and then the disqualifications are stated. Section 6 provides that, where an executor or any person having a prior right to administer is under the disqualification of nonage or is temporarily absent from the state, "such person is entitled to six months, after coming of age or after his return to the state, in which to make application for *letters testamentary* or *letters of administration*." Section 10 makes provision for a renunciation by the *executor*, and section 11 for a renunciation by those having a *prior right to administer*. (Italics ours.)

It is thus seen that throughout the subdivision the line is clearly marked between "letters of administration" and "letters testamentary," and between the executor and one entitled to administer, and this distinction is retained in sections 12 and 13, the first being entitled "When Person Entitled Deemed to Have Renounced," and the second "When Executor Deemed to Have Renounced." Section 12 provides: "If any person entitled to letters of administration, fails or refuses," etc. "If no person entitled to administer shall apply for letters of administration"—and was intended to apply to cases of intestacy, and not to those where there is a will. A consideration of the next subdivision in the chapter, entitled "Will Annexed," strengthens this position, because provision is made in section 14 for the appointment of

an administrator with the will annexed when there is no executor qualified to act "in the order prescribed in this chapter," and not within the time.

It may be, by analogy, section 12 is broad enough to cover cases where no executor is named in the will, or when one named refuses to qualify, but primarily its purpose is to deal with cases of intestacy, and for the reason that in the vast majority of cases executors are named in wills and qualify, and comparatively few are removed by death or otherwise within six months from the death of the testator, and if it should be held that the limitation of six months applied in such cases, it would be a denial of the right to administer to those placed by law in the preferred classes.

[1] We cannot think such was the intent of the General Assembly, and are of opinion that, the application for letters having been made within six months from the death of the first administrator with the will annexed, the parties should have their rights determined as regulated by section 3, which prescribes the order in which persons are entitled to administer, without reference to the limitation of six months in section 12.

Who, then, has the right to administer under the statute? Three of the four in the preferred class, representing a bequest of \$100, have renounced and nominated S. P. Williams, a stranger, and the fourth of the class, J. Lacy Williams, representing practically one-fourth of the estate, has made application for appointment and has been appointed, and the controversy is therefore between the nominee of the majority of the next of kin who have very little pecuniary interest and one of the next of kin owning a large part of the estate.

The right to nominate an administrator is recognized in several decisions in our court, collected and discussed in *Boynion v. Heartt*, 158 N. C. 488, 74 S. E. 470, Ann. Cas. 1913D, 616, but in none of them has the nomination been approved or sustained when a stranger was nominated by a majority as against one in the preferred class.

The statute gives each of the next of kin in the same class the same right to administer, the interests are frequently antagonistic, as in this case there may be no community of interest, and if numbers are permitted to control three of the next of kin, representing a pecuniary interest of \$1 each, could name an administrator as against two entitled to \$1,000 or \$10,000 each.

[2] We see no reason for permitting a majority to deprive another of his right, and the statute (Revisal, § 11) seems to contemplate that this can only be done by his own act, by renunciation.

In Pennsylvania the register had the power of appointment, and in *Swarts' Estate*, 189

Pa. 72, 41 Atl. 1001, the court said of the question now before us:

"The discretion vested in the register is limited to a selection from each class entitled in its order, and neither he nor the parties renouncing can pass by one of the children competent to administer and vest the appointment in a stranger. *William's Appeal*, 7 Pa. 259; *McClellan's Appeal*, 16 Pa. 110."

Again, in *Justice v. Wilkins*, 251 Ill. 16, 95 N. E. 1026:

"Any one of the nephews and nieces in this state, and otherwise qualified, was entitled to be appointed as administrator, and the court might have granted letters to any one or more of them. Could he legally appoint a stranger to the class, nominated by one of these nephews or nieces, unless the others who were equally entitled to administer waived their rights? We think not. In our judgment the statute is mandatory to appoint one or more of the next of kin residing in the state, who were otherwise qualified, unless they waived their rights. *O'Rear v. Crum*, 135 Ill. 294, 25 N. E. 1097; *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631. When any one heir of the class waives the right and nominates another, the one so nominated is not to stand in the place of the other, with equal rights to administer as against the other heirs of the class, unless the person nominating is the only heir of that class. If all of those who appear of the class entitled to administer waive that right, and another person is appointed at his, her, or their request, if one of the others of the class who are equally entitled to administer appears 'within sixty days from the death of the intestate' and insists upon his right to administer in person, and if he is a competent person, we are of the opinion that it would be the duty of the court to appoint him, provided however, in turning over the estate the court may make all necessary orders for its proper protection, and for the compensation of the person theretofore appointed."

"Code Civ. Proc. § 1365, in fixing the order in which certain classes of persons are entitled to administer a decedent's estate, provides (subdivision 2) that in the absence of a surviving husband or wife children shall be appointed. * * * Section 1379 provides that 'administration may be granted to one or more competent persons, although not otherwise entitled to the same at the written request of the person entitled filed in the court.' Held that, where three daughters survived, and one of them applied for administration, she should be appointed, though a competent person nominated by the other two daughters also applied; the court not having any discretion in such case." In *re Myers' Estate*, 9 Cal. App. 694, 100 Pac. 712.

The same principle is declared in *Cramer v. Sharp*, 49 N. J. Eq. 558, 24 Atl. 962.

We are therefore of opinion his honor committed no error in holding that J. Lacy Williams is entitled to the appointment as administrator d. b. n. c. t. a. in preference to S. P. Williams, a stranger.

No error.

(177 N. C. 303)

WILLIAMSON v. RABON et al. (No. 286.)

(Supreme Court of North Carolina. April 15, 1919.)

1. MORTGAGES ⇐608½ — DEED ABSOLUTE AS MORTGAGE—ALLEGATION AND PROOF.

A written deed absolute in terms cannot be changed into a mortgage, except upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage.

2. JUDGMENT ⇐347—SETTING ASIDE—LACK OF ESSENTIAL PROOF.

Where a fact essential to support judgment for plaintiff is entirely lacking, judgment must be set aside.

3. COURTS ⇐90(6)—RULE OF STARE DECISIS.

Where a case does not purport to lay down any definite or different principle or question or disturb the law prevailing and has not since been referred to or cited, a rule therein announced in direct conflict with prior decisions, reaffirmed in later decision, all holding that in order to change a deed into a mortgage it must be alleged and proved that clause of redemption was omitted by mistake, etc., cannot be invoked on the principle of stare decisis.

4. COURTS ⇐89—RULE OF STARE DECISIS.

The doctrine of stare decisis is fully established in North Carolina, and in proper instances the courts will continue to be upheld.

5. COURTS ⇐90(4)—STARE DECISIS—INTERPRETATION OF STATUTE.

In case of an authoritative interpretation of a statute formally made by a court of last resort, a single decision becomes a precedent sufficiently authoritative to protect rights acquired during its continuance.

6. COURTS ⇐89—STARE DECISIS—DECISIONS DECLARATORY OF COMMON LAW.

To establish a precedent sufficiently authoritative to protect rights acquired during its continuance, it is usually required, in case of decisions declaratory of the common law or of general equitable principles, that there be a series of decisions, or, if one, that it be so definite in its terms and so generally acquiesced in and acted on that it has come to be recognized as the accepted rule on a given question.

7. COURTS ⇐90(6)—STARE DECISIS—DECISIONS DECLARATORY OF COMMON LAW.

A Supreme Court decision in a case declaratory of common law, or of general equitable principles, does not constitute the law, but is only evidence thereof, and the general rule is that, when a court of last resort has overruled such decision, it is not thereafter considered bad law, but as never having been the law applicable in such case.

Appeal from Superior Court, Columbus County; C. O. Lyon, Judge.

Action by N. L. H. Williamson against F. J. Rabon and another. Judgment for plaintiff, and defendants appeal. Error.

The action is to have a written deed for two tracts of land from plaintiff to defendant, absolute in terms and for value, declared and dealt with as a mortgage to secure about \$2,000, with accrued interest, exact amount indefinite, on allegation and proof tending to show that, at the time the deed was executed, there was a parol agreement between the parties that the same should stand as mortgage to secure said amount, and plaintiff should have as much as three years to redeem same.

There was denial of the agreement by the defendant, with averment and proof tending to show that the deed was absolute in term for a full and valuable consideration paid to the plaintiff.

On issues submitted, the jury rendered the following verdict:

"(1) Did the defendants procure the deed, dated January 6, 1915, in form a fee simple upon the promise that plaintiff should have the right to redeem the land therein described upon payment of money advanced for plaintiff? Answer: Yes.

"If so, what is amount of debt due by plaintiff to defendants to secure the land in controversy? Answer: \$2,862, with interest from January 6, 1915."

Irvin B. Tucker and H. L. Lyon, both of Whiteville, for appellants.

McLean, Varser & McLean, of Lumberton, and Lewis & Powell, of Whiteville, for appellee.

HOKE, J. [1] It is the law of this state that—

"A written deed, absolute in terms, cannot be changed into a mortgage except upon allegation and proof that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage."

This position was approved and confirmed in the recent case of *Newton v. Clark*, 174 N. C. 393, 93 S. E. 951, and it was there further held that—

"Parol evidence that a deed to lands was made on an agreement to reconvey the same to the grantor on a certain contingency is incompetent to establish a parol trust in the grantor's favor," etc., citing a long line of authorities in support of both positions.

The opinion then quotes with approval from *Pearson, Judge*, in *Sowell v. Barrett*, 45 N. C. 54, as follows:

"Since *Streator v. Jones*, 10 N. C. 423, there has been a uniform current of decisions, by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt: (1) It must be alleged, and of course proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage; (2) the intention must be established not merely by proof of declarations, but by proof of facts and circum-

stances, dehors the deed, inconsistent with the idea of an absolute purchase. Otherwise, titles evidenced by solemn deeds would be at all times exposed to the 'slippery memory of witnesses.'"

And proceeds: "These principles are fully discussed in *Kelly v. Bryan*, 6 Ired. Eq. 41 N. C. 283, and it is useless to elaborate them again. This excerpt from the opinion has been quoted literally and with approval in *Bonham v. Craig*, 80 N. C. 224; *Watkins v. Williams*, 123 N. C. 170 [31 S. E. 888]; *Porter v. White*, 128 N. C. 43 [38 S. E. 24]. And the same principle is declared in different language in *Kelly v. Bryan*, 41 N. C. 286; *Brown v. Carson*, 45 N. C. 272; *Briant v. Corpening*, 62 N. C. 325; *Edgerton v. Jones*, 102 N. C. 283 [9 S. E. 2]; *Norris v. McLam*, 104 N. C. 160 [10 S. E. 140]; *Sprague v. Bond*, 115 N. C. 532 [20 S. E. 709]."

And in negation of the right to establish a parol trust in favor of the grantor, cites *Gaylord v. Gaylord*, 150 N. C. p. 228, 63 S. E. 1028.

[2] It is nowhere alleged in the pleadings that the clause of redemption was omitted by mistake, nor do we find that any proof was offered to that effect, nor is it established by the verdict. This is not a case, then, of a defective statement of a cause of action which has been in any way supplemented or cured, but the case presented is one where a fact, essential to support a judgment in plaintiff's favor, is entirely lacking, and the same must therefore be set aside. *Warlick v. Plonk*, 108 N. C. 81, 9 S. E. 190; *Emery et ux. v. R. R.*, 102 N. C. 209, 9 S. E. 139, 11 Am. St. Rep. 727. In the latter case, the principle is stated as follows:

"The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment."

[3,4] We were referred by counsel for plaintiff to the case of *Fuller v. Jenkins*, 130 N. C. 554, 41 S. E. 706, as an authority to the effect that a deed, absolute in form, may be changed into a mortgage by reason of a contemporaneous parol agreement to that effect and without allegation or proof that the clause of redemption was omitted by mistake or fraud, etc., and it is insisted that the principle of *stare decisis* may be invoked in support of the present proceedings and in protection of the rights and interests arising to plaintiff while that case expressed the ruling of the Supreme Court on the question presented. The doctrine of *stare decisis* or the principle of adherence to judicial precedents is fully established in this state and, in proper instances, will continue to be steadfastly upheld. *Mason v. Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635, and *Hill v. R. R.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606. The position recognized in *Fuller v. Jenkins* having been entirely disapproved in the later case of *Newton v. Clark*, *supra*, the doctrine is not in strictness presented by the

record, and the question recurs on the effect to be allowed the case of *Fuller v. Jenkins* as a precedent in support of the interest which plaintiff is here endeavoring to assert.

[5,6] While a single decision may become a precedent sufficiently authoritative to protect rights acquired during its continuance, such a case more frequently occurs in the construction of statutes applicable, in which case an authoritative interpretation, formally made by a court of last resort, is thereafter considered a part of the law itself and may be invoked to protect titles acquired and investments made on the faith of the principle so recognized and declared. In decisions, however, declaratory of the common law or of general equitable principles, in order to establishment of such a precedent, it is more usually required that there be a series of decisions on a given subject, or, if one, that it be so definitive in its terms and so generally acquiesced in and acted on that it has come to be recognized as the accepted rule on a given question.

[7] It is said that a Supreme Court decision in that class of cases does not constitute the law, but is only evidence of it, and the general rule is that, when a court of last resort has felt called on to overrule such a decision, it is not thereafter considered bad law, but as never having been the law applicable in such case. *Mason v. Cotton Co.*, *supra*, and authorities cited; *Ram on Judgments*, c. 3, p. 47. And the question of how far it should serve to protect intervening rights is largely in the discretion of the court that rendered it (*Black on the Law of Judicial Precedents*, p. 187), dependent on the character of the decision itself, that is, whether it is sufficiently definitive and purports to establish a given principle, the nature of the right for which protection is claimed, and whether it was considered and reasonably relied upon in the case presented, and how far a sound public policy is involved and must be allowed to affect the question. The principle appearing in *Fuller v. Jenkins* is in direct antagonism to the law of this state, as established by a current of decisions, well-nigh from the beginning of the court, certainly as far back as *Streator v. Jones*, 10 N. C. 423, in 1824, one of them, *Porter v. White*, 128 N. C. 42, 38 S. E. 24, just one year prior to the case in question and fully reaffirmed in the later decision of *Newton v. Clark*, *supra*; all holding that, in order to change a deed into a mortgage, it must be alleged and proved that the clause of redemption was omitted by mistake, etc. The case does not, in terms, purport to lay down any definite or different principle nor to question or disturb the law as it formerly prevailed. It has not since been cited or referred to as an authoritative precedent and is evidently an inadvertence on the part of the court and of the able and learned judge who wrote the opinion. In the case of *Ray v.*

Patterson, 170 N. C. p. 226, 87 S. E. 212, to which we were also cited and in which a similar issue appeared, the decision was made to turn principally on an erroneous ruling of the court as to the quantum of proof for which a new trial was allowed, and the instant question was in no way presented or passed upon. Again, there is no rule in our system of jurisprudence that has a greater tendency to maintain the stability of titles and the security of investments than that which upholds the integrity of solemn written deed and protects them from assault by parol testimony except in specified and very restricted instances, and sound public policy which forms the basis of stare decisis and its proper application forbids that, on the facts of this record, the decision relied upon by plaintiff should be in any way recognized as a precedent, rendering, as it would, all muniments of title coming under it liable to be altered or set aside by parol evidence as in ordinary cases. In no aspect of the matter, therefore, can *Fuller v. Jenkins* be regarded as an authoritative decision available for the protection of the right asserted by plaintiff in the present suit, and the position is fully supported by the decided cases on the subject. Thus, in *Mason v. Cotton Co.*, supra, the court refused to allow the principles of an overruled case in protection of a claimant's rights under an executory contract; the decision being contrary to a general business law and not having been acquiesced in as the settled rule on the subject. And in *Quaker Realty Co. v. La Basse*, 131 La. 996, 60 South. 661, reported also in *Ann. Cas.* 1914A, 1073, it was held that—

"A single decision can seldom serve as a basis for stare decisis, and never where opposed to previous decisions, especially where they are overruled without being referred to as if they had escaped the attention of the court."

And, in the editorial note in the publication referred to, there are numbers of cases from courts of the highest authority to the effect that a solitary decision has been held insufficient to change the law on a given subject as it had formerly prevailed. In *Heron, Adm'r, v. Whitely Malleable Castings Co. et al.*, 47 Ind. App. 335, 92 N. E. 555, it was decided, among other things:

"The decisions of the Supreme Court do not constitute the law, but are merely evidence thereof, and people have no right to rely thereon until harmonious and well-advised opinions have been reported and have stood unchallenged for a long time. * * *

"Where the decisions of the Supreme Court are conflicting, or are so recently made that the parties cannot be presumed to have contracted in reference thereto, the doctrine of stare decisis cannot be invoked in support of a contract."

In *Stockton, Trustee, v. Dundee Manufacturing Co.*, 22 N. J. Eq. 56, involving the

validity of a tender in United States notes at a time when they were held insufficient for the purpose and the effect of a subsequent decision holding this a valid tender, the court held:

"A change in the law, by decision, is retrospective, and makes the law at the time of the first decision as it is declared in the last decision, as to all transactions that can be reached by it. Hence, a tender having been made in United States notes before the commencement of this suit, the mortgage debt must be considered as legally tendered."

And the cases of *Storrie v. Cortes et ux.*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666, and *Allen v. Allen*, 95 Cal. 185, 30 Pac. 213, 16 L. R. A. 646, are in affirmance of the same general principle.

For the reasons indicated, we are of opinion, as stated, that the facts established by the verdict and shown in the record are insufficient to support the judgment, and that the same must be set aside and a new trial had, with leave given to plaintiff to amend his pleadings, making further averment of his cause of action if the facts available should justify such a course.

Error.

(177 N. C. 327)

UNDERWOOD v. JEFFERSON STANDARD LIFE INS. CO. (No. 387.)

(Supreme Court of North Carolina. April 15, 1919.)

1. INSURANCE — 587 — LIFE INSURANCE — CHANGE OF BENEFICIARY—EFFECT OF ASSIGNMENT TO INSURER—"ASSIGNED."

The word "assigned," as used in a life insurance policy provision that insured could change beneficiary while policy was unassigned, refers to an assignment to a stranger, and not one to the insurer for a loan thereon, and the insurer, while holding the policy under an assignment, could waive any objections to a change of beneficiary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assigned.]

2. INSURANCE — 349(3)—PAYMENT OF PREMIUM NOTE—DEFAULT.

A note given by insured to insurer to cover a life policy premium, not being taken in payment of the premium, but as an agreement for extension of the time of payment of premium from its date, when it was not paid there was a default in the premium payment from the date of the note.

3. INSURANCE — 370 — LIFE INSURANCE — PREMIUMS—PAYMENT FROM LOAN VALUE—LAPSE—EVIDENCE.

Evidence in an action on a life insurance policy held to show that there was not enough indebtedness to have caused a lapse or expiration of the policy before insured's death be-

cause the indebtedness to be deducted was less than the loan value, there being enough of the latter to pay premiums due and prevent lapse under the policy provisions.

4. INSURANCE — 179½ — LIFE INSURANCE — POLICY — CONSTRUCTION — LOAN VALUE.

Where nine annual premiums were duly and fully paid under a policy of life insurance, held that the loan value next opposite the figure "9" in the portion of the policy stating the loan values was the loan value at such time.

5. INSURANCE — 367(2) — LIFE INSURANCE — NOTES — COMPUTATION OF LOAN VALUE.

In an action by beneficiary to collect upon a life insurance policy which had been assigned to insurer to secure loans, held that a note given to insurer not secured by an assignment of the policy was not, under the terms thereof, to be computed as an amount to be taken from the loan value in determining whether sufficient loan value remained under policy clause to secure and pay premiums and keep the policy in force.

6. INSURANCE — 146(3) — LIFE INSURANCE — POLICY — CONSTRUCTION.

In construing a life insurance policy for the purpose of ascertaining its legal effect, since the contract is expressed in language selected by the insurer all doubts as to its meaning should be resolved in favor of insured.

Appeal from Superior Court, Guilford County; Shaw, Judge.

Action by Mary H. Underwood against the Jefferson Standard Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The case is as follows: The policy was issued by the Greensboro Life Insurance Company August 1, 1905, and on September 12, 1912, this company was merged with defendant. Nine full annual premiums were paid, the last being paid to the defendant on or about August 1, 1913. The premium due on August 1, 1914, was not paid in full, but \$68.85 was paid upon it, and a "blue note" for \$96 was given, which plaintiff contends by its terms kept the policy in force until February 1, 1915. The policy was originally payable to Ruth Underwood, daughter of insured, as beneficiary, but on October 1, 1907, the beneficiary was changed to the plaintiff. While plaintiff was beneficiary, the insured and plaintiff borrowed \$385 from the Greensboro Life Insurance Company and assigned the policy sued on as security for the loan. While the policy was thus assigned to the company the assured changed the beneficiary, this time from plaintiff to his estate; and while his estate was beneficiary he borrowed sums from the Greensboro Life Insurance Company aggregating \$342.29, thus bringing his total indebtedness to \$727.29, which was charged against the policy, as a lien on it, in the hands of the company

by assignment to it. Of this amount plaintiff signed a note for \$385, and, of the remaining \$342.29, \$162.04 was spent in paying the premiums on said policy. After the last loan was obtained by insured he again changed the beneficiary from his estate to the plaintiff.

Insured did not at any time avail himself of the privilege of taking the paid-up policy allowed him by nonforfeiture provision 2 set out below. The policy, among other provisions, contained the following:

[Relevant Portions of Tables A and B.]

Table A.			Table B.		
Nonforfeiture Values.			Nonforfeiture Values.		
After End of Year.	Loan Value.	Paid-Up Policy.	Ext. Yrs.	Ins. Mos.	After End of Year.
2	\$ 165	0	2	2
3	275	530	3	0	3
4	385	795	5	2	4
5	500	1060	8	0	5
6	620	1325	10	0	6
7	750	1590	12	10	7
8	875	1855	15	0	8
9	1010	2120	17	0	9
10	1180	2385	19	0	10

"Tables A and B of nonforfeiture values on the margin of the page show the guaranteed values of this policy corresponding to the number of years for which full annual premiums have been paid, and in the event of any indebtedness against this policy these values will be reduced proportionately."

Nonforfeiture provisions:

"(1) Loans will be made by the company in accordance with Table A upon satisfactory assignment of this policy as sole security, at a rate of interest not to exceed six per cent. per annum, provided premiums are duly paid to the anniversary next succeeding the date when the loan is applied for.

"(2) If provision 2 has not been availed of one month from default in payment of premiums, the company will voluntarily extend this policy in the first-named sum on page one as automatic paid-up term insurance in accordance with Table B."

"Change of Beneficiary: The insured may, while this policy is in force unassigned, change the beneficiary, and such change will take effect when indorsement thereof is made by the company upon this policy."

"Assignment: No assignment of this policy shall be valid unless made in writing, and the original, or a duplicate original, filed in the home office of the company. The company will not be responsible for the validity of any assignment."

"This policy is incontestable after one year from date except for nonpayment of premiums."

On September 2, 1914, the insured paid to the defendant \$19.97 unearned interest on the loan of \$727.29, as shown by article 19 of the complaint and not denied in the answer. The insured and the plaintiff, on the 21st day of August, 1912, executed a note to the Greensboro Life Insurance Company for \$150. This note was unsecured, did not re-

fer to the policy, nor profess to be a lien upon it, nor was the policy assigned to secure it, and was afterwards destroyed by the defendant's vice president.

The following is a copy of note for indebtedness to the company secured by the assignment of the policy:

"\$727.29.

No. —.

"This is to certify that I, the undersigned, the insured and beneficiary, respectively, under, and the sole owner of, policy No. 792, issued by the Greensboro Life Insurance Company, have this day borrowed from the said company the sum of seven hundred twenty-seven and $\frac{29}{100}$ dollars, and hereby assign the said policy, and all profits and benefits now due, or which may hereafter become due, thereon, to secure the repayment of said loan and the interest thereon, as herein provided."

The following is a copy of the "blue note":

"Greensboro, N. C., Aug. 1, 1914.

"On or before the 1st day of November, 1914, without grace and without demand or notice, I promise to pay to the order of Jefferson Standard Life Insurance Company one hundred twenty-three $\frac{9}{100}$ dollars, at their home office in Greensboro, N. C., with interest at the rate of six per cent. per annum.

"This note is accepted by said company at the request of the maker, together with \$38.89 dollars in cash, on the following express agreement:

"That although no part of the premium due on the 1st day of August, 1914, under policy No. 792-G on the life of W. I. Underwood, has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that, if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that, if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

Judgment for the amount of the policy and interest at six per cent., less \$150 and interest thereon, and costs, from which defendant appealed.

Brooks, Sapp & Kelly, of Greensboro, for appellant.

Chas. A. Hines and Thos. C. Hoyle, both of Greensboro, for appellee.

WALKER, J. (after stating the facts as above). The plaintiff contends, upon the above-stated facts, that the policy was kept in force until after the death of the insured by the nonforfeiture provisions above set forth. And, for the purpose of calculating the extended insurance, she insists that the value of the policy, at the end of the

ninth year, was \$1,010, the number set opposite the figure 9 in Table A, and from this sum should be taken the amount for which the policy was liable; and she further contends that this amount was the sum of \$385 (the amount of the note she signed); and \$162.04 (the sums used in paying premiums on the policy), less \$19.97 (the amount of unearned interest), in all \$527. The extended insurance, as the plaintiff contends, is therefore \$1,010—\$527.07 of 17 years, and should be counted from February 1, 1915.

The defendant contends, on the other hand that in calculating the extended insurance the value of the policy at the end of the ninth year was only \$875, the number set opposite the figure 8, in Table A, and by the application of the nonforfeiture provision 1. above set forth. It also contends that \$727.29 should be deducted from \$875, in order that the term of extended insurance may be calculated, and that such extended insurance should be counted from August 1, 1914, the date of the note, and not from the due date of the premium note. It is conceded by the defendant that if \$1,010 was the value of the policy at the end of the ninth year (and especially if the amount of the note for \$150 due the company is not to be added to the other indebtedness), it was in force at the death of the insured; and, on the other hand plaintiff conceded that if the value of the policy at the end of the ninth year was only \$875, and the debt properly chargeable against it was \$727.29, then the policy had expired before the death of the insured.

[1] The plaintiff further contends that the only amounts chargeable against the value of the policy in computing the extended insurance is \$385, the original loan signed by her, and \$162.04, the portions of the other loans used in paying the premiums; and from this, she contends, should be taken \$19.97 unearned interest paid to the defendant, and her reasons are as follows:

"(a) The policy provides that the insured may, while this policy is in force and unassigned, change any beneficiary, and that there is no question that this policy was assigned to the company at the time when the attempted change in the beneficiary was indorsed on the policy, and therefore the attempted change was null and void, the rule of law being that where provision is made in a policy for a change of the beneficiary the right must be exercised in strict accordance with the provisions of the policy."

And she cites for this position Lanier v. Insurance Co., 142 N. C. 14, 54 S. E. 786; 14 R. C. L. Insurance, § 554 et seq.; 14 R. C. L. pages 1390, 1391; and that, where an insurance policy provides for a change of the beneficiary, the latter has a vested interest therein subject to be divested, and then only in strict accordance with the provisions of the policy, for which contention she refers to Deal v. Deal, 87 S. C. 395,

69 S. E. 886, Ann. Cas. 1912B, 1142; *Arnold v. Insurance Co.*, 3 Ga. App. 685, 60 S. E. 470; *Mutual Benefit v. Willoughby*, Ann. Cas. 1913D, 838, note. And further she contended that if the attempt to change the beneficiary from the plaintiff to the estate of the insured was a nullity, and the plaintiff continued to be the beneficiary, then loans made against the policy, evidenced by the notes which she did not sign, were invalid as to her, as, "under a policy for the benefit of the wife and children of the insured, an assignment by the insured will not cut off their interest, even though it is contingent at the time the assignment is made." 25 Cyc. 778, 779.

Answering this contention, it may be said that the assured had the right to change the beneficiary, by designating his personal representative, for the use of his estate, as such. The policy had not been "assigned," in the sense that word is used in the contract. The assignment spoken of is one to a stranger, and not one to the company; for the latter could waive any objection to the change of the beneficiary, and did so by assenting to the one which was made in this case. Where a stranger is assignee, his rights could not materially be affected in the absence of his consent, and consequently the company, without authority for that purpose, could not waive for him. The provision was inserted to prevent confusion or complication, and to relieve the company from any danger of liability growing out of changing the beneficiary after the policy had been assigned. These reasons, of course, would not apply where the assignment has been made to the company itself. The debt, therefore, was \$727.29 instead of \$527.07, as contended by the plaintiff, and we think it was that amount, in any view, as the difference between the two was the amount of the debt contracted while the estate was assignee, and the company had the right to make the loan notwithstanding the assignment and without the plaintiff's consent.

[2] (b) The defendant admits that it did not earn \$19.97 of the interest that was paid to it by the insured on September 2, 1914, but contends that this amount should be applied on its unsecured note for \$150, which it destroyed. This contention, says plaintiff, is unsound; for it is clear that this payment of unearned interest should be applied to the note upon which it was paid and reduced its amount, and she relies upon this authority for so contending:

"Except when otherwise agreed, a payment made on an indebtedness consisting of principal and interest, and applied by either the debtor or creditor, will be applied first to the interest due, and then to the principal. Payments of interest by mistake, when no interest is due, is applied as payment on the principal debt at the date of maturity of the obligation. When payments of interest are made in excess

of the legal interest due, the excess will generally be applied to the principal." 30 Cyc. 1249, 1250.

"Money paid beyond lawful interest on account of the debt is, in legal effect, a payment upon the debt." *Loveridge v. Larned* (C. C.) 7 Fed. 294.

As to the "blue notes":

(c) Again plaintiff insists that the "blue notes," and payments of cash in connection therewith, kept the policy in force until February 1, 1915.

We need not discuss in detail all of the questions raised on this appeal, as we are satisfied that the admission of the parties as to certain facts are sufficient for our purpose in deciding the case upon one or two grounds alone.

Our opinion is that the extension period of the insurance should be counted from August 1, 1914. The object of the "blue note" was not to fix a new date for this purpose—that is, February 1, 1915—but it was given by the assured, and taken by the company, as an accommodation or indulgence to the former, something like a grace or favor to him in the way of extended time for payment of the premium, and not as in itself a payment of the premium. If the note was not paid, it was the same as if it had never been given, and there was a default in the payment of the premium as of August 1, 1914, in which event the extended insurance would automatically start and prevent a lapse of the policy. We have so held in a case very similar to this, and exactly the same as this case in all of the essential facts relating to this question. The court in *Sexton v. Insurance Co.*, 157 N. C. 142, 72 S. E. 863, s. c., 160 N. C. 597, 76 S. E. 535, was called upon to construe an instrument substantially worded as is the "blue note" in this case and it was said by Justice Brown, 157 N. C. at page 144, 72 S. E. at page 864:

"There is no evidence that the defendant accepted the note as a payment for the premium. It is clearly an extension of the time of payment. In express terms the note on its face declares the policy is void if the note is not paid when due. This note is similar in language to the one construed in *Ferebee v. Insurance Co.*, 68 N. C. 11."

The court further said, at page 145 of 157 N. C., at page 864 of 72 S. E., quoting from 3 *Cooley's Briefs on Insurance*, p. 2269, and citing *Pitt v. Insurance Co.*, 100 Mass. 500:

"It is commonly stipulated by insurance companies that, if a note is accepted for a premium, a failure to pay the note at maturity shall terminate the insurance. When the policy, or the policy and the note, contained a stipulation to this effect, a failure to pay at maturity a note given for a premium will work a forfeiture of insurance."

See, also, *Murphy v. Insurance Co.*, 187 N. C. 334, 83 S. E. 461.

The extension clause was inserted to save the policy from forfeiture or to prevent one. The giving of the note and payment of cash for the premium did not work an extension. The court in *Bank of Commerce v. N. Y. Life Ins. Co.*, 125 Ga. 552, 54 S. E. 643, deciding the same question, held:

"The fact that \$21 was paid in cash upon the premium did not operate to extend the policy; there being in the contract nothing declaring that a payment of a part of an annual premium should give a continuation period proportionate to the fraction of the premium paid. * * * The validity of this contract cannot be successfully questioned. It did not undertake to destroy any existing right of the beneficiary under the policy. The extension of time was a favor, not a right, and the allowance of additional time for payment of a premium beyond its maturity did not operate to confer still further rights, in spite of the terms of the extension."

The same decision was made in *Union Mut. Life Ins. Co. of Portland, Me., v. Adler*, 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088, and the case strongly supports this view.

[3] But if the extended insurance began on August 1, 1914, instead of February 1, 1915, the policy was alive and in full force when the assured died, because when his indebtedness to the company is deducted, or rather properly proportioned to the loan value of the policy, there is enough of the latter left to carry it beyond the day of the death. In other words, there was not enough indebtedness to have caused a lapse, or the expiration of the policy, before that event, and this is certainly true if the note for \$150 is not to be counted as a part of the indebtedness.

We may well pause here to again consider the case of *Sexton v. Insurance Co.*, supra, in another aspect, as defendant contends that \$875 is the proper loan value of the policy, and not \$1,010, because in the *Sexton Case*, 160 N. C. 597, 600, 76 S. E. 535, 536, the court states:

"It is true the plaintiff claims that under the automatic extension feature of the policy, there having been a payment of three annual premiums, the plaintiff was entitled to an extension to the amount marked on the policy. The policy, which was in evidence, provided that the 'nonforfeiture value on the margin of this page shows the several guaranteed values of this policy corresponding to the number of years for which annual premiums have been paid, and in the event of any indebtedness against this policy these values will be reduced proportionately.' This table shows that where three annual premiums have been paid, as in this case, the loan value was \$60, which would have entitled the insured to three years and one month's extension. But it appeared in the evidence of the plaintiff that the insured had borrowed said \$60 from the company, which was unpaid, and, therefore, upon the plaintiff's evidence, the insured was entitled to no extension."

[4, 5] Defendant then says that the original record of this case shows that there had been four premiums paid instead of three, and it deduces from this fact that the court adopted the loan value of three payments when there had been four, as it practically says should be done in this case. But that is a non sequitur. It does not follow that, because the court may have made a mistake as to the number of payments, it has held that defendant's contention is right as to what is the loan value, for the law is stated correctly upon the assumption that there were only three payments. "There having been payment of three annual premiums, the plaintiff was entitled to an extension to the amount marked on the policy"—that is the amount set down next opposite the figure 3—and the court so allowed, and adjudged accordingly. It is perfectly clear that the court did not mean otherwise, and that it acted upon the assumption that there had only been three premiums paid. We do not know what the record shows, or whether this was a mistake in fact, but we must take the law to be as declared upon the facts stated by the court, in the absence of any correction of the alleged mistake by petition to rehear. The parties seem to have been contented with the statement of the fact as it was made. But, however that may be, we are decidedly of the opinion that the only construction of the policy is that the figures next opposite to "nine" in the first column of the table are the correct ones to be adopted here.

If there had been no indebtedness, the period of extension, after eight full payments of premiums would have been 15 years, and after nine payments it would have been 17 years. In the former case the "loan value" of the policy would have been \$875, and in latter case \$1,010. This is according to the table of values of term and paid-up policies, showing the length of extended insurance in the case of the former class, or term insurance. The provision as to the payment of the premium to the anniversary next succeeding the date of a loan cannot operate, by any fair or reasonable construction, to reduce the loan value of the policy to \$875, as that provision was a mere condition annexed to the making of the loan, and was evidently not intended to decrease the loan value, or to give any benefit by a reduction of it. It being admitted that nine annual premiums were duly and fully paid, the loan value next opposite the figure 9 must control in estimating the extension period, as we have already shown. The result would be that the policy was in force when the assured died, but this is conclusively so when we hold, as we do, that in estimating the amount of the indebtedness the note for \$150 should not be counted. It was not a lien on the policy, and the latter provides:

"Tables A and B of nonforfeiture values on the margin of this page show the guaranteed values of this policy corresponding to the number of years for which full annual premiums have been paid, and in the event of any indebtedness against this policy these values will be reduced proportionately."

This clause, especially the latter part of it, plainly shows that only indebtedness secured by an assignment of the policy shall be considered. The note of \$150 was not "a debt against the policy," as contemplated by that provision.

[8] We must not overlook the fact that, in construing a policy for the purpose of ascertaining its legal effect, the contract is expressed in language selected by the company for its purpose, and therefore that all doubts as to its meaning should be resolved in favor of the assured. *Bray v. Insurance Co.*, 139 N. C. 390, 51 S. E. 922; *Rayburn v. Casualty Co.*, 138 N. C. 379, 382, 50 S. E. 762, 107 Am. St. Rep. 548; *Arnold v. Insurance Co.*, 152 N. C. 232, 67 S. E. 574; 14 *Ruling Case Law*, p. 226; *Grabbs v. Insurance Co.*, 125 N. C. 389, 34 S. E. 503; and *Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563. This court said in *Bray v. Insurance Co.*, supra:

"If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs; and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. * * * This is the rule to be adopted for our guidance in all such cases, and one reason, at least, for it is that the company has had the time and opportunity, with a view to its own interests, to make clear its meaning, by selecting with care and precision language fit to convey it, and, if it has failed to do so, the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract, as one of indemnity for his loss;" citing *Grabbs v. Insurance Co.*, 125 N. C. 389, 34 S. E. 503.

In applying this just and salutary rule, Justice Harlan, in *First National Bank of Kansas v. Hartford Fire Insurance Co.*, 95 U. S. 673, 679, 24 L. Ed. 563, 565, thus tersely and strongly restated the rule, with the reasons for it:

"When a policy of insurance contains contradictory provisions, or has been so framed as

to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

The rule is very pertinent here as to the several questions raised. But we entertain no doubt, without the aid of the rule, as to what the parties meant when they entered into this contract, and especially in regard to the extension clause.

It is not necessary to consider the point as to the application of the unearned interest to the debt (of \$779) which is chargeable against the policy, thereby reducing it, as we are of the opinion that, without making such use of it, the policy had not expired at the death of the assured, but was still in force.

The case was admirably argued by both sides, and we are indebted to the learned counsel who appeared before us (Mr. Kelly and Mr. Hines) for having made easier our task in unraveling an apparently complex and intricate case by their very enlightening argument.

We have reached the conclusion that the note for \$150 should be omitted from the account in ascertaining the period for the extension of the insurance under Table A, and the stipulation in the policy explanatory of it, which provides for the proportioned reduction of the policy value by the existing indebtedness. And, further, that the loan value was \$1,010 instead of \$875. These two conclusions carry the policy beyond the death of the assured and entitle plaintiff to recover upon it. We are also inclined to the opinion that the amount of the unearned interest should also be deducted, but it is not necessary to decide that question in view of our other holdings, and we therefore leave it open.

We are of opinion that Judge Shaw gave the correct judgment, and it must be so certified.

Affirmed.

(177 N. C. 318)

NANCE v. WESTERN UNION TELEGRAPH CO. (No. 395.)

(Supreme Court of North Carolina. April 15, 1919.)

1. APPEAL AND ERROR ¶273(4)—EXCEPTIONS—TESTIMONY.

General exception to testimony incompetent in part and good in part will not be sustained on appeal.

2. APPEAL AND ERROR ¶273(5)—EXCEPTIONS—INSTRUCTIONS.

An exception to the charge of the court without specifying the particular objectionable part thereof will not be sustained on appeal.

3. PLEADING ¶204(1)—DEMURRER—PLEADING GOOD IN PART.

Demurrer to a pleading as a whole will be overruled where a part thereof is good.

4. EVIDENCE ¶180—RELEVANCY—SIMILAR FACTS—RES INTER ALIOS ACTA.

In boarding house keeper's action for failure of defendant's employes to board and room with him as required by defendant's contract, where defense was the inferior quality of food furnished, witness who had eaten food furnished by plaintiff both before and after contract was entered into could testify as to the kind of meals provided by plaintiff for his boarders before employes commenced boarding with him, where there was no agreement to give employes food of better quality than theretofore given; such evidence not being *res inter alios acta*.

5. EVIDENCE ¶129(1)—RELEVANCY—SIMILAR FACTS.

Evidence of similar facts is admissible to prove particular fact in issue if it rationally tends to prove such fact and is so related to it as to form a reasonably safe basis for a conclusion in regard to such fact.

6. EVIDENCE ¶53—RELEVANCY—SIMILAR FACTS—INFERENCES.

Among inferences which, except under certain conditions, the law will not permit to be drawn, is that a person has done a certain act because he has done a similar act at another time.

7. CONTRACTS ¶335(2)—BREACH—RIGHT OF ACTION.

A party to a contract can maintain an action for its breach upon averring and proving a performance of his own antecedent obligations arising on the contract or that he was prevented from performing it by the other party or those acting for him.

8. DAMAGES ¶40(2)—LOSS OF PROFITS—BREACH OF CONTRACT.

In boarding house keeper's action for damages for failure of defendant's employes to board and room with him as required by defendant's contract, profits which would certainly have been realized but for such breach are recoverable.

9. DAMAGES ¶23—BREACH OF CONTRACT—PROFITS—LOSSES—CONTEMPLATION OF PARTIES.

In action for breach of contract, the injured party is entitled to recover all damages, including gains prevented as well as losses sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty.

10. TRIAL ¶350(4)—SUBMISSION OF ISSUE—BREACH OF CONTRACT.

In action for breach of contract, where defendant denied having breached the contract, the submission merely of the issue as to the amount, if any, plaintiff was entitled to recover, was insufficient, since there should have been an issue as to whether or not defendant had breached the contract.

Appeal from Superior Court, Davidson County; Shaw, Judge.

Action by O. L. Nance against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. No error.

Plaintiff sued for damages, alleging that he contracted with the defendant to board and lodge nine of its employes at \$1.25 per day for each of them, and that after staying with him a few days they left his home, without any legal or sufficient cause, although he had to incur great expense in preparing to perform his part of the contract, and while they were with him as boarders and lodgers he supplied them with good and wholesome food and comfortable lodging, and was at all times able, ready, and willing to perform the contract throughout the time named therein. The defendant denied the allegations of the complaint.

The jury returned the following verdict:

"What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: \$150."

Judgment and appeal by the defendant.

Francis R. Stark, of New York City, and Walser & Walser, of Lexington, for appellant. J. F. Sprulli, of Lexington, for appellee.

WALKER, J. (after stating the facts as above). [1-3] There is but one question which requires consideration. Mrs. Wafford testified that she had eaten at the plaintiff's boarding house both before and after the employes came there, and saw the supper which was spread for them on the night they did not come, when they agreed to come and were expected by the plaintiff to come, and it "looked nice," was well cooked, and "looked as nice as anybody's." Defendant objected to this testimony, but it will be observed that at least some of it was clearly admissible, and the objection must fail; for where a part of testimony is competent, although the other part of it may not be, and exception is taken

to all of it, it will not be sustained. Defendant should have separated the "good from the bad," and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him, and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule. *State v. Ledford*, 133 N. C. 722, 45 S. E. 944; *Barnhardt v. Smith*, 86 N. C. 479; *Phillips v. Land Co.*, 174 N. C. 542, 545, 94 S. E. 12 and cases cited; *Caldwell County v. George*, 176 N. C. 602, 97 S. E. 507. We have very recently, at this term, approved this rule. It also applies to the charge of the court (*Ritter L. Co. v. Moffitt*, 157 N. C. 568, 73 S. E. 212; *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011; *Sigmon v. Shell*, 165 N. C. 582, 81 S. E. 739), and also to a demurrer in pleading (*Caho v. Railroad Co.*, 147 N. C. 23, 60 S. E. 640; *Hay v. Collins*, 118 Ga. 243, 44 S. E. 1002; *Sloan v. S. A. L. Ry. Co.*, 64 S. C. 389, 42 S. E. 197; *N. & W. R. Co. v. Stegall's Adm'r*, 105 Va. 538, 64 S. E. 19; *Va. & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991).

[4] But the testimony as to the kind of meals provided by plaintiff before the boarders came was relevant and competent, not generally or in all cases, but in this case, because of its peculiar facts. Plaintiff kept a boarding house, and agreed for a consideration to take these employes of defendant as boarders, giving them such lodging and table board as he had theretofore furnished to his other boarders. There was no special provision for better board or accommodations. It was competent for the witness, therefore, in stating what kind of table board they received after coming there, to compare it with that furnished before they came, as tending to show that, under the contract, which was general in its terms, and called for the same kind of accommodations and board theretofore supplied, the employes received the ordinary and usual board, and not such as they stated had been received. But, if not substantive evidence, it was, at least, corroborative of the witness, and no special instruction was asked as to how it should be applied by the jury, as required by rule 27 of this court (164 N. C. [Anno. Ed.] 438, 81 S. E. xi).

[5, 6] The question to be decided, when this class of testimony is offered, is whether it is relevant; that is, whether it rationally tends to prove the fact in issue, and is so related to it as to form a reasonably safe basis for a conclusion in regard to the fact. Where the defense in an action brought to recover for labor was that the plaintiff had unskillfully performed such labor, evidence that he had unskillfully performed other labor was held irrelevant. *Campbell v. Russell*, 139 Mass. 278, 1 N. E. 345; *Maguire v. Middlesex R. Co.*, 115 Mass. 239. Among inferences which, except under certain conditions, the

law will not permit to be drawn, is that a person has done a certain act because he has done a similar act at another time. 17 Cyc. 279. The evidence in this case was both relevant and competent—relative because it tended to prove a material fact; and competent because the witness had personal knowledge of the matters to which she testified, and her statement was not *res inter allos acta*, as suggested by defendant's counsel. It will be noticed that Mrs. Wafford spoke of the table fare both before and after B. H. Moore and the other employes came to board. She saw the supper spread for them, and of which they did not come to partake, and she also had eaten at Mrs. Nance's table before that day. All this evidence tended to rebut that of the defendant, and to show that there had been full compliance with the terms of the contract by the plaintiff.

If the testimony offered in behalf of the plaintiff was found by the jury to be true, which seems to be the case, the plaintiff furnished such meals and substantial food as were sufficient to satisfy the normal appetite, though not, perhaps, suited to those of fastidious tastes. He was not required, under the contract, to gratify the luxurious tastes of an epicurean.

The testimony of Mrs. Wafford that her daughter was employed by plaintiff to help in the house when the new boarders should come, and that she was afterwards told by plaintiffs that her child's service would not be needed, as his wife could do the work after the boarders had left, if not harmless, tended to show that plaintiff, as he stated, had prepared, after making the contract, to receive his guests and have the proper waiters at the table for serving the meals. They could not eat if they could not get the food, and there must be some one to bring it to them. This is not an unusual, but a customary, provision at a boarding house, or a hotel. This proof was offered to show plaintiff's readiness to perform his part of the contract.

[7-8] A party to a contract can maintain an action for its breach upon averring and proving a performance of his own antecedent obligations arising on the contract, or that he was prevented from performing it by the other party or those acting for him. *Tussey v. Owen*, 139 N. C. 460, 52 S. E. 128. And as to the damages, profits which would certainly have been realized but for the defendant's fault are recoverable. *Hardware Co. v. Buggy Co.*, 167 N. C. 423, 83 S. E. 557. The principal rule in such cases is that the party injured is entitled to recover all the damages, including gains prevented as well as losses sustained, as were fairly within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty. *Gardner v. Telegraph Co.*, 171 N. C. 405, 407, 88 S. E. 630, L. R. A. 1916E, 481.

The doctrine is thus well stated in *Griffin v. Culver*, 16 N. Y. 489, 69 Am. Dec. 718:

"The broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."

This court, when discussing this rule, said in *Hardware Co. v. Buggy Co.*, supra:

"As shown by further reference to the authorities, this certainty referred to by the learned judge does not mean 'mathematical accuracy,' but a reasonable certainty"—citing *Sutherland on Damages* and *Hale on Damages*, pp. 70, 71.

The subject is fully considered as to broken contracts in *Machine Co. v. Tobacco Co.*, 141 N. C. 284, 53 S. E. 885, where we held:

"(1) Where one violates his contract, he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed." *Griffin v. Culver*, supra.

"(2) The law seeks to give full compensation in damages for breach of contract, and in pursuit of this end, it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case furnishes a standard by which their amount may be determined with sufficient certainty.

"(3) In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances and which are perhaps merely fanciful, to be considered by the jury as part of the compensation."

A text-writer thus refers to the rule:

"In an action for damages, the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered though plaintiff can only give his loss approximately." *Hale on Damages*, p. 70, quoted with approval by this court in *Bowen v. Harris*, 146 N. C. 385, 50 S. E. 1044.

And further, on page 71:

"A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented, but absolute certainty is not required, compensation for prospective losses may be recovered when they are such, as in the ordinary course of things, are reasonably certain to ensue. Reasonable means reasonable

probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed."

And as to torts the rule applicable to them is stated in *Johnson v. Railroad Co.*, 140 N. C. 574, 53 S. E. 362.

Some of these questions are not presented by the assignments of error, but they are discussed to some extent in the briefs, and we have deemed it proper that we should refer to them.

[10] We will not close without adverting to the form of the issue, which we do not approve. There should have been an issue as to whether there had been a breach of the contract; the defendant having denied that there had been one. The second issue then, should have been in the form of the one submitted, or substantially so. But there was no objection to the form of the issue, and we merely refer to it, because such an issue has been condemned by this court. *Denmark v. Railroad Co.*, 107 N. C. 188, 12 S. E. 54; *Hatcher v. Dabbs*, 133 N. C. 239, 45 S. E. 562; *Shoe Co. v. Hughes*, 122 N. C. 298, 29 S. E. 339. If the breach had been admitted, then, of course, the issue submitted would be the proper one.

There was no error in the trial of the case, and we find none in the record.

No error.

(112 S. C. 183)

ELLISON et al. v. MATTISON et al.
(No. 10132.)

(Supreme Court of South Carolina. Jan. 25, 1919.)

1. JUDGMENT \S 565 — CONCLUSIVENESS — NONSUIT WITHOUT PREJUDICE.

A judgment of nonsuit entered without prejudice against remaindermen under their grandfather's will, in a suit for partition prematurely brought because their mother, the life tenant, was yet alive, does not bar a subsequent suit brought after termination of the life estate to recover their remainder interest.

2. JUDGMENT \S 576(1)—CONCLUSIVENESS — ERRONEOUS JUDGMENT.

A judgment against remaindermen rendered in a suit for partition does not bar a subsequent suit to recover their remainder interest, where the former judgment was erroneous on its face, in that the court, as a court of equity, failed to grant relief to which the parties were entitled on the case stated by them.

3. WILLS \S 614(8)—CONSTRUCTION—ESTATE CREATED—ABSOLUTE ESTATE IN PERSONALTY.

Where testator devised land to his wife for life, at her death the land to be sold and equally divided among his five children, the portion falling to two daughters to be theirs for life, and then to their children forever, the daughters did not take an absolute estate, so as to bar

their children from any rights under the will, though the proceeds became personalty.

4. WILLS \S 467—CONSTRUCTION—RECITALS AS TO WISHES OF TESTATOR.

Where a testator devised land to his wife for life, directing that at her death the land be sold, and the proceeds be divided equally among his five children, and expressing his "desire" that the portion falling to two daughters should be theirs during lifetime, then to their children forever, the children of the daughters took in remainder; the disposition, as to the daughters, not being precatory merely.

5. WILLS \S 740(4)—CONVEYANCE BY DEVISEE—EFFECT.

Under a will directing that at the death of the wife, the life tenant, the land be sold, and the proceeds equally divided among five children, two of whom, daughters of testator, were to hold for life with remainder to their children, where the wife, with four of the children, conveyed the land in fee simple to the other child, the deed could not be construed as a family settlement barring the children of the daughters of their interest in remainder.

6. REMAINDERS \S 17(3)—ACTION BY REMAINDERMEN—ACCRUAL OF ACTION.

Action by remaindermen to subject land to payment of their legacy is not barred by limitations, where brought within the statutory period after their cause of action accrued by death of the life tenant.

7. REMAINDERS \S 17(3)—ADVERSE POSSESSION.

Where under a will the grandchildren of testator were entitled to share in the proceeds of the sale of certain land upon the death of their mother, who had a life estate in the land, there could be no adverse holding against the grandchildren until after the death of their mother.

Appeal from Common Pleas Circuit Court of Anderson County; James E. Pearlfloy, Judge.

Action by Jane E. Ellison and others, against W. E. Mattison, individually and as administrator c. t. a. of Peter Johnson, deceased, and another. From a judgment for plaintiffs, defendant J. D. Stone appeals. Judgment modified and affirmed in other respects.

J. M. Paget, of Anderson, Carey & Carey, of Pickens, and L. L. Rice and Bonham, Watkins & Allen, all of Anderson, for appellant.

A. H. Dagnall and Sullivan & Cooley, all of Anderson, for respondents.

GAGE, J. The history of this litigation is set out in 90 S. C. 146, 72 S. E. 991, and 99 S. C. 151, 82 S. E. 1046. The action there reported was for partition, and it failed. This action, arising out of the same transaction, is by the children of Mrs. Mary Ellison and Mrs. Carolina Mattison, daughters of Peter Johnson, to subject two-fifths of a title in certain real estate now held by one Stone to

the payment of a legacy created by the will of Peter Johnson, who was the source of title common to all the parties.

The circuit court concluded that the land was liable to pay the legacy due to Ellison, but that Mattison was barred by the statute of limitations to claim the payment of his legacy.

The defendant Stone has made fifteen exceptions; but they have been wisely reduced by the argument to five questions. They are these: (1) Res adjudicata; (2) the parties Ellison and Mattison have no right under Peter's will, (a) because their mothers took an absolute estate, and (b) because the words used in the will were not words of command, but merely words of desire; (3) failing in these postulates, Peter's will had been carried out; (4) statute of limitation; and (5) adverse possession.

These in their order.

[1, 2] The plea of res adjudicata is not sound.

When the Ellison children and the Mattison children sued in the action before referred to, the Ellisons were nonsuited because their mother, who was life tenant, was yet alive, and her children therefore had no present right. The order of nonsuit declared that it was "granted without prejudice to their rights to maintain such [action] as and when their rights if any may accrue." By the express words of the order the accruing right of the Ellisons was left intact. Nothing was adjudged as to them save at the time they sued they had no present right. It is true that, so far as the Mattisons are concerned, the cause was not thus arrested, but went on to a final judgment against them.

But in the instant action the Mattisons have set up in their answer and relied upon in the trial no statement of facts that were not stated in the complaint in the first action. The only difference betwixt the two actions lies in the circumstance that in the first action the Mattisons esteemed themselves on the facts alleged to be entitled to partition, and in the instant action, on the same facts alleged, the Mattisons esteem themselves entitled to be paid a legacy out of the proceeds of the sale of land. The whole right was stated in the first action.

It was no fault of Mattisons that they did not get in the first action a remedy; their statement of the facts entitled them to a remedy, as we shall presently show in the instant case. It was no legal fault of theirs that they did not ask the appropriate remedy. Indeed, that cause might have been retained that they might have prosecuted in it the appropriate remedy. That it was not so retained is not now altogether chargeable to the Mattisons.

[3] The appellant's second postulate rests on two assumptions; and they both spring out of this and the relevant section of the will:

"The residue of my estate real and personal I give and bequeath to my beloved wife, Nancy A. Johnson, to be hers during her natural life or widowhood, and at her death or marriage then the said realty and personalty to be sold and equally divided among my children, and having an eye in such division and settlement to the advances I have already made to them, which advances are hereinafter stated to date. As well shall an eye be had to advances after the date hereof in said division and settlement. Furthermore I desire that the portion of my estate that may fall to my daughters N. Caroline Mattison and Mary A. E. Ellison to be theirs during their lifetime and then to their children respectively forever."

The appellant contends "that, the bequest to Caroline and Mary being personal property, they take absolute estates," and he cites for authority the words of Judge Nott in *Carr v. Porter*, 1 McCord, Eq. at page 90. The court there only meant to say that, if a testator should expressly devise a life estate in land, the same words would create an absolute estate in personalty. The court did not intend, of course, to imply that a limited estate in personalty might not be created by express words.

It was suggested in 90 S. C. 146, 72 S. E. 991, that the will of Peter was "a gift of personal property, money, a legacy, to Mrs. Mattison for life with remainder over to her children."

[4] The other assumption of the appellant is also untenable, to wit: That the words of the will under which the plaintiff claims are merely precatory, and confers on him no right of property.

It is true that the expressed "desire" of the testator does not always of itself amount to a direction; it may or it may not amount to a direction according as the intention of the testator may be gathered from the whole instrument. A testator's expressed and lawful desire ought, of course, to be carried out, unless it be inconsistent with other and stronger words contained in the instrument.

In the instant case the will contains no words which are inconsistent with that construction which gives imperative operation to the expressed "desire." The object of the testator's bounty were a wife and five children. He devised land (1) to his wife for her life. He then directed (2) that the land should be sold and the proceeds divided equally between the five children. He went further and expressed (3) the "desire" that the portion which might fall to Caroline and Mary should be "theirs *during their lifetime* and *then* to their children respectively forever." The italics are supplied.

The testator made a difference betwixt the children. To three he gave absolutely. To two he gave a right for their life; and he plainly expressed the desire that the children of these two should have the absolute right.

There is nothing in *Arnold v. Arnold*, 41 S.

C. 298, 19 S. E. 670, relied upon by the appellant, inconsistent with this view, nor in *Brunson v. King*, 2 Hill, Eq. 490.

[6] The third postulate of the appellant is that the expressed desire of Peter has been carried out; that is to say that the land has been sold and the proceeds paid to the five children, that two of the children received absolutely two-fifths of the proceeds, and that Caroline and Mary received, with limitations, two-fifths, to be enjoyed by them during their lives and forever as trustees for their children, and that the transaction amounts to a family settlement. But the only testimony in the case to prove that is a simple deed of conveyance by the wife, Nancy, and four of the children to the other child, B. Lewis Johnson, who was also executor of the will. Nancy held a freehold title in the land for her life, and she had the right to convey that; and when she did so B. Lewis took from her a like title. Lewis died, and the land was sold for the settlement of his estate three years before the life estate fell in by Nancy's death in 1888. Mauldin bought B. Lewis' title at the estate sale in 1885, and Stone bought from him the same year. Plainly they took at least the freehold life estate which Nancy had conveyed to Lewis.

It is true the deed to Lewis was signed also by the four children other than himself, and that act would manifestly estop Willis and Lara (two of the other children) to make any further claim to land or money, and they have made none, and it would also estop Caroline and Mary to make any further claim for themselves. But there is no evidence that the transaction evidenced by the deed of the four children to Lewis was intended to be in performance of the will, other than the suggestion of counsel that it might have been and probably was of that character. The transaction was had seven years after the executor qualified and three years before the death of the life tenant. There is no proven record of the transaction in the probate court. The executor was never discharged from his trust. No witness testified that the conveyance referred to was done to carry out the provisions of the will.

This case is the same, so far as the proof goes, as if the five children had conveyed the land to a stranger. In such a case it will not be denied, we think, that the stranger would hold the land subject to its sale under the direction of the will. There is no evidence which tends to show that the transaction was intended as a family settlement. Such a settlement rests on contract, express or implied, and there is no testimony that the family intended the transaction to be a contract to settle their interests under the will of Peter. The probability is that it was what the deed suggests it to have been, a sale by the widow and four children of their supposed fee-simple title to B. Lewis Johnson.

[8, 7] The fourth issue is the bar of the

statute of limitations. To the Ellisons it is plainly not fit. The Ellison children had no right until the death of their mother in 1916. And for the same reason there was no adverse holding by Stone against the Ellisons.

The circuit court concluded that Mattison's right was barred by the statute, and that judgment was based on the conclusion of fact that Caroline died in 1898; but the testimony of Ambrose Williams and Hewlett Sullivan fixes definitely the death of Caroline on April 29, 1901. The Mattisons are therefore not barred.

In that respect the judgment of the circuit court is modified. In other respects it is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(112 S. C. 170)

KIRKLAND DISTRIBUTING CO. v. SEABOARD AIR LINE RY. et al.
(No. 10188.)

(Supreme Court of South Carolina. April 8, 1919.)

1. WATERS AND WATER COURSES \Leftrightarrow 119(4)—
SURFACE WATERS—CONTRIBUTORY NEGLIGENCE.

Where the owner of a warehouse consented to the construction of a certain grade by railroad across a street, and undertook to build its warehouse in accordance with it, it cannot recover damages from the railroad by reason of flooding of basement of warehouse by surface waters due to grade, even though grade was not in accordance with a city ordinance.

2. MUNICIPAL CORPORATIONS \Leftrightarrow 842—TORTS
—SURFACE WATERS—CONTRIBUTORY NEGLIGENCE.

A city is not liable for the flooding of a basement by reason of defects in the grade of a street, unless the injured party proves that he was not guilty of contributory negligence.

3. MUNICIPAL CORPORATIONS \Leftrightarrow 842—TORTS
—SURFACE WATERS—CONTRIBUTORY NEGLIGENCE.

Where owner of a warehouse consented to construction of a grade across street by a railroad, and undertook to construct its warehouse accordingly, knowing that surface waters would collect by reason of the grade, a city, although negligent in depositing trash in street, which was banked at the defective railroad grade, was not liable by reason of the flooding of the basement of the warehouse, because the negligence of the city and contributory negligence of the owner of the warehouse were inseparable.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Kirkland Distributing Company against the Seaboard Air Line Railway and

the City of Columbia. From a judgment for defendants, plaintiff appeals. Affirmed.

A. M. Lumpkin, of Columbia, for appellant.
Lyles & Lyles and C. S. Monteith, of Columbia, for respondents.

FRASER, J. The appellant thus states its case:

"This court will recall that a short time ago an action by this same plaintiff against the Seaboard Air Line Railway Company was heard on appeal and decided by this court adversely to the plaintiff. 96 S. E. 122. The city of Columbia was not a party to that action.

"The plaintiff began this action in 1917, and the cause of action alleged in the complaint is based on damage done to the plaintiff's warehouse and property in its basement, as having occurred on account of a rainstorm which fell on the night of June 9, 1917.

"The two actions are entirely different. A nonsuit was granted in favor of both defendants, on the theory that the decision of this court in the former case settled all questions which arose in the case now before the court. The wide difference in the two cases is clearly shown by the exceptions of the appellant in the present case.

"The two defendants herein are charged with joint and concurrent negligence in causing the injury complained of; the Seaboard Air Line Railway, defendant, with failing to comply with the ordinance of the city of Columbia, by the terms of which ordinance they were required to grade all streets across which they laid their tracks in conformity with the grade existing prior to the laying of such track, and the testimony in this case shows that they utterly failed to comply with the requirement, and on that account a ditch was formed across Lady street, which was the direct cause of the damage in question taken in connection with that of the defendant, the city of Columbia, which is charged with unloading a large amount of brickbats and hard lime mortar in Lady street on the northern side thereof, and on the grade above the side track in question, which crosses Lady street; that during the rain in question these brickbats and lime mortar were washed down to the side track, forming a further and higher barrier to the flow of water in the street and turned it with more force and violence out of the street drainage and into this plaintiff's property, and caused the damage.

"The prior case, which was in the Supreme Court and is reported in the advance sheets at this time, did not involve any of these questions, either the violation of the ordinance or the negligence and mismanagement of the city of Columbia in filling up a natural drainage way in the street with brick and other debris, to the damage of plaintiff.

"The testimony in this case certainly clearly shows that the side track in question was laid a considerable distance below the level of Lady street. The testimony further shows that this condition has existed for several years, in violation of the terms of the ordinance. The level of the street has never been readjusted in accordance with the level of the track as laid.

This formed the ditch or sluice which the witnesses say caused the damage. We call the court's special attention to the fact that the spur track is entirely different from the side track which is in question in this case. The side track crosses Lady street toward the north.

"We take it that the city of Columbia is responsible for defects and mismanagement in their streets and the filling up of them with material that would clog drains and cause damage; would such an act on its part make it liable under the Statute? We think the court should have submitted the two cases to the jury for their determination, and its failure to do so is the ground for the exceptions herein."

[1] I. Exception 1:

"In that his honor was in error in granting a nonsuit on behalf of the Seaboard Air Line Railway, defendant, because the evidence showed that under section 536, Revised Ordinance of the City of Columbia, and the ordinances dated March 11, 1913, under which ordinances the side track in question across Lady street was constructed, the railway company did not construct said track in accordance with the city ordinances above mentioned, and negligently left said street in an improper condition and not properly graded for drainage or for travel, and caused the entire flow of water down Lady street to be turned out of its course and thrown in the plaintiff's warehouse, causing the damage alleged."

The appellant employed an architect to make plans for the construction of its warehouse, who said:

"As reported to him when he first took the matter under consideration, the grade of the side track across Lady street had been fixed by the city engineer, but that subsequently the engineers of the Seaboard Air Line Railway Company reported to him that the city engineer had consented to the lowering of the grade across Lady street by one foot, and that subsequently they could give Mr. Kirkland the benefit of that lowering, and a little better; they could lower the spur track to 18 feet at its northern end immediately adjoining Lady street, instead of the 14⁶/₁₀ which they had been standing for. This was done at Mr. Kirkland's request, and he got the benefit of the lower grade. At the time of preparing the plans for the Kirkland building, witness had before him a blueprint of the elevation of the side track across Lady street, and also of the grade of the spur track for the Kirkland building, and knew that it was a continuous descending grade from Lady street to the spur track in question and then from the spur track in question back to the northern edge of the Kirkland building, and that water would run downgrade."

The water entered the warehouse through windows in the basement. During the progress of construction of the warehouse, the plaintiff, at the suggestion of the railroad people, raised the base of these windows about 6 inches. The plaintiff and the defendant railroad knew that surface water was likely to rise along the warehouse and might enter the windows and flood the basement. They knew there was damage and agreed on the means to be used to prevent the consequent damages. As the plaintiff made its case, its damages resulted, not from the presence of the water, but from the volume of water. The plaintiff undertook to fix responsibility on the railroad company by showing that the excess volume of water was caused by the grade of the railroad at Lady street. The plaintiff not only knew what the grade was, but agreed to it and undertook to build its warehouse in accordance with it. The appellant then says the grade was not in accordance with the city ordinance, and therefore it was negligence. As it affects this case, it is wholly immaterial whether the grade was a lawful or an unlawful grade. It is manifest that the plaintiff cannot dig a pit, and recover damages from another because he has fallen into it. It is equally manifest that the plaintiff cannot agree that another shall dig a pit, and then recover damages because he has fallen into it. The grade at Lady street was made, in part, at least, for plaintiff's convenience, with its full knowledge and consent, and the plaintiff cannot recover against a railroad. The nonsuit was properly directed in favor of the defendant railroad. This exception is overruled.

[2] II. The nonsuit in favor of the city must also be sustained. If the flooding of the plaintiff's warehouse was caused by the concurrent negligence of the city of Columbia, in depositing trash in the street which was banked at and caused by the defective grade at the crossing, then the city is not liable, because the statute requires the plaintiff to prove the absence of contributory negligence.

[3] We have seen that the plaintiff and the defendant railroad were jointly responsible for the defective grade, if it was defective, and the plaintiff was guilty of contributory negligence in fixing the grade at the crossing. Here negligence and contributory negligence go hand in hand and are inseparable. Where negligence and contributory negligence are inseparable, a nonsuit must be ordered.

The judgment is affirmed.

HYDRICK and GAGE, JJ., concur.

(112 S. C. 95)

STATE v. COOLER et al. (No. 10186.)

(Supreme Court of South Carolina. April 8, 1919.)

1. CRIMINAL LAW \S 1166½(6) — HARMLESS ERROR—EXAMINATION OF JURORS — STENOGRAPHIC NOTES.

Failure of the stenographer to take notes of the examination of jurors in a prosecution for homicide is not reversible error, where all the essential facts are before the court.

2. CRIMINAL LAW \S 751—WITHDRAWAL OF JUROR SHOWING BIAS.

In a prosecution for homicide, where the jury was completed in the afternoon, the court can, on the next morning before testimony is introduced, withdraw a juror, shown to have expressed an opinion that the defendant was guilty.

3. COURTS \S 45 — ERECTION — "CIRCUIT" COURTS—CONSTITUTIONALITY.

Under Const. art. 5, § 13, providing that the state shall be divided into judicial circuits, Act Feb. 14, 1916 (29 St. at Large, p. 688), creating 14 judicial circuits and leaving Charleston county alone in the Ninth circuit, is valid, since the word "circuit" means a division of the country for judicial business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Circuit.]

4. CRIMINAL LAW \S 798(½)—INSTRUCTIONS—EVIDENCE.

In a prosecution for homicide, it was error for the court to refuse to charge that the jury must base its finding exclusively on the evidence taken in open court, where the bias of one of the jurors had been brought in question.

5. CRIMINAL LAW \S 873(4) — EVIDENCE—DECLARATIONS OF CODEFENDANTS.

Admission in evidence of declarations by a codefendant was not error, in a prosecution for homicide; the judge having properly cautioned the jury that the statements were evidence only against the codefendant.

6. CRIMINAL LAW \S 428—EVIDENCE—DECLARATIONS OF CODEFENDANTS — NECESSITY AS TO ENTIRE STATEMENT.

Declarations by a codefendant as to the particulars of the crime must come out in their entirety, if any part is given.

7. CRIMINAL LAW \S 508(1)—TESTIMONY OF CODEFENDANT—ADMISSIBILITY.

A codefendant as a witness in a prosecution for homicide can testify though his testimony includes a statement that his codefendant did the killing.

8. ASSAULT AND BATTERY \S 66—JUSTIFICATION—OPPROBRIOUS LANGUAGE.

Opprobrious language does not justify an assault or furnish legal provocation.

Appeal from General Sessions Circuit Court of Jasper County; Ernest Moore, Judge.

Aleas Cooler and another were convicted of murder, and they appeal. Judgment reversed, and new trial ordered.

Cole L. Blense, of Columbia, W. N. Heyward, J. P. Wise, and H. Klugh Purdy, all of Ridgeland, and J. Fraser Lyon, of Columbia; for appellants.

Geo. Warren, of Hampton, and S. G. Mayfield, of Holbrook, Ariz., for the State.

FRASER, J. The appellants were convicted of murder and sentenced to electrocution. There are 21 exceptions. Several of the exceptions raise the same questions, and, as they have not been separately stated, they need not be separately considered.

[1] I. The first question in logical order refers to the stenographic report in the case. The stenographer did not take notes of the examination of jurors upon their voir dire, and this failure is a subject of appeal. The selection of the jury is a very important part of the trial. They are required to take full stenographic notes of all proceedings. The examination of jurors is an important part of the proceedings. The essential facts, however, are before the court, and this is not reversible error. The exception that raises this question cannot be sustained.

[2] II. One of the jurors, named Papham, was sworn on his voir dire and accepted as a juror. It seems that the jury was completed at the afternoon session, but no evidence was offered until the next morning. When the court was opened, the next morning, counsel for the appellant Cooler called attention of the court to the fact that this juror had expressed an opinion and examined a witness who testified that this juror had expressed the opinion that this appellant was guilty. His honor held that the juror was already accepted and it was too late to withdraw him from the jury and substitute another. At this stage of the case, the presiding judge certainly had the power to withdraw the juror, at the request of the defendant, and substitute another, and it was error not to do so.

[3] III. The appellant raises the question of the constitutionality of the act creating the Fourteenth circuit (Act Feb. 14, 1916 [29 St. at Large, p. 688]). In so far as this case is concerned, the case of State v. McAppus, 107 S. C. 345, 92 S. B. 1053, is conclusive, and this exception is overruled.

[4] IV. The defendant Cooler asked the presiding judge to charge the jury that it must base its findings exclusively on the evidence taken in open court. The presiding judge thought doubtless, that he had included that request in his general charge. Inasmuch as the bias of one of the jurors had been brought in question, this request should have been charged as requested by the defendant.

[5.] V. The appellant Cooler complains of the admission of statements made by his codefendant, Davis, in court and out of court. In both cases his Honor was correct. Davis was a defendant, and the state could prove what Davis said about the case. His honor properly cautioned the jury that the statements were evidence only against Davis. The whole statement must come out if any part is given. The statement must be received, as it was received, in this case, with the caution that it only affected Davis.

[7] As to the statement in court: We say Davis was a witness, and had the right to make his statement, even if it included a statement that his codefendant had done the killing. We have been cited to no authority, and we know of none, that holds to the contrary.

[8] VI. The only other point that need be considered in this case is the effect of opprobrious language. It is too well settled in this state to require the citation of authority that language, no matter how opprobrious, does not justify an assault or furnish legal provocation. To discuss this further would involve the facts, and, as this case must go back for a new trial, the impropriety is manifest.

The judgment is reversed, and a new trial ordered.

HYDRICK, WATTS, and GAGE, JJ., concur.

GARY, C. J., did not sit.

(112 S. C. 108)

RICHARDSON v. ELLIS. (No. 10116.)

(Supreme Court of South Carolina. Jan. 17, 1919.)

Appeal from Common Pleas Circuit Court of Greenville County; John S. Wilson, Judge.

Action by James M. Richardson against R. W. Ellis. From an order confirming findings of master, to whom case was referred, defendant appeals. Affirmed.

Martin & Henry, of Greenville, for appellant. Lanford & Richardson, of Greenville, for respondent.

GARY, C. J. This action arose under section 3543 of the Code of Laws of 1912, which is as follows: "No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and purport."

The defendant entered into possession of the land in question, under such an instrument of writing as is required by law to be recorded.

The master, to whom the case was referred, found as matter of fact that the plaintiff, who

subsequently purchased the land from the defendant's grantor, neither had notice of the instrument itself, nor of its nature and purport. On appeal these findings of fact were confirmed by his honor the circuit judge, and this appeal is from his order of confirmation.

The appellant has failed to satisfy this court that there was error in said findings.

Affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(112 S. C. 93)

COULTER v. HERMITAGE COTTON MILLS. (No. 10177.)

(Supreme Court of South Carolina. March 29, 1919.)

HUSBAND AND WIFE \S 209(5)—RIGHTS OF WIFE—SEPARATE ACTION IN TORT.

A married woman may maintain an action for damages for assault and battery committed upon her by her employer's representative without joining her husband as a party plaintiff.

Appeal from Common Pleas Circuit Court of Kershaw County; W. H. Townsend, Judge.

Action by Callie Coulter against the Hermitage Cotton Mills. A nonsuit was allowed, and plaintiff appeals. Reversed.

M. M. Johnson and B. B. Clarke, both of Camden, for appellant.

W. B. De Loach, of Camden, for respondent.

HYDRICK, J. Plaintiff, a married woman, brought this action against defendant for damages for an assault and battery, alleged to have been committed upon her by a representative of defendant in the course of his employment. She did not join her husband as a party plaintiff, nor did she allege that she was a married woman. The answer was a general denial.

At the trial, plaintiff introduced testimony tending to prove the assault and battery alleged, and incidentally it was brought out that she was a married woman. At the conclusion of the testimony, defendant moved for a nonsuit, on the ground that she could not maintain the action without joining her husband. The court granted the motion, and plaintiff appealed.

We think the court was in error. In the case of Messervy v. Messervy, 82 S. C. 559, 64 S. E. 753, it was decided that a married woman could maintain an action for damages for maliciously enticing her husband away from her, without joining the husband as a party. While the circumstances of the two cases are not precisely alike, the right of the wife to maintain an action in tort for injury to her person without joining her husband was affirmed in that case, on the ground

that it was "a chose in action," in the broadest sense of those words, which belongs exclusively to her, and therefore she has the right to sue for such injury without joining her husband. Her right of action is separate and distinct from that which her husband may maintain, in such a case, for the loss of her services and other damages resulting to him by reason of her injury—just as a parent and minor child may maintain separate actions for an injury to the child. Judgment reversed.

FRASER and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(112 S. C. 109)

SALLEY v. PARKER et al. (No. 10180.)

(Supreme Court of South Carolina. April 7, 1919.)

1. LANDLORD AND TENANT ⇨274(3)—WRONGFUL DISTRESS.

A landlord, who took a stove of a tenant for rent, when the tenant in fact owed no rent, was guilty of conversion.

2. PRINCIPAL AND AGENT ⇨23(2)—RELATION—PROOF.

Agency may be proven by circumstances.

3. PRINCIPAL AND AGENT ⇨23(5)—CONVERSION—AGENCY—PROOF.

In action against two persons for conversion, evidence held sufficient to sustain a finding that one of defendants who took the property was the agent of the other defendant.

4. LANDLORD AND TENANT ⇨274(7)—WRONGFUL DISTRESS—PUNITIVE DAMAGES.

In an action against a landlord for conversion of a stove which a tenant had left on the premises, where landlord did nothing beyond asserting his right to hold the stove, punitive damages were improperly allowed.

5. LANDLORD AND TENANT ⇨270(7) — DISTRESS—NECESSITY FOR WARRANT.

One acting for landlord in taking property of a tenant for rent must have a distress warrant to evidence his authority when he takes the property.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Mrs. M. S. Salley against E. W. Parker and J. A. H. Geiger. From judgment for plaintiff, defendants appeal. Affirmed.

Halcott P. Green, of Columbia, for appellants.

Cooper & Alderman, of Columbia, for respondent.

GAGE, J. This is a lawsuit about a cooking stove. It arose out of these circumstances:

The plaintiff became a tenant of a dwelling house which was owned by Dent. She had vacated the house, but left behind her the stove. She returned to get the stove and was forbidden to do so by Geiger, who seized it for an alleged balance of rent due by the plaintiff. For this act of alleged conversion the former tenant sued both Parker and Geiger, and had a verdict for both actual and punitive damages.

The exceptions made four questions: (1) There was no proof of conversion, (2) wrong instructions about how agency may be proved, (3) there was no proof of willfulness, and therefore no basis for punitive damages, (4) wrong instructions about the service of a distress warrant.

[1] 1. If Mrs. Salley had paid all the rent she owed, and she testified she had, then the taking of the stove for her alleged debt was a conversion. The jury found there was a conversion.

[2] 2. The court made a correct and admirable statement of the law to guide the jury in finding if Geiger when he seized the stove was agent of Parker. There was no assumption by the court that Geiger was agent. The instruction was: (1) That agency may be proven by all the circumstances of the case; (2) that, if the circumstances do fix agency, then the acts of the agent bind the principal if done within the scope of the employment.

The circumstances suggest that Geiger was agent of Parker. The testimony tends to prove that Parker let the house to Mrs. Salley and collected the rents; that Parker filled out the distress warrant and sent it to Dent to sign; that the signed warrant was returned to Parker to be put into Geiger's hands, and was left at Coker's place for Geiger; that Parker talked to Geiger about the stove; that Parker told Colcock he was holding the stove for rent due, and declined to give it up until payment was made.

[3] This was ample testimony for the jury to have concluded that Parker was principal to collect and Geiger was his agent for that.

[4] 3. The counsel for respondent admitted at the hearing before us that the defendants did nothing beyond the assertion of their right to hold the stove. There was therefore no warrant to assess punitive damages, and so much of the judgment as represents punitive damages is reversed.

[5] 4. The appellant has cited no authority to sustain the contention that Geiger did not need to have a distress warrant to evidence his authority when he seized the stove, and we think there was none.

The remedy by distress was provided by the common law. The statutes have only modified the remedy. 3 Kent, p. 472 et seq.

"A warrant of distress is nothing but a power of attorney. The bailiff, or other person ex-

ecuting the warrant, is only the agent of the landlord." *Bagwell v. Jamison*, Cheves, 252.

It was the duty of Geiger to have made proof of his agency when he went to act. He knew that, for he swore he had and presented the warrant; but Mrs. Salley denied so much.

By the defendant's testimony the warrant was made out by Parker, signed by the landlord, Dent, and put into Geiger's hand to execute.

The statute law does not declare that the warrant shall be presented to the tenant (the same thing as service); but the warrant is the only evidence of the agent's right, and the agent is bound to show his right to justify his act.

Judgment affirmed.

HYDRICK and FRASER, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(112 S. C. 89)

PETERSON v. ATLANTIC COAST LINE R. CO. (No. 10182.)

(Supreme Court of South Carolina. April 7, 1919.)

1. APPEAL AND ERROR §1003 — REVIEW — VERDICT.

In law case verdict will not be disturbed upon the ground that it is against the overwhelming weight of the testimony, except where it is wholly unsupported by evidence.

2. ATTORNEY AND CLIENT §92 — AUTHORITY OF ATTORNEY—WAIVER OF ISSUE.

Attorney employed to prosecute or defend an action has authority to waive the submission of an issue to the jury, where he does so in good faith believing that it is for the best interests of his client.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by I. C. Peterson against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Cobb and Cooper & Alderman, all of Columbia, for appellant.

Barron, McKay, Frierson & Moffatt, of Columbia, for respondent.

HYDRICK, J. Plaintiff brought this action to recover damages for injuries sustained by him as the result of defendant's alleged negligence in transporting him as a passenger from Columbia to Camp Jackson.

The evidence disclosed the following circumstances: In the summer of 1917 the construction of Camp Jackson, which is about six or seven miles from Columbia, was in prog-

ress. Defendant ran a train, composed of an engine and 15 or 20 cattle cars, between the city and the camp for the purpose of conveying workmen to and fro. The train would leave the city early in the morning, signaling its departure by blowing the whistle some minutes before leaving, and would stop at street crossings and other places en route to take up workmen going to the camp, and after work hours in the afternoon it would take up the workmen at the camp and bring them back to the city. It did not appear by what arrangement this train was run, at whose instance or expense. But transportation on it was free to workmen at the camp, and none of them were required to pay fares. The foreman at the camp who employed plaintiff told him to come out on this train, and plaintiff was carried to and from the camp on it for a month or more before he was injured. On September 26, 1917, the car in which plaintiff was riding jumped the track, while running on a high embankment and approaching a trestle. Fearing that it would run off into the deep ravine, plaintiff jumped off, and broke his left leg. There was testimony tending to prove that plaintiff's injury was caused by negligence attributable to defendant. On the other hand, the testimony was susceptible of the inference that defendant was not guilty of actionable negligence.

At the close of all the testimony, defendant moved for a directed verdict on the ground, among others, that there was no evidence of actionable negligence. The motion was refused. The court then asked plaintiff's attorneys if they had any authorities bearing upon the relation between plaintiff and defendant at the time of the injury; that is, as to whether plaintiff was a passenger, and entitled to that degree of care which a carrier owes a passenger. They replied that they had none, and that, as they were uncertain as to whether the evidence was sufficient to establish that relation, they would be satisfied with a charge as to ordinary care, as between a carrier and licensee.

Under instructions to which no exception has been taken, except as hereinafter mentioned, the jury returned a verdict for defendant. Whereupon plaintiff moved for a new trial, which was refused; and from judgment on the verdict he appealed to this court, assigning error in the refusal of a new trial on two grounds.

[1] The first is that the verdict is against the overwhelming weight of the testimony. This ground was not much stressed in argument, and properly so, since it has been decided in so many cases that such a ground cannot be entertained by this court in a law case except where the verdict is wholly unsupported by evidence; and, as has already been said, there was evidence upon which the verdict can be sustained.

The next ground is that, notwithstanding the request of plaintiff's attorneys, the court erred in not submitting to the jury, under proper instructions, the issue as to whether or not plaintiff was a passenger and entitled to the degree of care required by that relation. Plaintiff's attorneys admit that it was at their suggestion that the court withdrew that issue from the jury, and that they asked the court to do so, because they were very confident that the jury would find a verdict for plaintiff, and they did not want to endanger the verdict which they so confidently expected to win by insisting upon the submission to the jury of an issue about which they were in doubt as to the sufficiency of the evidence to sustain a verdict.

[2] They now contend, however, that they had no authority to bind their client by consenting to the withdrawal of that issue from the jury, and that the court was in error, notwithstanding their request, in failing to submit it, under proper instructions. This contention is unsound. It is certainly within the authority of an attorney employed to prosecute or defend an action to waive the submission of an issue to the jury, where he does so in good faith, believing that it is for the best interest of his client. Not only so, but in some circumstances it would be his duty to do so for the protection of the interests of his client; and where he does so in good faith his client is bound. *Ex parte Jones*, 47 S. C. 393, 25 S. E. 285; *Dixon v. Floyd*, 73 S. C. 202, 53 S. E. 167; *Poore v. Poore*, 105 S. C. 206, 89 S. E. 569. Indeed, it is matter of everyday practice; and in numerous cases we have held that a client may be bound even by the implied consent of his attorney, or by his silence, when it was his duty to speak; for instance, when he fails to prefer a request to charge on an important issue, or fails to call the court's attention to an omission in the charge upon such an issue, his client is bound.

Judgment affirmed.

FRASER and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(112 S. C. 191)

BEAM v. CONTINENTAL CASUALTY CO.

(Supreme Court of South Carolina. April 9, 1919.)

INSURANCE — 452 — ACCIDENT INSURANCE —
INJURY NOT INCIDENTAL TO OCCUPATION —
RECOVERY.

Under accident policy providing that it does not, except as incident to the occupation of railway employes, cover entering or trying to enter a moving conveyance using mechanical power, there could be no recovery for injuries sustained by insured in attempting to board a

moving train, not as incident to the occupation of freight conductor, but while he was traveling on a conductor's pass.

Appeal from Common Pleas Circuit Court of Greenville County: T. J. Mauldin, Judge.

Action by Samuel M. Beam against the Continental Casualty Company. From the judgment rendered, defendant appeals. Reversed.

Cothran, Dean & Cothran, of Greenville, for appellant.

Bonham & Price, of Greenville, for respondent.

FRASER, J. This is an action to recover on an accident insurance policy. The plaintiff took out an accident insurance policy in the Aetna Life Insurance Company, and the policy was assumed by the defendant, Continental Casualty Company.

The risk was classed as hazardous. The occupation was stated as freight conductor and that his average weekly earnings were not less than \$30. The application also stated, "I am not deformed, have no bodily infirmity, and have not sustained any severe bodily injury." The admitted facts are that the plaintiff was not at that time in the employ of the railroad as conductor; that he had received an injury about a year before, from which he had been incapacitated to perform the duties as conductor, and had not been restored to work, either at the date of the policy or at the time of the accident. The plaintiff expected to be reinstated, but had not been. He still retained certain privileges as an employe, but was not in service. At the time of the accident, the plaintiff was traveling on a freight train on a conductor's pass. While attempting to board a moving train, the plaintiff fell and was injured.

The pleadings are long. There are 22 exceptions, raising interesting questions, but, in the view this court takes of exception 8, the other questions become academic, and need not be discussed.

Exception 8 reads as follows:

"The presiding judge erred in overruling the defendant's eighth ground of motion for directed verdict, which was as follows: 'That the policy of insurance contains the following provisions: "This insurance does not cover (except as incident to the occupations of railway employes, railway express messengers, and railway mail clerks insured as such) entering or trying to enter or leave a moving conveyance using mechanical power." That at the time of his accident the plaintiff was not employed by and actually working for the Southern Railway Company, and was injured while trying to enter the caboose of a moving freight train for his own convenience, and while not engaged in work incident to the employment of a freight conductor.'"

The plaintiff was trying to enter a moving conveyance, to wit, the cab, using mechanical power, and not as incident to the occupation of freight conductor.

It is manifest that a declaration as to the law of waiver, fraud of the agent, etc., would be mere dicta. The policy did not purport to cover an accident that happened while the insured was trying to enter a moving conveyance, using mechanical power while traveling exclusively on his own business or pleasure.

A verdict should have been directed in favor of the defendant, and the judgment is reversed.

HYDRICK, WATTS, and GAGE, JJ., concur.

(112 S. C. 106)

FLOYD et al. v. FLOYD et al. (No. 10184.)

(Supreme Court of South Carolina. April 8, 1919.)

1. REFORMATION OF INSTRUMENTS ¶25—DEFENSE—NONPAYMENT OF CONSIDERATION.

Equity will not reform a deed, conveying only a life estate, so as to convey the fee, where the grantee had failed to pay the entire consideration.

2. REFORMATION OF INSTRUMENTS ¶28—PERSONS ENTITLED TO REFORMATION—GRANTEE—NONPAYMENT OF CONSIDERATION.

A subsequent grantee seeking reformation of a deed to the original grantor, barred from relief in equity by his failure to pay the entire consideration, stands in the same shoes as such original grantor.

Appeal from Common Pleas Circuit Court of Horry County; John S. Wilson, Judge.

Action by Samuel Q. Floyd and another against Matthew T. Floyd and others. From a judgment dismissing the complaint, complainants appeal. Affirmed.

H. H. Woodward and Norton & Baker, all of Conway, for appellants.

Hoyt McMillan, of Mullins, for respondents.

HYDRICK, J. This is an action to reform a deed, which conveyed only a life estate to the grantee, when, it is alleged, the intention was to convey the fee; the necessary words of inheritance having been omitted by mistake or ignorance of the scrivener.

In 1877, Lewis H. Floyd executed and delivered to his son, Samuel Q. Floyd, the deed in question, which conveyed 427 acres for the consideration of \$300. The deed was recorded in August, 1878.

In 1880, Samuel Q. Floyd conveyed 177 acres of the tract to Johnson, who conveyed the same to Burroughs & Collins Company.

Defendants are the heirs of Lewis H. Floyd, who died in 1835.

Defendants denied the allegations of intention to convey the fee, and resisted the prayer for relief on the further grounds that the consideration of the deed had never been paid, and of plaintiffs' laches.

According to the undisputed evidence, only about \$100 of the consideration was ever paid. For the balance, Samuel Q. Floyd gave his father his note, which has never been paid. After the death of his father, the administrator of his estate sued him on the note, and he defeated a recovery thereon by pleading the statute of limitation.

[1, 2] It is not worth while to consider the sufficiency of the evidence to prove the alleged intention or mistake, or to sustain the defense of laches, since it is perfectly clear that, upon an ancient and time-honored principle of equity, Samuel Q. Floyd is not entitled to relief. He does not come with clean hands. Nor, even at this late day, does he offer to do equity, by offering to pay what he justly owes for the land. Therefore he is not entitled to ask for equity. His grantee stands in his shoes, and occupies no better position. The complaint was properly dismissed.

Judgment affirmed.

WATTS, FRASER, and GAGE, JJ., concur. GARY, C. J., did not sit.

(112 S. C. 82)

MUSE v. CLARK et al. (No. 10187.)

(Supreme Court of South Carolina. April 8, 1919.)

1. BILLS AND NOTES ¶256—DISCHARGE OF INDORSERS—ALTERATION.

Under Negotiable Instruments Act, §§ 124, 125, where note was originally made payable to "Bank of G. * * * at said bank," and indorsed by defendants, its alteration by the maker, after the bank had refused to discount it, by striking out the words "Bank of G." and substituting above it the name of plaintiff, was a material alteration discharging defendants as indorsers.

2. BILLS AND NOTES ¶378—ALTERATION—RECOVERY ACCORDING TO ORIGINAL TENOR.

Where note was originally made payable to "Bank of G. * * * at said bank," and indorsed by defendants, and after the bank had refused to discount it, altered by the maker by striking out the name of the bank as payee and substituting above it the name of plaintiff, plaintiff could not recover from defendant indorsers under the provision of section 124 of the Negotiable Instrument Law that a holder in due course may enforce payment of a materially altered note according to the original tenor.

3. BILLS AND NOTES §537(1)—INDORSERS— ALTERATION—CONSENT.

Whether indorsers consented to alteration of note by changing name of payee *held* for the jury.

Appeal from Common Pleas Circuit Court of Greenwood County; James E. Peurifoy and S. W. G. Shipp, Judges.

Action by J. P. Muse against W. B. Clark, George Bailey, Hugh E. Giles, and F. E. Donnalld. From judgment for plaintiff, the first three defendants appeal. Reversed.

Tillman & Mays, of Anderson, and Grier, Park & Nickolson, of Greenwood, for appellants.

Featherstone & McGhee, of Greenwood, for respondent.

HYDRICK, J. This is an action on a promissory note. Plaintiff alleges that defendant Donnalld executed his note for \$225, dated May 27, 1915, payable to the order of the Bank of Greenwood, on December, 1915, and defendants, Bailey, Clark, and Giles indorsed said note to enable Donnalld to raise said sum; that, thereafter and before maturity, the name of the payee, Bank of Greenwood, was stricken out, and plaintiff's name was inserted in place thereof, as payee, by Donnalld, after which plaintiff took the note, in due course, and advanced the money thereon; that same was due, unpaid, etc.

The indorsers demurred to the complaint for insufficiency, on the grounds that the proposed contract with the bank was not accepted, that the alteration alleged avoided the note as to them, and that no contract between them and plaintiff was alleged. Judge Peurifoy overruled the demurrer, and the case was tried before Judge Shipp and a jury.

The note was written on a blank form of the Bank of Greenwood, and, when indorsed by appellants, it was payable "to the order of Bank of Greenwood * * * at said bank." The words quoted were printed in the body of the note; but the bank refused to discount it, and thereafter it was altered, and accepted by plaintiff, who testified that, when it was presented to him the printed words "Bank of Greenwood" had been stricken out by running a line through them with a pen, and his name had been interlined above those words. He also testified that it appeared that the alteration had been made with different ink and possibly by a different hand from the other writing in the note. But plaintiff's witness Andrews testified that he filled in the blanks in the note for Donnalld, and, when it had been signed and indorsed by appellants, carried it to the bank to get the money for him; and, when the bank refused to accept it, he returned it to Donnalld; and, while he did not remember changing the name

of the payee, he said the name "J. P. Muse" looked like his writing. And Donnalld testified that, when he brought the note back to him, Andrews suggested that he might get the money from plaintiff, and said, "Let me change it for you" (as he had filled in the other parts of the note), and that Andrews made the change in the presence of Bailey and Giles, two of the indorsers, both of whom knew of it, and handed the note to him, and he carried it to plaintiff and got the money. Each of the indorsers denied knowledge of the alteration. Bailey and Giles testified that Donnalld told them that he destroyed the note, when the bank refused to discount it, and Clark said that he supposed that it had been destroyed; and each of them said that he knew nothing to the contrary, until the spring of 1917, when demand for payment was made upon them.

After hearing the evidence, Judge Shipp directed a verdict for plaintiff, holding that he was bound by the order of Judge Peurifoy, overruling the demurrer of the indorsers, and that, as plaintiff had proved the allegations of his complaint, he was entitled to recover. From judgment on the verdict, the indorsers appealed.

[1] Respondent contends that the alteration was not material; that the purpose of the indorsers was to enable Donnalld to raise that sum of money, and it could make no difference to them whether he got it from the bank, or from plaintiff, or any one else; and that, in any event, plaintiff, being an innocent holder, in due course, is entitled to recover.

Sections 124 and 125 of the Negotiable Instrument Act (28 Stat. 663) read:

"124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

"125. Any alteration which changes:

"(1) The date;

"(2) The sum payable, either for principal or interest;

"(3) The time or place of payment;

"(4) The number or the relation of the parties;

"(5) The medium or currency in which payment is to be made;

"Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect is a material alteration."

Tested by the terms of section 125, the alteration was material. By subdivision 3 of that section, an alteration which changes

the place of payment is declared to be material. In its inception, the note was payable "to the order of Bank of Greenwood . . . at said bank." When the words "Bank of Greenwood" were stricken out, the words "at said bank" were left without meaning; so that the note was not then payable at that bank, or any other particular place. It follows that the place of payment was changed by the alteration.

Moreover, the last sentence of subdivision 5 of said section says:

"Any other change or addition which alters the effect of the instrument in any respect is a material alteration."

Prior to the statute, the decided weight of authority was that changing the name of the payee of a note, after its legal inception, without consent of the parties sought to be changed thereon, is a material alteration. 1 R. C. L. 967, § 4; Id. 973, § 7; Holbart v. Lauritson, 34 S. D. 267, 148 N. W. 19, L. R. A. 1915A, 166, and note in which the cases are reviewed. Clearly, changing the name of the payee alters the legal effect of the instrument.

The authorities cited by respondent are not to the contrary. In fact, they are not in point, because in none of them was there any alteration of the instrument sued on. If there had been no alteration of the note here sued on, and if plaintiff had taken it as issued, and afterwards had the bank indorse it, so as to transfer the legal title to him, a different state of facts calling for the application of a different principle would have been made, and to that state of facts the cases cited by respondent would have been pertinent.

[2] Respondent contends, however, that, even though the alteration is material, nevertheless he is entitled to recover under the following provision of section 124:

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

According to the testimony, the note bore upon its face such evidence of alteration that the jury might have found that plaintiff was not a holder in due course; therefore, if that were a vital issue, it would be one of fact for the jury.

But, assuming for the purposes of this case that plaintiff was a holder in due course, we do not see how he can enforce payment of the note according to its original tenor, according to which it was payable to the order of the Bank of Greenwood. How would it be possible to enforce payment to the order of that

bank, without making it a party to a contract which it expressly refused to enter into? We must conclude that the intention of the Legislature was that the provision above quoted should be applied only in those cases where the contract can be enforced according to its original tenor; and we can readily see how this can be done in a variety of cases, as for instance, where the alteration affects only the negotiability of the instrument, and the amount of principal or interest, and in other respects, which need not be mentioned, it may be enforced according to its original tenor. But where, as in this case, it is of such a nature that, if made without consent of the parties to be charged, it deprived the contract of all legal validity in its inception, it cannot be enforced according to its original tenor. *First National Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445.

[3] Appellants question the ruling of Judge Peurifoy on their demurrer as well as that of Judge Shipp in directing a verdict against them. It is unnecessary to consider the ruling on demurrer, because without objection plaintiff introduced testimony tending to prove a fact of vital importance in the case which was not specifically alleged in his complaint, though the allegations taken altogether may have been deemed sufficient, by liberal construction and intentment, to have admitted the testimony, even if it had been objected to. The fact alluded to was that the alteration was made with the knowledge and consent of some, if not all, of the indorsers. Perhaps it would be more nearly correct to say that there was testimony tending to prove that the alteration was made under circumstances from which the jury might have drawn an inference of knowledge and consent on the part of some, if not all, of the indorsers. If that be true, that is, if they, or any of them, did know of and consent, expressly or impliedly, to the alteration, those so knowing and consenting are bound. As to them, the note as altered is an original and not an altered contract. *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770. If the evidence be sufficient to bring the case within the exception provided for by section 124, plaintiff may recover against the indorsers so consenting. But whether they knew of and consented to the alteration was an issue of fact arising out of the testimony, upon which they were entitled to have the verdict of the jury. It follows that the court erred in directing a verdict for plaintiff, and there must be a new trial.

Judgment reversed.

GARY, C. J., and FRASER and GAGE, JJ., concur.

WATTS, J., did not sit.

(112 S. C. 67)

STRICKLAND v. SEABOARD AIR LINE RY. CO. (No. 10179.)

(Supreme Court of South Carolina. April 7, 1919.)

1. CONSTITUTIONAL LAW §56—JURISDICTION—POWER OF LEGISLATURE.

Where the Constitution confers jurisdiction upon a court, the Legislature cannot take it away.

2. COURTS §43—CONSTITUTION—COUNTY COURT—COURT OF COMMON PLEAS.

Since the Legislature cannot deprive the court of common pleas of the jurisdiction in civil cases or of the appellate jurisdiction in cases within the jurisdiction of magistrates' courts, given by Const. art. 5, § 15, the legislative power, given by section 1, to establish county courts, may be exerted by conferring upon a county court established by the Legislature concurrent jurisdiction with that invested in the court of common pleas, including, in view of section 23, concurrent jurisdiction over appeals from magistrates' courts.

3. STATUTES §64(3)—PARTIAL UNCONSTITUTIONALITY.

In view of Const. art. 5, §§ 1, 15, 23, the act creating a county court for Richland county, Act March 1, 1917 (30 St. at Large, p. 156) § 8, purporting to confer upon that court exclusive jurisdiction over appeals from magistrates' courts, is constitutional so far as it gives such court jurisdiction of such appeals, and unconstitutional and void only so far as it attempts to make that jurisdiction exclusive.

Appeal from Common Pleas Circuit Court of Richland County; W. H. Townsend, Judge.

Action by Henry R. Strickland against the Seaboard Air Line Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

George A. Alderman, of Columbia, for appellant.

H. N. Edmunds, of Columbia, for respondent.

HYDRICK, J. The question for decision in this case is whether the provision of section 3 of the act creating a county court for Richland county (30 Stat. 156), which confers upon that court exclusive jurisdiction to hear and determine appeals in all civil cases from magistrates' courts, is constitutional.

The provisions of the Constitution bearing upon the question are found in sections 1, 15, and 23 of article 5, the pertinent parts of which are:

"Section 1. The judicial power of this state shall be vested in a Supreme Court, in two circuit courts, to wit: A court of common pleas having civil jurisdiction and a court of general sessions with criminal jurisdiction only. The General Assembly may also establish county

courts, municipal courts and such courts in any or all of the counties of this state inferior to circuit courts as may be deemed necessary, but none of such courts shall ever be invested with jurisdiction to try cases of murder, manslaughter, rape or attempt to rape, arson, common-law burglary, bribery or perjury."

"Sec. 15. The courts of common pleas shall have original jurisdiction, subject to appeal to the Supreme Court, to issue writs or orders of injunction, mandamus, habeas corpus, and such other writs as may be necessary to carry their powers into full effect. They shall have jurisdiction in all civil cases. They shall have appellate jurisdiction in all civil cases within the jurisdiction of inferior courts, except from such inferior courts from which the General Assembly shall provide an appeal directly to the Supreme Court."

"Sec. 23. Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides, and every criminal action in the county where the offense was committed. In all cases tried by them, the right of appeal shall be secured under such rules and regulations as may be provided by law."

[1] Section 15 confers upon the court of common pleas jurisdiction in all civil cases, and appellate jurisdiction in all cases within the jurisdiction of magistrates' courts, since they are inferior courts from which appeals are not allowed directly to the Supreme Court. Where the Constitution confers jurisdiction upon a court, the Legislature cannot take it away. Therefore the Legislature cannot deprive the court of common pleas of jurisdiction in any civil case, nor of appellate jurisdiction in cases within the jurisdiction of magistrates' courts except by providing for a direct appeal from these courts to the Supreme Court.

[2] But the power conferred upon the Legislature (by section 1) to establish county courts, and other courts inferior to circuit courts, carried with it, by necessary implication, the power to invest such courts with jurisdiction, which necessarily must be of cases within the jurisdiction of the circuit courts, since they had already been invested with jurisdiction in all civil and criminal cases, and the exception of certain cases implies power to confer upon them jurisdiction in such others as the Legislature may determine. But the power so implied must be exerted so as to avoid conflict with the express provisions of the Constitution. This may be done by conferring upon such inferior courts concurrent jurisdiction with that vested in the court of common pleas, since that does not deprive the latter of the jurisdiction vested in it by the Constitution. In conformity with this principle, the Legislature made the original jurisdiction of the county court concurrent with that of the court of common pleas; but, in violation of it and of the express provision of the Consti-

tution, it attempted to give the county court exclusive jurisdiction of appeals from the courts of magistrates.

[3] As the Legislature clearly had the power to give the county court concurrent jurisdiction of such appeals, and as the greater includes the less, so much of the act as gives the county court jurisdiction of such appeals is valid, and only so much of it is void as attempts to make that jurisdiction exclusive. It follows that the county court has concurrent jurisdiction with the court of common pleas to hear such appeals.

The provision of section 23 fortifies this conclusion, for, while it is there declared that, in all cases tried by magistrates, the right of appeal shall be secured, no appellate tribunal is specified; and we find no inhibition in that section, or elsewhere, against providing for an appeal to any other than the circuit court. The intention there expressed is that the right of appeal to some higher tribunal shall be secured by law, and that it shall be subject to such rules and regulations as the Legislature may see fit to adopt; that is, such as fix the time within which and the conditions upon which an appeal may be taken, the manner in which it shall be prepared and prosecuted, and so forth.

The judgment of the circuit court is affirmed.

FRASER and GAGE, JJ., concur.

GARY, C. J., and WATTS, J., did not sit.

(112 S. C. 56)

SANDERS v. BOYNTON et al. (No. 10183.)

(Supreme Court of South Carolina. April 8, 1919.)

1. EVIDENCE \S 461(2) — PAROL EVIDENCE — WARRANTY OF TITLE.

In action for breach of warranty of title, testimony by defendants that they intended to convey to plaintiff only such interest as they had in the land described in the deed, which was in fact less than a sixth interest in each defendant, and to warrant title only to such interest, was not rendered admissible, over the objection that it was parol evidence to vary the terms of a written instrument, by plaintiff's pleading that, notwithstanding the terms of the deed made defendants warrantors of the entire estate, the intention was that each conveyed and warranted the title only to a sixth undivided interest.

2. TRIAL \S 91 — EXCLUDING IRRELEVANT EVIDENCE.

Although plaintiff, by failing to move to strike out irrelevant matter set up as a defense, has no right to have testimony supporting it excluded, the court may and should exclude it either on plaintiff's objection or its own motion.

3. COVENANTS \S 39 — WARRANTY OF TITLE — KNOWLEDGE BY GRANTEE OF DEFECTS.

Knowledge by the grantee of a defect in his grantor's title is no defense to an action on the grantor's warranty of title.

Appeal from Common Pleas Circuit Court of Barnwell County; F. B. Gary, Judge.

Action by George D. Sanders against Emma R. Boynton and another. From judgment for defendants, plaintiff appeals. Reversed.

R. A. Ellis and Bates & Simms, all of Barnwell, for appellant.

James M. Patterson, of Allendale, and Holman & Boulware and James A. Willis, all of Barnwell, for respondents.

HYDRICK, J. This is an action for damages for breach of warranty of title to land conveyed to plaintiff by defendants. The facts are undisputed. James F. Sanders devised the lands conveyed, among others, to his brother, W. J. Sanders, for life; and he devised the remainder, as follows: One-third to plaintiff, who is the son of the life tenant; one-third to E. L. Sanders, a brother of testator; one-sixth to his sister "Emma R. Boynton and her children"; and one-sixth to his sister "Eliza Hickson and her children." Each of the sisters had a number of children; but each of them believed, as plaintiff did, also, that she was entitled, under the will, to an undivided sixth interest in fee simple in the land so devised; and on January 28, 1909, after the death of the life tenant, E. L. Sanders and the defendants, Mrs. Boynton and Mrs. Hickson, joined in a deed, wherein they conveyed to plaintiff two tracts of the land so devised, with covenant of general warranty. No reference is made in the deed to the fact that plaintiff already owned an undivided third interest in the land conveyed, nor is it specified therein what interest each of the grantors had or intended to convey; but, on its face, the deed purports to be the joint conveyance by the grantors of the entire estate in fee simple with joint covenant of general warranty. The consideration expressed in the deed was \$4,000, which according to the testimony, was \$2,000 for the one-third interest of E. L. Sanders, and \$1,000 for the one-sixth interest of each of the defendants, and they were paid accordingly. Under this deed, plaintiff took exclusive possession of the lands so conveyed, returned them for taxation in his own name, paid the taxes, and made valuable improvements thereon.

A few years after the execution of this deed, E. L. Sanders, as executor of the will of James F. Sanders, brought an action against George D. Sanders and others, including these defendants, as heirs and devisees of his testator, for the construction of his will, and for partition and distribution

of his estate. In that action, George D. Sanders set up the deed hereinbefore mentioned, and alleged that, at date thereof, he thought that he was buying, and the grantors therein thought that they were selling, all the rights of every person under the will of James F. Sanders to the land therein described; but that he was then advised, and therefore alleged, that the children of Mrs. Boynton and Mrs. Hickson had an interest in said lands; and he prayed that their interest be determined, and that it be adjudged that the grantors in said deed have no interest in the property therein described. It was adjudged in that action that Mrs. Boynton and her children were tenants in common of the one-sixth of the estate devised to her and her children, and Mrs. Hickson and her children were tenants in common of the one-sixth devised to her and her children, but that plaintiff was entitled to the interests of Mrs. Boynton and Mrs. Hickson in the lands described in the deed. Under the decree of the court, the land which had been conveyed to plaintiff in the deed was sold and bought by plaintiff at that sale for \$11,765, and it was adjudged that the share of Mrs. Boynton in the proceeds was \$81.51, and the share of Mrs. Hickson was \$63.40. These shares were paid to the plaintiff herein, their grantee in the deed.

Plaintiff then brought this action on the covenant of warranty contained in said deed, alleging that, notwithstanding the terms of the deed made the grantors (these defendants) warrantors of the entire estate, the intention was that each conveyed and warranted the title only to a sixth undivided interest in fee simple in the premises described, and that he paid \$1,000 to each of the defendants for such interest, and that the warranty had been breached, etc.

The defendants interposed a general denial, and set up the following defenses: First, that it was their intention to convey to plaintiff only such interest as they had in the land, under the will; second, that plaintiff knew as well or better than they did what interest they had, and therefore he is estopped to enforce the covenant of warranty; and, third, that the matter is *res adjudicata*, under the judgment in the case of *E. L. Sanders, as executor, etc., v. George D. Sanders et al.* (hereinbefore mentioned), and plaintiff is estopped by that judgment.

[1] Over plaintiff's objection, the defendants were allowed to testify that their intention was to convey to plaintiff only such interest as they had in the land described in the deed, and, of course as corollary thereto, that they intended to warrant the title only to the interest which they intended to convey. This testimony was clearly obnoxious to the rule that parol is inadmissible to vary the terms of a written instrument. The learned judge was mindful of the force of that objection to it, but based his ruling

upon the ground that plaintiff had admitted in the allegation of his complaint that the deed did not correctly express the intention of the parties; and, as he had stated therein his version of their intention, it appeared to him that defendants should be allowed to give their version of it. This view overlooked the fact that, in the absence of fraud or mistake of fact, of which there was neither allegation nor proof, plaintiff had the right to enforce the contract according to its terms; and, of course, he had the right to waive, for the benefit of defendants, such provisions of it, favorable to him, as he saw fit; and defendants had no right to insist that the waiver or concession should be more extensive than that agreed to by plaintiff.

Aside from this, the testimony was susceptible of no other reasonable inference than that plaintiff thought he was buying, and defendants thought they were selling and conveying to him, an undivided sixth interest of each in the land described; and they admit their intention to warrant the title to the interests which they conveyed.

While Mrs. Boynton did testify, on her direct examination, that she sold only her interest and that nothing was said about what it was (whether one-third or one-sixth), on cross-examination she testified that she did not know what her interest was, until it was decided in the case of *Sanders, Executor, etc., v. Sanders et al.*, and, further, as follows:

"Q. You had thought all along that your sister Mrs. Hickson had the same interest in it that you had? A. They (meaning her brother Elliott [E. L. Sanders] and plaintiff) said so. Q. That was your understanding? A. That is what they told us. Q. That your interest, along with your sister's, was the same as Elliott's and your brother's? A. Yes, sir. Q. That was the conveyance you made to George? A. No, I sold him my interest in the land."

The testimony of Mrs. Hickson is not set out in the record, but it is therein stated that it was to the same effect as that of Mrs. Boynton. When the testimony of defendants is considered in the light of the undisputed facts and circumstances, to wit, that Elliott and George each had an undivided third, and that the consideration paid to each of the defendants was adequate to an undivided sixth, the inference is irresistible that each of them thought she had and intended to convey an undivided sixth.

The court also admitted, over plaintiff's objection, evidence which defendants contended would support their plea that plaintiff was estopped to enforce the warranty, because he knew as well or better than they did, what interest they had in the land. The objection was based on the ground that the estoppel alleged was no defense. The court based its ruling on the ground that, if it were not a good defense, plaintiff should

have moved to strike it from the answer, and, having failed to do so, evidence in support of the plea was admissible.

[2, 3] According to the decisions of this court, while plaintiff, by reason of his failure to move to strike out the irrelevant matter set up in the answer as a defense, had no right to have the testimony excluded, it was, nevertheless, within the power of the court, either on plaintiff's objection, or of its own motion to exclude it. In *Martin v. Railway*, 70 S. C. 8, 48 S. E. 616, the court said:

"The proposition that a court is obliged to receive evidence which does not tend to establish any fact from which, under the pleadings, a legal conclusion would result, merely because the immediate litigants are not in a position to complain, cannot for a moment be entertained. The court is vested with power to exclude such evidence in the interest of other litigants and of the public. Those who have a cause on trial are entitled to time and opportunity to present the evidence and argument which bear upon the real issue; but, when either party attempts to go beyond this, it is within the power of the trial judge, and a duty he owes to others having business in the court and to the public, either upon the objections of the other party, or of his own motion, to require adherence to the true controversy."

The principle decided in *Martin v. Railway* was reaffirmed in *Bromonia Co. v. Drug Co.*, 78 S. C. 482, 59 S. E. 363, and in *Givens v. Electric Co.*, 91 S. C. 417, 74 S. E. 1067. Where it clearly appears that, under the law, the evidence offered cannot affect the result, the court should exclude it, since its admission would result only in confusion and useless consumption of time in the administration of justice. That it could not be allowed to avail defendants in this action, without violating well-settled principles of law, is clear beyond doubt. It is settled, upon reason and authority, that knowledge by the grantee of a defect in his grantor's title is no defense to an action on the grantor's warranty of the title. Such knowledge may be the grantee's chief reason for requiring the warranty, and he may rely more upon his grantor's warranty than upon his own knowledge of the title. The precise point was decided in *Grice v. Scarborough*, 2 Speers, 649, 42 Am. Dec. 391. There the grantor warranted the title to be free from all incumbrances. There was an outstanding lease by the grantor, known to the grantee, but not mentioned, or excepted from the warranty. In the action on the warranty, assigning the existence of the lease as a breach thereof, the defendant pleaded that plaintiff had notice of the lease. The plea was held bad on demurrer. The court said:

"On the question of the insufficiency of the defendant's plea, I think there can be no doubt. The contract is in writing. Parol evidence cannot be received to explain what the parties intended, or to add or subtract anything from

it. It would be to make a new contract, where the grantee covenants against all incumbrances, to show by parol that he did not warrant against a particular incumbrance. And that, I suppose, is the inference to be drawn from the alleged notice. The very object of the covenant may have been to compel the seller to extinguish the incumbrance, that the purchaser might have the full possession and enjoyment of the premises."

To the same effect is *Wallace v. Frazier*, 2 Nott & McC. 516, *Stucky v. Clyburn*, Cheves, 186, 34 Am. Dec. 590, and numerous others that might be cited. The principle is thus stated in 11 Cyc. 1066:

"The fact that either or both of the parties knew at the time of the conveyance that the grantor had no title in a part or in the whole of the land does not affect the right to recover for a breach of covenant."

The text is sustained by the citation of cases from many states and from the Supreme Court of the United States.

The court properly overruled the defendants' plea of *res adjudicata*. There is nothing in the judgment in the case of *Sanders*, as *Executor*, etc., v. *Sanders*, which adjudicates anything as to plaintiff's right to pursue defendants on their covenant of warranty. In fact, it is difficult to see how that issue could have arisen or been adjudicated in that case.

Both parties appealed from the order setting the "case" for appeal; but we find no error in the order.

It follows, from what has been said, that the circuit court erred in refusing plaintiff's motion to direct a verdict, and the judgment is accordingly reversed.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(111 S. C. 526)

STATE v. BURTON. (No. 10121.)

(Supreme Court of South Carolina. Jan. 21, 1919.)

1. CRIMINAL LAW — 1166½(8) — HARMLESS ERROR — COMPETENCY OF JURORS — PRIOR SERVICE AS JUROR.

In a prosecution for homicide, presentment by the court of a juror, who had sat on the coroner's jury at the inquest, though error, was not prejudicial, where the defendant rejected the juror by peremptory challenge and did not exhaust his peremptory challenges.

2. CRIMINAL LAW — 470 — EXPERT EVIDENCE — MATTER IN ISSUE.

In a prosecution for homicide, testimony of a physician, who attended deceased after he received his mortal wound, that the deceased knew and realized that he could not live, held not in-

admissible on the ground that it was a mere opinion upon the material question as to the admissibility of the deceased's statement as a dying declaration.

3. HOMICIDE \S 205—DYING DECLARATIONS—SOLICITATIONS.

The fact that a physician told deceased that he could not live and that, if he had any statement concerning anything he wanted to come out in his case, to make it to him, would not render inadmissible the statements of deceased.

4. HOMICIDE \S 216—EVIDENCE—DYING DECLARATIONS—COMPETENCY TO SHOW "IN EXTREMIS."

The testimony of a physician who attended deceased after he received his mortal wound to the effect that he told deceased that he could not live, that deceased stated he realized such fact and that it was hard to die, was competent to show that deceased was "in extremis."

5. CRIMINAL LAW \S 366(3)—STATEMENT BY PERSON INJURED—RES GESTÆ.

In prosecution for homicide, testimony by witnesses as to statements made by deceased to them shortly after the shooting *held* admissible as part of the *res gestæ*.

6. CRIMINAL LAW \S 683(2) — ADMISSION OF EVIDENCE IN REPLY—DISCRETION OF COURT.

In prosecution for homicide, the court *held* to have not abused its discretion in allowing the state to introduce evidence in reply.

7. CRIMINAL LAW \S 822(1)—TRIAL—INSTRUCTIONS AS A WHOLE.

The court's charge to the jury in a prosecution for homicide, taken in its entirety, *held* not to show any error prejudicial to defendant.

Appeal from General Sessions Circuit Court of Newberry County; James E. Peurlfoy, Judge.

Ira O. Burton was convicted of manslaughter, and he appeals. Affirmed.

The following proceedings were had at the trial:

During the selection of the jury the defendant made nine objections peremptorily. Juror No. 17, sworn, says:

"I am not related by blood or marriage to the defendant. I haven't formed or expressed an opinion as to the guilt or innocence, except I was a member of the coroner's jury. I am not conscious of any bias either for or against him. I know of no reason why I should not bring a true verdict according to the law and the testimony.

"By Mr. Timmerman: The coroner's jury only arrived at the facts as to how the deceased came to his death.

"Yes; I made up my mind as to how the deceased came to his death.

"Q. You didn't make up your mind as to anything else? A. No, sir.

"Q. How do you separate it? How could you separate it from the other testimony?

"By the Court: I don't think a juror has to go into all that.

"By Mr. Timmerman: Your honor please, we except to this juror. He has some knowledge of the case, and must have formed some opinion, having heard the testimony at the coroner's inquest. He has listened to that investigation, and we except to him. We want to examine the juror further, and we except to the ruling of your honor in stopping the examination.

"The Court: I didn't stop the examination. I merely held that I didn't think the juror had to go into and explain how he differentiated between whether or not he passed upon the facts or the cause of his death.

"By Mr. Timmerman: May I ask another question?

"The Court: Yes, sir."

Examined by Mr. Timmerman, juror stated:

"I don't remember how many eyewitnesses were examined, but several; I expect a half dozen or more. Those witnesses went into details and told about the transaction. The members of the jury inquired as to the details of the killing.

"Mr. Timmerman: I would like to make reference to the coroner's inquest.

"Mr. Cromer: We suggest that that couldn't be presented before the jury.

"Mr. Timmerman: Certainly not. I want to present it to your honor.

"Witness: Having heard examination at the coroner's inquest, I am prepared mentally to give the defendant a fair trial. I only remember the testimony submitted in a general way. I feel that I could give him a fair trial. I am not conscious of any bias either for or against him."

(Presented and rejected by defendant.)

Testimony for the state:

Dr. J. K. Gilder, sworn, says:

"I reside in Newberry. I am a practicing physician. I knew David A. Langford, and have known him since he was a boy. I was called to see him about the 29th of January, this last year. I found him in my drug store and examined him. I found a gunshot wound. I didn't make a thorough examination until I carried him to Columbia on the evening train. I made a thorough examination there. He was operated on. We found a pistol wound. It entered the left side, and it penetrated the pancreas and cut the intestine and ranged toward the back. I stayed with him all the time he was in the hospital, except one or two occasions I came to Newberry. The shooting occurred Saturday evening, and he died the following Thursday evening about 8 or 9 o'clock. The bullet entered the left side and ranged back toward the spinal column. We didn't find the bullet that night. He died in Columbia. The wound caused his death. I talked with him the evening before he died and also about 11 o'clock on Thursday before he died. Thursday morning I told him that he couldn't live, and that, if he had any statement to make, to make it to me, anything that he wanted to come out in his case. He said that it was hard to die that way: that there was no cause— * * * He said that he would like to see his son before he died, who was in Newberry; his wife was at the hospital.

I told him he couldn't live; he knew he couldn't live; he realized he couldn't live. After he said that it was hard to die that way, and that he wanted to see his son, he made a statement to this effect— * * *

"The Court: Let me ask him a question. You say that you advised him that he couldn't live? A. Yes, sir.

"Q. Do you or not know whether he realized his condition? A. Yes, sir; he realized his condition. * * *

"Mr. Cooper: Q. Just state what he said to you, doctor, about dying. A. When he stated to me that he would like to see his son before he died, it wasn't with any intention to bring the boy to Columbia.

"Mr. Timmerman: We object to that as a mere opinion and move to strike it out.

"The Court: He can state whether or not any arrangements were made, if he knows, to bring the child to Columbia.

"Mr. Cooper: What about that? A. None were made. He did not suggest any. I think most of his family was in Columbia at the time. He did not subsequently to that express any hope of getting well. He sank from that time on. * * *

W. S. Langford, sworn, says:

"I am a brother of the deceased. He was younger than I. (Witness identified clothes of the deceased and the same were offered in evidence.) I was coming from towards the opera house across the street where there is a pinder parcher and a billboard when my brother was shot. When I heard the shot I thought it was an automobile tire or something, and I looked around and saw a man brandishing a pistol. When I got closer I saw it was Burton. I saw my brother on the sidewalk. I went to him as quick as I could. Don't know whether I trotted, ran, or walked. He was standing up with his hands to his side (indicating). When I got near to him his hands kind of dropped, and I realized he was shot. I asked him, 'What's the matter?' * * *

"The Court: Where was the defendant at that time? A. Out on the street.

"The Court: How far from you? A. I guess he was as far from here as to Mr. Timmerman. My brother was about the middle of the sidewalk.

"Q. Had your brother moved from the place where he was shot? A. I don't know. When the crowd opened up, I saw him, and then I ran to him. As soon as I saw him I got to him pretty quick. I went pretty quick—a minute or two I suppose. As soon as I got to him he made a statement. * * * I came up to him and said, 'What is the matter, Dave?' He said, 'Ira Burton shot me in the stomach for nothing.' * * * He said, 'I want you to take care of Lil and Bluford.' That indicated that he was going to die. I says, 'All right; I will get you to the doctor; maybe you are not wounded much.' I took him by the arm, and he said, 'I can walk,' and we walked up the street. Mr. Burton was still there, and I asked him if he had a gun. He said that he did not. I heard some talk, but I didn't catch what it was. I took my brother to the drug store. Just as we started off Mr. Reighly came up and took his right arm. I had his left. It was bleeding. I think the cuff button cut his arm. He began

to weaken as he went across the street to the drug store. My brother did not have any weapon of any kind except that he may have had a pocketknife. On the way to the drug store I saw Hayne Abrams. He joined us. I remember seeing Frank Hunter. * * *

Dr. W. G. Houseal, sworn, says:

"I am a practicing physician. I live in Newberry. I saw Langford the day that he was shot a few minutes after he was shot in the drug store. I heard him make a statement. I heard him tell his brother that he knew he had a pistol wound, and that he couldn't live, and that he wanted him to take care of his wife and child.

"Q. After he said that about dying, did he make any statement as to how the matter happened? * * * A. He also stated to his brother that his business was in good shape; that he had a certain amount of life insurance, mentioning the amount. I said, 'Dave, how did this happen?' He said he came in contact with Burton on the street, and he said to Burton, 'I understand that you have been circulating reports about me, that I have been keeping Mayme Harp,' and asked Burton if he had said so. He said Burton said, 'Yes,' and he called Burton a lie, and Burton called him a 'damn lie' and that he had struck Burton, and Burton pulled out a pistol and shot him. He said he had no idea that Burton would shoot him and that he was taken by surprise. He didn't say anything about whether or not he was armed. * * *

Judge's charge:

"Mr. Foreman and gentlemen of the jury, I commend you upon the very patient and careful hearing that you have given the witnesses and also the attorneys in the trial of this case. I have been impressed with your apparent desire to know the truth and your earnest desire to reach a true verdict. I shall ask your indulgence for a moment while I shall give you what I conceive to be the law applicable to the case. You have been sworn to try this case according to the law and the testimony, and I wish to admonish you in the beginning that it is as much your duty to try it according to the law as it is to try it according to the testimony. You are not responsible for the testimony that has been given you by the witnesses; equally you are not responsible for the law. That has come down to us through ages, and I have no more right to make the law in this or any other case than you have to make the law. So you will try this case under the law and under the testimony, and you have approached the case with that condition of mind. You are not related either by blood or marriage to either party, you have not formed any opinion or expressed it as to the guilt or innocence of the accused, and you are not conscious of any bias either for him or against him, and you do not know of any reason whatever why you should not bring in a true verdict according to the law and the testimony. So that you approach the deliberation of this case with a clear mind and a clean heart, prepared to vindicate the law and try the case under the law.

"Now, the defendant at the bar, Ira O. Burton, is charged with one of the most serious crimes known to the law. He is charged with

murder. The allegation is that on the 29th of January, 1916, in the town of Newberry, that he shot one David A. Langford with a pistol and wounded him, and from that wound he died in a hospital in Columbia on February 4th, and that the circumstances surrounding the shooting were such as to make out the crime of murder, and therefore the allegation is that it was done willfully, maliciously, feloniously, and with malice aforethought. He is also indicted for at the same time carrying a concealed weapon about his person, against the statutes of this state.

"Now, Mr. Foreman and gentlemen of the jury, murder is the killing of any person with malice aforethought, either expressed or implied. Murder is the killing of any person with malice aforethought, either expressed or implied. So that the first inquiry that you will make is whether or not the person is dead. That question is not disputed. The next question is, 'Who killed him?' and, finding out who killed him, your next inquiry will be, 'Under what circumstances did he kill him?'

"Human life is sacrificed. Mankind has been able to invent many wonderful things and do many wonderful things, but science has never yet been able to bring back a life that has been shut out. When once the spark has been put out, mankind has been helpless in all ages of the past to bring back or revivify man, and therefore, when any one takes human life, the law places upon that act a fearful penalty, unless it is done under certain circumstances. In olden times, before organized society existed, when a man was killed it was the duty of his nearest relative to seek out and take the life of the man who killed him, and he was called the 'Avenger of Blood,' but in the time of Joshua cities of refuge were made where, if a man killed another by mischance or accident, he might flee to that city and escape the hand of the Avenger of Blood, and that was the first step towards organized courts. That was the first step, Mr. Foreman and gentlemen of the jury, because many times the Avenger of Blood would kill a man who had the right to take the life of another, and therefore he could flee to the city and there be tried at the gate in a court, and if he was found innocent, he could remain in the city, but that was in the case of an accident. Later on the human race began to slowly improve and develop, and it was known that many cases that were not accidents, yet in which the person in the exercise of the right of self-defense would take the life of another, when he ought not to be slain by the hand of the Avenger of Blood, and this we have in our courts to-day, the second step; that any one who takes life in self-defense will not be punished by the Avenger of Blood.

"So, Mr. Foreman and gentlemen of the jury, you will investigate in this case and see whether or not the defendant took the life of the deceased, and he admits that he did. Under what circumstances did he take it? If he took it under such circumstances, Mr. Foreman and gentlemen of the jury, which would indicate a willful intention to take human life and without legal justification or excuse, as I shall charge you, he would be guilty of murder, and, as I charged you, murder is the killing of a human being with malice aforethought, either expressed or implied. So that you will observe that the first element in the definition is malice and mal-

ice is that condition of heart—that condition of mind which shows a heart regardless of social duty and fatally bent on mischief. It is the intentional doing of any unlawful act against another without justification or excuse. Malice is synonymous with the criminal intent. Now this malice must exist in the mind of the party who takes human life before and at the time of the act of taking human life; its existence may be expressed or implied. Now, express malice is where any one declares or manifests a positive intention to commit a crime. If you, Mr. Foreman, should say that 'I intend to shoot a man' and proceed to shoot him, your declaration would be express malice. Now, implied malice is inferred from the facts and circumstances proved, because a man is presumed to intend the consequences of his voluntary acts. It may be implied in a number of ways; the kind of weapon used, lying in wait, preparation, deliberation, any number of ways that you may infer that malice exists. I charge you that, where it is shown that a person kills another without anything more the law implies malice or presumes malice without anything else, but, when all the facts and circumstances are proven, then the state must show that malice existed beyond a reasonable doubt.

"So, Mr. Foreman and gentlemen of the jury, your first inquiry will be whether or not the defendant killed the deceased with malice aforethought, either expressed or implied. If he did do it without justification or legal excuse, then he is guilty of murder. But, if you should find, Mr. Foreman and gentlemen of the jury, that he did take the life of the deceased, but that he did it under such circumstances of provocation or legal excuse that would tend to de-throne reason and arouse anger, and cause him to strike or shoot under the impulse of that anger, then the killing would not be lawful, but it would be reduced from murder to manslaughter, and manslaughter is the killing of a human being without malice. So you will see the difference in that. In murder the malice must exist; in manslaughter there is an absence of malice. Manslaughter is usually defined as the taking of human life in sudden heat and passion and upon sufficient legal provocation, but even, Mr. Foreman and gentlemen of the jury, where there is provocation, there is no right to kill, unless the circumstances are such as to justify the person in making the assault to believe that he had to act in self-defense, and I shall charge you on that. So, Mr. Foreman and gentlemen of the jury, from the testimony which you have heard it is your duty to determine that testimony, the weight of it, and the value of it, and the credibility to be given to each witness, and in reaching your conclusions you will exercise your good judgment, your knowledge of human nature, and in reaching this you will determine whether or not he shot the deceased with malice or without malice.

"Now, Mr. Foreman and gentlemen of the jury, you should consider further his plea of self-defense. Where a person kills another and admits the killing and comes into court, the law presumes, as I have stated before, that he intended his act and will hold him responsible for his act, but in this case the defendant contends that, while he did kill the deceased, yet he alleges that he did it in defense of his own life and his own person; so it becomes necessary for

me to charge you as to the law of self-defense. Now, Mr. Foreman, that is a good defense if it is made out. The right to defend one's life and one's person is a God-given right. It is not only common to man, but it is common to every creature. The law of self-preservation is said to be the first law of nature, and the law recognizes the right, and if a person in the exercise of that right kills his assailant, the law excuses him, but in order to make good this place, Mr. Foreman and gentlemen of the jury, the burden is on the defendant to prove to your satisfaction by the greater weight of the evidence certain things. Self-defense is based upon necessity, and I charge you in the beginning that human life is so sacred, human life is so sweet, that no man has the right to assault or take human life except that it is necessary to save himself from death or serious bodily harm; so that the whole defense, Mr. Foreman and gentlemen of the jury, may be condensed into the one word 'necessity.' If it was not necessary, and the other elements of self-defense were present, it is excusable, but it must be necessary, and in order to make out the plea the person setting up the plea must prove by the greater weight of the evidence, first, that he was not at fault in bringing on the difficulty, and that is a reasonable rule. It complies with good common sense and justice, because why should a man bring on a difficulty and then, being placed in that difficulty that he brought on himself, it becomes necessary for him to take the life of the person, for him to come into court and say he had to kill in order to save his own life. So a person must be without fault in bringing on the difficulty; he must come into court with clean hands; and if he should fail to prove to your satisfaction that he was without fault in bringing on the difficulty, then his plea of self-defense fails. Then next is that it was necessary, not only must he be without fault in bringing on the trouble, but it must be necessary for him to take the life of the deceased in order to save himself from death or serious bodily harm. Not only that, but he must believe that he was in danger of suffering death or serious bodily harm, and that a man of ordinary reason and firmness would have believed the same thing placed as he was placed. I say it is not only necessary that he must believe that he was in danger of suffering death or serious bodily harm, but a man of ordinary firmness and reason must believe the same thing under the same circumstances. The standard is the man of ordinary reason and firmness. Some men might think they were in danger when they were not and others might think they were not in danger when they really were. Some men are more courageous than others; some are more timid. So the best the law can do is to take the man of ordinary reason and courage. And then he must prove the additional factor that there was no other reasonably safe means of escape. Even he was without fault, even it was necessary or appeared to be necessary, if there is a reasonably safe means to avoid taking human life, the law imposes upon him to avail himself of that opportunity.

"Of course, Mr. Foreman and gentlemen of the jury, a man wouldn't be required to run if by running he would more greatly endanger himself, and I charge you further, Mr. Foreman and gentlemen of the jury, that a man does not have to wait until his antagonist strikes before

exercising the fatal blow if he believes he is in danger, and that he was not at fault in bringing on the difficulty, and that a man of ordinary reason and firmness would have believed the same thing placed as the defendant was placed. A man has the right to act upon appearances, provided a man is suffering death or serious bodily harm, and he would not have to wait until he was struck the fatal blow or until he would have been shot before acting. Mr. Foreman and gentlemen of the jury, I charge you further that no words, however opprobrious, are sufficient to justify an assault. You have no right to strike a man because he insults you, because he calls you a lie, or because he calls you anything else. No words will justify an assault. I charge you further that a man cannot insult another and bring on a difficulty by insulting words or epithets, and then, after bringing on the difficulty, should he take the life of his assailant, he could not plead self-defense. As I charged you under the general law, he must be without fault in bringing on the difficulty, and if a man should apply opprobrious language to another and bring on a difficulty, and in that difficulty which he brought on himself it becomes necessary for him to take the life of the other, he could not plead self-defense successfully. He must be without fault in bringing on the difficulty; but it is for you to determine under all the facts and circumstances, Mr. Foreman and gentlemen of the jury, what is the truth here. If you should find that the defendant has proven by the greater weight of the evidence, not beyond a reasonable doubt, but by the greater weight of the evidence, and that means his evidence of self-defense, you put it in the balances and weigh it, and that does not mean, Mr. Foreman and gentlemen of the jury, that you should believe everything that every witness says or that you should swallow every circumstance that is detailed, but it is for you to weigh it and from your knowledge of human nature to determine what is the truth, and if he has proven to you by the greater weight of the evidence that he was without fault in bringing on the difficulty, that it was necessary for him to take the life of the deceased in order to save his own life or save himself from serious bodily harm, and that he believed that he was in danger of suffering death or serious bodily harm, and that a man of ordinary reason and courage and firmness would have believed the same thing placed as he was placed, and that there was no other reasonable safe means of escape, then it is your duty to find him not guilty. If you find that he has failed to prove any one of these four elements, then his plea of self-defense fails. Then you will determine whether or not the state has proven beyond a reasonable doubt whether he is guilty or not guilty. He is entitled to the benefit of any reasonable doubt growing out of all the circumstances and a reasonable doubt is just what the term implies. It means a doubt for which you can give a reason; not a whimsical doubt, not a flimsy doubt, not a doubt that a man would pick out who is hunting for a doubt, but any doubt that would come up in the mind of an honest man who is earnestly seeking to know the truth. If there is such an honest doubt in your mind, then it is your duty under the law to give the defendant the benefit of it, but, if there is no reasonable doubt in your mind as to his guilt under the

law as I have charged you, then it is your duty to find him guilty.

"Now, Mr. Foreman, I think that is about all the law that I want to charge you. The responsibility is yours. It is a duty that no man would crave. It is a duty that no man would seek, and yet there is but one purpose and one course to follow. This word 'verdict' comes from a Latin word meaning truth, and if your verdict should speak anything else, then it would have the wrong name. I think it was Ella Wheeler Wilcox who said, and I think it is a beautiful thought: 'That there are only two things that we should fear in this world. The first is that we may not know our duty, and the second is, knowing it, we might not have the strength to perform it. Only two things that we need fear: That we may not have intelligence to know our duty, or, if we have light to know it, then we haven't got strength to perform it.'

"Now, gentlemen of the jury, you must know your duty from the testimony that you have heard on that stand and under the law as I have given it to you. That is the only way you can get it, and when you have considered the testimony and have found your duty, then you are not responsible for the result. You don't represent the defendant any more than you represent the state, nor do you represent the state any more than you do the defendant. When you shall have found your duty, then may you have the strength to write it on the back of this indictment, and then a clear conscience will be yours and it matters not what comes in after life, when you feel that you have done your duty under the light as God has given you to see the light, then you may fear no man nor devil. If you should find the defendant guilty of murder, you write the word 'guilty' and sign your name as foreman. In that case the penalty will be death by electrocution. If you should find that he is guilty of murder, but there are such circumstances and facts surrounding it that you should think the death penalty should not be imposed, then you find him guilty with recommendation to mercy, and in that case the punishment will be life imprisonment. If you should find that he is not guilty of murder, but that he is guilty of manslaughter under the law as I have charged you, then you will say guilty of manslaughter and sign your name as foreman. In that event the punishment will not be less than 2 years nor more than 30 years in the discretion of the court. If you find that the state has failed to make out its case beyond a reasonable doubt or the defendant has established his plea of self-defense by the greater weight of the evidence, the form of your verdict will be 'Not Guilty,' and sign your name as foreman. Take the record, Mr. Foreman, and find a verdict."

Exceptions:

"(1) His honor erred in not excusing juror No. 17 for the reason: (a) Said juror had been a member of the coroner's jury that originally investigated the death of the deceased; (b) said juror stated he had made up his mind as to how the deceased came to his death; (c) said juror had only heard the state's testimony, and a burden was placed on the defendant to remove any impression adverse to him that had been made; (d) the court accepted the juror's view of whether he was or not indifferent; (e) under all the facts developed on his examination, it

did not appear that he was indifferent and did not appear that he was a proper juror to sit in that case.

"(2) His honor erred in allowing the witness Dr. J. K. Gilder to testify that the deceased 'knew he couldn't live; he realized he couldn't live;' the error being that the testimony was a mere expression of an opinion upon the material question as to the admissibility of the deceased's statement as a dying declaration.

"(3) His honor erred in allowing the witness Dr. J. K. Gilder to testify to statements made by the deceased, the error being: (a) The statement was not shown to be a dying declaration; (b) the witness asked the deceased to make a statement for his case; (c) it was not shown that the deceased was without hope of recovery at the time of the alleged statement; (d) there was no competent testimony that the deceased was in extremis at the time of the alleged statement.

"(4) His honor erred in allowing the witness W. S. Langford, a brother of the deceased, to testify to statements made by the deceased upon the witness's arrival at the scene of the difficulty, after it was over, the error being: (a) The statement itself was a mere expression of an opinion or conclusion of the deceased and was not a statement of fact; (b) the statement was not shown to have been a part of the res gestæ, or a dying declaration; (c) the statement was not shown to have been made to or in the presence and hearing of the defendant.

"(5) His honor erred in allowing the witness Dr. W. G. Houseal to testify to statements made to him by the deceased on the day of the difficulty, the error being: (a) That the said statement was not shown to have been a dying declaration, it not appearing that the defendant was in extremis at the time, but, on the contrary, that he was not in extremis, as he lived more than five days thereafter; (b) said declaration was not shown to have been a part of the res gestæ.

"(6) His honor erred in not allowing the defendant to answer the following question: 'Q. Did you know deceased's reputation, that is, D. A. Langford's reputation for going armed in this community?'—the error being that the testimony sought to be elicited was material and bore directly upon the defendant's plea of self-defense, and was in reply to testimony of the witness W. S. Langford and others for the state.

"(7) His honor erred in allowing the witness Mrs. D. A. Langford, wife of the deceased, to testify in reply as follows: 'Q. I wish you would state to the jury what was your husband's habit with reference to carrying a pistol? A. Well, when he came in he often went in the room and played with his little boy. * * * I simply want to tell that when he came in the house he very often played with the little boy. He wouldn't take anything out of his pocket. I shouldn't think he would get on the floor and not take anything out of his pocket'—the error being: (a) The testimony was not in reply; (b) it was an effort to bolster witnesses already offered by the state in its testimony in chief; (c) it was argumentative, and was an expression of an opinion, and was no statement of fact; (d) the court had refused to allow the defendant when on the stand to answer a similar question, although the issue had been made by the state in the opening of its testimony.

"(8) His honor erred in charging the jury as follows: 'Human life is sacred. Mankind has been able to invent many wonderful things and do many wonderful things, but science has never yet been able to bring back a life that has been shut out. When once the spark has been put out, mankind has been helpless in all ages of the past to bring back or revivify man, and therefore, when any one takes human life, the law places upon that act a fearful penalty, unless it is done under certain circumstances'—the error being that this was no statement, or clarification, of any principle of law applicable to the issues in the case, and could and did only tend to confuse the minds of the jury, and tended to prejudice them against the defendant.

"(9) His honor erred in charging the jury as follows: 'Manslaughter is usually defined as the taking of human life in sudden heat and passion and upon sufficient legal provocation, but even, Mr. Foreman and gentlemen of the jury, where there is provocation, there is no right to kill, unless the circumstances are such as to justify the person in making the assault to believe that he had to act in self-defense, and I shall charge you on that'—the error being that said charge did not contain a sound proposition of law, was confusing, and tended to leave the jury with the impression that before a killing could be reduced from murder to manslaughter that the defendant would have to show that he struck the deceased in self-defense, and denied the defendant the full benefit of his plea of self-defense.

"(10) His honor erred in charging the jury as follows: 'Self-defense is based upon necessity, and I charge you in the beginning that human life is so sacred, human life is so sweet, that no man has the right to assault or take human life, except that it is necessary to save himself from death or serious bodily harm; so that the whole defense, Mr. Foreman and gentlemen of the jury, may be condensed into the one word "necessity." If it was not necessary to take human life, then it should not have been taken. If it was necessary and the other elements of self-defense were present, it is excusable, but it must be necessary'—the error being that the charge placed upon the defendant the burden of proving an absolute necessity for the taking of the life of the deceased, which the law does not require, in addition to the elements descriptive of self-defense, whereas the legal necessity is inclusive of all of the elements of self-defense.

"(11) His honor erred in charging the jury as follows: 'To make out the plea, the person setting up the plea must prove by the greater weight of the evidence, first, that he was not at fault in bringing on the difficulty, and that is a reasonable rule. It complies with good common sense and justice, because why should a man bring on a difficulty and then, being placed in that difficulty that he brought on himself, it becomes necessary for him to take the life of the person, for him to come into court and say he had to kill in order to save his own life'—the error being: (a) Said charge did not state a sound proposition of law; (b) it was argumentative, the judge assuming the roll of advocate; (c) it tended to impress the jury with the idea that the court thought the defendant was not without fault; and (d) it was in effect a charge upon the facts.

"(12) His honor erred in charging the jury as follows: 'I charge you further that a man can-

not insult another and bring on a difficulty by words, or epithets, and then, after bringing on the difficulty, should he take the life of his assailant, he could not plead self-defense'—the error being that said charge was misleading in that it had no application to any issue involved in the case, and it tended to prejudice the jury against the defendant and to confuse them.

"(13) His honor erred in charging the jury as follows: 'If you should find that the defendant has proven by the greater weight of the evidence, not beyond a reasonable doubt, but by the greater weight of the evidence, and that means his evidence of self-defense, you put it in the balances and weigh it, and that doesn't mean, Mr. Foreman and gentlemen of the jury, that you should believe everything that every witness says or that you should swallow every circumstance that is detailed, but it is for you to weigh it,' etc.—the error being: (a) That said charge tended to impress the jury with the view that the judge did not believe the defendant's witnesses as to self-defense, as he did not use the same language or any similar language, but, to the contrary, in charging as to the state's burden in proving its case beyond a reasonable doubt; (b) it was in effect a charge upon the facts; and (c) it limited the jury to a consideration of the testimony of defendant's witnesses and excluded from the jury consideration of testimony from state's witnesses tending to establish the plea.

"(14) His honor erred in refusing to charge defendant's fourth request, as follows: 'If the jury find that the defendant was without fault in bringing on the difficulty, and that he actually believed that he was in such immediate danger of losing his life or sustaining serious bodily harm, that it was necessary for his own protection to take the life of the deceased, and if further in the opinion of the jury the circumstances in which the accused was placed were such as would justify such a belief in the mind of a person of ordinary reason and firmness, then a case of self-defense is fully made out, and the verdict should be not guilty'—the error being that said request contained a sound proposition of law which was applicable.

"(15) His honor erred in refusing to charge defendant's seventh request, as follows: 'To justify a homicide, or an assault and battery, the danger need not be actual if the accused acted on a reasonable appearance and belief of danger, where all elements of self-defense are present'—the error being that said request contained a sound proposition of law which was applicable.

"(16) His honor erred in refusing to charge defendant's eighth request, as follows: 'Where two men engage in a quarrel, and one of them appears to attempt to draw a pistol or other weapon, the other is not bound to wait until he finds out what he is going to do; for such delay might be fatal to his life'—the error being that said request contained a sound proposition of law that was applicable.

"(17) His honor erred in refusing to charge defendant's tenth request, as follows: 'If one without fault in bringing on the difficulty is assaulted by another apparently intending to do him grievous injury, and of that the jury are the judges, the one assaulted need not wait, but if, under the circumstances surrounding him, he actually believe that his life is in dan-

ger or that he is liable to suffer great bodily injury, and if the jury believe that a man of ordinary reason and firmness would have believed himself to be in such danger, and would have acted as the defendant did, then your verdict would be not guilty—the error being that said request contained a sound proposition of law which was applicable.

“(18) His honor erred in refusing to charge defendant's eleventh request, as follows: ‘The jury should not hold the defendant to the same calm and deliberate judgment which you are now able to exercise, but you should put a man of ordinary reason and firmness in his place at the time he fired the fatal shot and judge of the defendant's act situated as he was and confronted as he was at the time he fired the fatal shot, and decide if a man of ordinary reason and firmness would have acted likewise, remembering that the defendant had a perfect right to kill the deceased if he was without fault in bringing on the difficulty, and if appearances reasonably indicated that he was in danger of serious bodily harm, and if a person of ordinary reason and firmness would have had the same belief, and there was no probably safe means of escape’—the error being that said request contained a sound proposition of law which was applicable.

“(19) His honor erred in refusing to charge defendant's fourteenth request, as follows: ‘The jury is charged that, where a plea of self-defense is set up, the defendant is not required to establish such plea beyond a reasonable doubt, but only by the preponderance or greater weight of the testimony’—the error being that said request contained a sound proposition of law which was applicable.

“(20) His honor erred in refusing to charge defendant's fifteenth request, as follows: ‘That the jurors and each of them are required by law to give the prisoner the full benefit of all reasonable doubt; each juror to act on his own doubt, and not the doubt of another juror’—the error being that said request contained a sound proposition of law which was applicable.”

Geo. Bell Timmerman, of Lexington, and B. V. Chapman, of Newberry, for appellant.

H. S. Blackwell, Sol., and R. A. Cooper, both of Laurens, and George B. Cromer and Blease & Blease, all of Newberry, for respondent.

WATTS, J. [1] The defendant was tried under an indictment for murder of Langford at the fall term of the court of general sessions for Newberry county, 1916, before his honor Judge Peurifoy and a jury, and convicted of manslaughter. A motion for a new trial was made and refused, and sentence imposed upon the defendant. After sentence defendant appeals, and by 20 exceptions imputes error, and seeks reversal. These exceptions allege error in presenting the juror No. 17. We think that his honor was in error in presenting this juror, possibly as he had to sit in the coroner's jury at the inquest, and it is not good practice to allow a juror to sit as a petit juror in any

case where he has been on the grand jury that returned the bill of indictment, or a coroner's jury, where the return is that the deceased came to his death by the party on trial, or where the juror has been on a panel that resulted in the court ordering a mistrial, or a new trial has been granted by the court after verdict rendered; but in the case at bar the presenting of the juror was not prejudicial, as defendant objected to the juror, and by so doing did not exhaust his peremptory challenges.

The jury was completed without the defendant having exhausted his peremptory challenges, and that excuses any error on the part of his honor in presenting the juror, and the exceptions complaining of error on the part of his honor in reference to this juror are overruled.

[2] The next exceptions to be considered are the exceptions that allege error on the part of his honor in the admission of evidence as dying declarations. The exceptions complaining of error in this particular are overruled. His honor had ample authority to rule as he did under numerous decisions of this court. *State v. Johnson*, 26 S. C. 155, 1 S. E. 510; *State v. Bradley*, 34 S. C. 136, 13 S. E. 315; *State v. Lee*, 58 S. C. 352, 36 S. E. 706; *State v. Head*, 60 S. C. 520, 39 S. E. 6; *State v. Wideman*, 96 S. E. 688.

[3] The next questions to be determined are the exceptions which allege the improper admission of evidence as part of the res gestæ. These exceptions are overruled under the authorities of *State v. Arnold*, 47 S. C. 13, 24 S. E. 926, 58 Am. St. Rep. 867; *State v. Thomas*, 103 S. C. 316, 88 S. E. 20; *State v. Wideman*, supra.

[4-7] The next exceptions complain of error in allowing the state to improperly introduce evidence in reply. This was a matter largely in the discretion of the circuit judge, and we see no erroneous exercise of that discretion. The safer practice is to ask the trial judge to be allowed to rebut any new matter that is brought out in reply, but in this case we cannot see that the defendant was prejudiced or deprived of any substantial right. These exceptions are overruled. The other exceptions complain of error on the part of his honor in charging the jury. Taking the charge in its entirety, we fail to see where the defendant was prejudiced to such an extent as to work reversal. He charged the jury in his own language the principles of law governing the case. All exceptions are overruled.

Judgment affirmed.

HYDRICK, FRASER, and GAGE, JJ., concur.

GARY, C. J., disqualified.

(112 S. C. 165)

STATE v. BOWEN et al. (No. 10178.)

(Supreme Court of South Carolina. April 5, 1919.)

1. EVIDENCE ⚡341—SHERIFF'S BOND—CERTIFIED COPY.

In an action against the sureties on a sheriff's bond, the admission of a certified copy of the bond in place of the original is proper in view of Civ. Code 1912, § 663, providing that such a copy shall be good and sufficient evidence.

2. SHERIFFS AND CONSTABLES ⚡169—ACTIONS ON BOND—EVIDENCE.

In an action on a sheriff's bond, proof that tax executions turned over to the sheriff were missing was sufficient prima facie to fix liability upon his bondsmen for them; it being the sheriff's duty to collect the executions or return them within 90 days.

3. SHERIFFS AND CONSTABLES ⚡169 — ACTIONS ON BOND—EVIDENCE.

In an action on a sheriff's bond for a shortage in the sheriff's account, where it appeared that the sheriff had held the same office for the previous term, it will be presumed that the default occurred during the last term, but such presumption may be rebutted.

4. SHERIFFS AND CONSTABLES ⚡157(2), 169 —ACTIONS ON BOND—BURDEN OF PROOF.

Where a sheriff holds two succeeding terms of office, his bondsmen for the last term are not responsible for defalcations committed before the execution of his bond or during the first term, but the burden is upon them to prove that it was so committed.

5. SHERIFFS AND CONSTABLES ⚡171 — ACTION ON BONDS—QUESTION FOR JURY.

In an action on a sheriff's bond, where it appeared that the sheriff had also held office during the previous term, and the evidence was susceptible of more than one inference as to the term wherein defalcation occurred, the question was for the jury.

6. SHERIFFS AND CONSTABLES ⚡157(2)—ACTION ON BONDS—LIABILITY OF SURETY FOR SUCCEEDING TERMS.

Where a sheriff has held office for two succeeding terms, and a shortage in his account appears, the bondsmen on the bond covering the last term, although not liable for the primary defalcation, may be liable for secondary default in the sheriff's failure to account for the money held at the beginning of the last term.

7. EVIDENCE ⚡423(5)—PAROL EVIDENCE—PRIMARY AND SECONDARY LIABILITY.

In an action against a sheriff's bondsmen, the question whether the liability of the sureties for the first or second term, as between themselves, is primary or secondary is not founded on contract, but is an equity which may be established by parol testimony.

8. SHERIFFS AND CONSTABLES ⚡166—ACTIONS ON BOND—PARTIES.

Where a sheriff has held succeeding terms of office, and a shortage appears in his accounts,

the sureties on the bonds for both terms should be before the court in order that the rights, equities, and liabilities may be finally determined.

Appeal from Common Pleas Circuit Court of Kershaw County; Geo. E. Prince, Judge.

Action by the State of South Carolina against E. H. Bowen and others. Judgment for plaintiff, and defendants appeal. Reversed.

Cole L. Blease, of Columbia, and M. M. Johnson, of Camden, for appellants.

T. H. Peeples, Atty. Gen., C. N. Sapp, Asst. Atty. Gen., and Wade Hampton Cobb, Sol., of Columbia, for the State.

HYDRICK, J. This is an action against the sureties on the last official bond of the late W. W. Huckabee, as sheriff of Kershaw county. He was appointed in October, 1912, to fill an unexpired term, and was elected in November of the same year for a full term, and was commissioned January 1, 1913. He was re-elected, in November, 1916, and commissioned on February 8, 1917, having given the bond here sued on, dated February 1, 1917. He died in office April 18, 1917. On September 17, 1915, the county treasurer turned over to him tax executions for the year 1914, amounting to \$11,319.94, and on May 2, 1916, executions for the year 1915, amounting to \$11,777.44. On none of these executions did he ever make any return or report to the treasurer.

Upon investigation made after his death, it was found that he had collected \$6,492.03 of the executions for 1914, and \$4,426.45 of those for 1915, and that he had to his credit in bank \$2,149.11, leaving a deficit of \$8,769.37. It was also found that some of the executions that had been turned over to him were missing. These amounted to \$591.13, making a total shortage of \$9,360.50.

The defendants offered no testimony, and the Attorney General moved for a directed verdict for the amount of the shortage proved, contending that it should be presumed, in the absence of proof to the contrary, that the entire default occurred during the last term. To this defendants objected, and contended that the evidence adduced made an issue of fact for the jury whether the default occurred during the last or the term previous to the last, and that, if the jury should find that it occurred during the previous term, they would not be liable, but the liability would fall upon the sureties of the bond for that term. The court sustained the contention of the Attorney General and directed a verdict accordingly. From judgment thereon defendants appealed.

[1] There was no error in admitting a certified copy of the bond, instead of requiring

production of the original. The statute (section 663, vol. 1, Code 1912) provides that such a copy shall be good and sufficient evidence.

[2] Nor was there error in holding that proof that executions that had been turned over to the sheriff were missing was sufficient prima facie to fix liability for them upon his bondsmen; for, according to the statute, it was the duty of the sheriff to collect the executions turned over to him, or return them to the treasurer, within 90 days, with his reasons for failing to do so. Therefore the burden was upon him and his bondsmen to account for them, or rebut the prima facie proof of liability in some way.

[3-5] But the court was in error in directing the verdict because the evidence made an issue of fact as to whether the defalcation occurred in the last term, or in the term previous to the last. While it is true, as held in *State v. Edwards*, 89 S. O. 224, 71 S. E. 826, that where an officer has held the same office for two or more terms, and is found short in his accounts, it will be presumed, in the absence of evidence to the contrary, that the default occurred during the last term; yet that is a presumption of fact, which may be rebutted. It arises from the duty of the officer to have in hand all the money which he ought to have at the beginning of his second term. Of course, the bondsmen of the last term are not responsible for a defalcation committed before the execution of their bond; but, in view of the presumption, the burden is upon them to prove that it was so committed. See *State v. Edwards supra*, and authorities cited. In this case there was evidence tending to show that the defalcation occurred during the previous term, and, as it was susceptible of more than one inference, that issue should have been submitted to the jury.

In *State v. Causey*, 93 S. C. 308, 76 S. E. 707, it was held that the failure of an officer to pay over money when required by statute, or on demand, pursuant to an order of court, is prima facie evidence of conversion at that time, and that he did not have such funds in his hands at the beginning of the succeeding term. The evidence in this case is that the executions were all turned over to the sheriff during the previous term. The statute (section 476, vol. 1, Code 1912) made it the duty of the sheriff to return all tax executions to the treasurer within 90 days after issue thereof, with his report thereon, and, on default, he was liable to prosecution and to an action on his official bond. The time

within which he should have returned the executions, with his report thereon, expired long before the commencement of the last term. Therefore the evidence showed prima facie that the default occurred during the previous term. If so, the sureties on the bond for that term are at least primarily liable, and these defendants are only secondarily liable.

[6] As pointed out in *State v. Causey*, supra, the sureties on the last bond may be liable, as for a secondary default; that is, for the failure of the sheriff, at the beginning of his last term, to collect from himself, or the sureties on the bond of the previous term, the money which it was his duty to turn over to himself as his own successor. As was there said, if another person had succeeded to the office, this would have been his (the succeeding officer's) obvious duty, and the obligation is the same on one who succeeds himself. If, therefore, it should turn out that loss has occurred from the negligence of the sheriff to perform that duty, as, for instance, if it shall appear that the sureties on that bond have, in the meantime, become insolvent, then the sureties on the last bond would be liable, as for the secondary default.

[7, 8] But obviously that liability cannot be imposed upon them in this case, in the present state of the pleadings and parties; for no such default is alleged in the complaint, and the sureties on the bond of the previous term are not before the court. The sureties on both bonds have the right to be heard upon the issues arising as to their liability as between themselves. As was held in *State v. Causey*, the question whether the liability of the two sets of sureties, as between themselves is primary or secondary, is not founded on contract, but is an equity which may be established by parol testimony. It follows that the sureties on both bonds should be before the court, in order that the rights, equities, and liabilities of all parties may be finally determined.

The judgment of the circuit court is therefore reversed, and the case is remanded for a new trial, with leave to plaintiff to amend by bringing in the sureties on the previous bond and by alleging the secondary default mentioned.

Judgment reversed.

FRASER and GAGE, JJ., concur.

GARY, C. J. and WATTS, J., did not sit.

VIRGINIA IRON, COAL & COKE CO. v. CLAYTOR'S ADM'R.

(Supreme Court of Appeals of Virginia.
Nov. 14, 1918.)

Error to Circuit Court, Botetourt County.

Action between the Virginia Iron, Coal & Coke Company and Claytor's administrator. There was a judgment for the latter, and the former brings error. Affirmed by divided court.

Jackson & Henson, of Roanoke, for plaintiff in error.

Haden & Haden, of Fincastle, for defendant in error.

PER CURIAM. Affirmed by divided court.

KELLY, J., absent.

(124 Va. 750)

D. I. DUPONT DE NEMOURS & CO. v. TAYLOR.

(Supreme Court of Appeals of Virginia. March 27, 1919.)

1. MASTER AND SERVANT §286(40)—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Whether defendant was negligent in putting plaintiff to work on a tramroad car without notice of an overhead pipe which struck him *held*, under the evidence, for the jury.

2. MASTER AND SERVANT §289(27) — CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Whether a servant was negligent in standing on a tramroad car and riding backwards when struck by an overhead pipe *held*, under the evidence, for the jury.

3. MASTER AND SERVANT §288(2)—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a servant struck by an overhead pipe while riding on a tramroad car assumed the risk *held*, under the evidence, for the jury.

4. MASTER AND SERVANT §289(19)—KNOWLEDGE OF DANGER—EVIDENCE.

In action for injuries to a servant struck by an overhead pipe while riding on a tramroad car, *held*, under the evidence, that it could not be said as a matter of law that he knew or was chargeable with knowledge of the danger.

5. APPEAL AND ERROR §930(1)—REVIEWING EVIDENCE AS ON DEMURRER.

On review of verdict for plaintiff attacked as contrary to law and evidence, the truth of all of plaintiff's parol evidence and all inferences therefrom favorable to plaintiff is admitted, regardless of conflicting evidence of defendant.

6. APPEAL AND ERROR §930(1) — CONFLICTING TESTIMONY—DEMURRER TO EVIDENCE.

There being a conflict in the testimony on some of the subjects bearing on the issue

whether plaintiff servant knew of or was chargeable with knowledge of danger, the testimony for plaintiff must prevail under the demurrer to the evidence rule.

7. APPEAL AND ERROR §999(3)—QUESTIONS CONCLUDED BY VERDICT.

Subject of imputed knowledge, having been submitted under instructions prepared by defendant company's counsel without objection on the part of plaintiff, is concluded by verdict for plaintiff servant.

8. TRIAL §296(3)—ERRONEOUS INSTRUCTION—CURE BY OTHER INSTRUCTIONS.

If instruction given at request of plaintiff was subject to objection that there was no evidence justifying embodying therein the idea that plaintiff servant had no opportunity of knowledge of any danger, defendant company was not harmed, where such feature of the case was fully and completely covered by instructions given at its request.

9. MASTER AND SERVANT §234(3)—"IMPUTED KNOWLEDGE."

It is only when men of ordinary prudence and observation would have observed, under like circumstances, that a servant's opportunity for knowledge can be held the equivalent of "imputed knowledge."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Imputed Knowledge.]

10. MASTER AND SERVANT §235(1)—NEGLIGENCE OF SERVANT—"NEGLIGENCE"—FAILURE TO OBSERVE.

Mere failure of a servant to observe, when there is no occasion for observation, is not "negligence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

11. MASTER AND SERVANT §234(3)—INJURIES TO SERVANT—KNOWLEDGE OF DANGER.

It is only negligent ignorance that can be chargeable as the equivalent of knowledge on the part of a servant.

12. TRIAL §412—ERRORS IN ADMISSION OF TESTIMONY—WAIVER.

Defendant's objection to plaintiff's testimony that foreman instructed plaintiff "to take my men and get on the trucks," on the ground that it was not shown that foreman had authority to give such instruction, was waived by defendant proving by its principal witness that "he (plaintiff) was required to ride on the car at some place."

13. NEW TRIAL §74 — VERDICT — SETTING ASIDE.

The measure of damages in personal injury suits must be left to the judgment and discretion of an impartial jury, and no mere difference of opinion on the part of the trial judge will justify any interference with verdict, unless it appears that jury has been influenced by partiality or prejudice or has been misled by some mistaken view of the merits of the case.

14. DAMAGES ¶228—REDUCTION OF VERDICT—WHEN PERMISSIBLE.

If a verdict may be set aside as excessive, but is not so excessive as to evince passion, prejudice, or corruption, the plaintiff may be put upon terms to accept a reduced amount, though there is no measure of damages.

15. DAMAGES ¶228—REDUCTION OF VERDICT—CONSENT OF DEFENDANT.

It is not necessary that the losing party consent to remitter.

16. APPEAL AND ERROR ¶162(1)—SURRENDER OF RIGHT TO APPEAL—ACCEPTANCE OF VERDICT FOR REDUCED AMOUNT.

In view of Acts 1906, c. 167, the plaintiff does not surrender his right of appeal by accepting a judgment for a reduced amount provided it is done under protest.

17. APPEAL AND ERROR ¶1004(3) — JUDGMENT FOR REDUCED AMOUNT.

Judgment will be affirmed on appeal as reduced upon the presumption of its correctness, in the absence of evidence to the contrary; but when the evidence certified shows that the verdict is not so excessive as to warrant the belief that jury was influenced by partiality, prejudice, or corruption, or has been misled by some mistaken view of the merits of the case and also fails to disclose any standard by which trial court could have measured reduction, remitter will be set aside.

Prentiss, J., dissenting in part.

Error to Circuit Court, Prince George County.

Action by A. B. Taylor against the E. I. Dupont De Nemours & Company. There was judgment for plaintiff, and defendant brings error, plaintiff assigning cross-error on action of trial court requiring him to make a release of \$2,000 of the verdict and accept judgment for \$8,000. Affirmed, and additional judgment for plaintiff for amount which he was required to release.

Charles E. Plummer and J. Gordon Bohannan, both of Petersburg, for plaintiff in error.

S. M. Brandt, of Norfolk, and R. B. Willcox, Jr., of Petersburg, for defendant in error.

BURKS, J. The plaintiff, A. B. Taylor, a servant of the defendant company, recovered a judgment against the defendant for \$8,000 damages, claimed to have been sustained by reason of negligence of the defendant company. To that judgment this writ of error was awarded.

[1-8] The plaintiff was put to work loading gun cotton to be transported from one point to another in the defendant's plant. The cotton was hauled along a tramroad, above which there was a line of pipe. The plaintiff was struck and knocked down, and received the injury complained of. He claims

that the place at which he was placed to work was not safe by reason of the fact that the pipe line was too low to admit his safe passage under it, while standing on the car on which the cotton was being transported, and that he had no knowledge of this fact and was not informed thereof by the defendant company. The defendant claims that the place was reasonably safe, as the plaintiff knew or was chargeable with knowledge of the height of the pipe line; that he assumed the risk, and was, furthermore, guilty of such contributory negligence as barred his recovery. Counsel for the company (plaintiff in error) have argued these defenses with their usual ability, and have cited many authorities to sustain their position. The case, however, lies within narrow limits, and the law is not difficult of application. The questions to be determined were: (1) Was the company negligent, under the circumstances, in putting Taylor to work without notice of the low overhead pipe line; and (2) was Taylor negligent in standing on the truck and riding backwards; or (3) did he assume the risk. These were questions of fact to be determined by the jury under proper instructions from the court.

It is apparently conceded that the defendant was negligent unless the place at which Taylor was put to work was reasonably safe, "considering the character of the work and the manner in which it was directed to be done"; but whether conceded or not we are of opinion that such is the law. All of the defenses tendered, therefore, were dependant for success upon showing that Taylor knew, or was chargeable with knowledge, of danger from the overhead pipe line, and the evidence was directed to this situation.

The defendant recognized from the beginning that in order to escape liability it was necessary for it to establish the plaintiff's knowledge, actual or imputed, of the danger to which he would be subjected in the discharge of his duties. It was the foundation upon which rested, not only the defenses of assumption of risk and contributory negligence, but also the defense that the defendant had furnished the plaintiff a reasonably safe place in which to work. This is made manifest from the petition for the writ of error. It begins, in effect, by announcing the following proposition:

"As a basis for the consideration of the affirmative defenses of assumption of the risk and contributory negligence, in detail, it is submitted that the plaintiff knew or was charged with knowledge of conditions that affected his safety as an employé."

After a very full and able discussion of the evidence and of the law applicable thereto, it closes with this statement:

"The same evidence is relied upon to establish the first proposition asserted as a ground for setting aside the verdict of the jury, viz., that the place at which the plaintiff was at work was reasonably safe, considering the character of the work, and the manner in which it was directed to be done."

[4] Of course, if the foundation falls, the superstructure must go with it. The crucial question, therefore, was and is: Did the plaintiff know, or was he chargeable with knowledge, of the danger to which he was subjected, and which resulted in the injury complained of?

[5] It must be borne in mind that the company stands here as on a demurrer to the evidence interposed by it, thereby admitting the truth of all of the plaintiff's parol evidence, and all inferences therefrom favorable to the plaintiff, which a jury might fairly draw, and as waiving all of its own evidence in conflict therewith, and all inferences from the latter, except those which necessarily flow therefrom. Viewed from this standpoint, the jury might have reasonably found, as facts, the following:

Taylor was a man 38 years old, and was first employed by the defendant as a night policeman, in July, 1915, and continued this work until some time in September, when he was discharged for going to sleep while on duty. About October 1, 1915, he was again employed by the defendant, this time as labor foreman, and continued in this position until he was injured December 20, 1915. His duties, at first as night policeman and afterwards as labor foreman, carried him over a very large part of the plant. He went wherever he was ordered to go, and this carried him practically all over the plant, except the portion where he was injured. He testifies that he had never been in this part of the plant before, and was not familiar with it. There were tramroads for transporting different kinds of materials running through many places in the plant. There were, also, overhead pipe lines throughout the plant, and these crossed the tramroads at many points, possibly as high as 25 or 30 in the plant in which the plaintiff was injured. Electric motors, pulling low platform trucks, were operated over these tramroads. The tramroad on which the plaintiff was hurt, and the pipe line over it, were new lines of comparatively recent construction, one witness placing their completion at about two weeks before the accident, and the building to which the plaintiff was to transport gun cotton was new and not entirely completed. The cotton was being transported to it for the first time on the day the plaintiff was injured. The plaintiff was put to the work of transporting gun cotton from No. 1 Purification House, to No. 6 Purification House, about 5 or 5:30 o'clock, on December 20, 1915. He

was instructed to load the cotton on the trucks, and, after it was so loaded, to take his men and get on the trucks and carry the cotton to its destination. The train he was loading consisted of a small electric motor and five trucks. The deck or platform of these trucks was about 2 feet, 2½ inches above the top of the rail. Between the point of loading and discharge of the cotton, there was an overhead line 6 feet, 10½ inches above the rail of the track, so that between the deck or platform of the truck, and the overhead pipe line, there was a space of only 4 feet, 8 inches. Of the existence of this overhead pipe line, the plaintiff had no knowledge, and was given no information. The gun cotton was being transported in tin cans between 3 and 4 feet high, and containing about 100 pounds each. There was no guard rail, or other appliance on the trucks to prevent these cans from falling off. After loading the cotton on the trucks, the plaintiff, with his men, got on the trucks and started to Purification House No. 6. After going some little distance, one of the cans fell off the truck, and the train proceeded some little distance before the motorman got notice to stop and have it replaced. Finding it difficult to communicate with the motorman speedily, the plaintiff stood on the motor, next to the motorman, with his back in the direction in which the train was going, so that he could easily see if a can, or any of the men, fell off the trucks, and, if so, reach back and touch the motorman, and notify him to stop at once. This position was taken by the plaintiff for that purpose. After proceeding some little distance in this position, and while the train was moving at a rate of 2 or 3 miles an hour, he was struck by the overhead pipe and knocked down upon the track, and received the injury of which he complains. This injury was not only painful, but was serious and permanent in its nature. There is no evidence as to the height of any of the other pipe lines in the plant above the ground, nor is there any evidence that the other lines were of similar construction overhead to the one which inflicted the injury. For aught that appears in the testimony, the pipe that struck the plaintiff was the only one of low construction in the plant. The plaintiff was required, with his men, to ride on the truck carrying the cotton, in order to be present to unload it when it reached its destination. He denies that he had any other instruction as to how, or where, he was to ride, except as hereinbefore stated or any knowledge of the existence of the overhead pipe which inflicted his injury, or that he was informed thereof. It is testified to by a witness for the defendant that it was "The general order in that plant, all over it, for nobody to ride standing upon the motor. Everybody understood it." But there is no

evidence that this general order was either published, or brought to the attention of the plaintiff, and the statement that everybody understood it was, manifestly, only the expression of opinion of the witness.

[6] On some of the subjects above mentioned, there is a conflict of testimony; but, under the demurrer to evidence rule, the testimony for the plaintiff must prevail.

Upon this testimony, it cannot be said as a matter of law that Taylor knew or was chargeable with knowledge of the danger to which he was exposed, and which caused his injury. It was a question of fact to be determined by the jury under proper instruction from the court. The trial court was extremely liberal to the company in the matter of instruction. It gave every instruction requested on its behalf, in all 13. These instructions covered every phase of the case, warranted by the evidence, that able and ingenious counsel could suggest, and yet the jury found for the plaintiff. We are unable to say that the verdict on these questions is either without evidence to support it, or that it is plainly contrary to the evidence.

[7, 8] We do not deem it necessary to discuss further than is hereinafter done the subject of imputed knowledge so ably presented by counsel for the company, as that question was submitted to the jury under instructions prepared by such counsel, without objection on the part of the plaintiff, and is concluded by the verdict. The verdict likewise concluded the question of the negligence of the defendant in the method of constructing its pipe lines and the alleged contributory negligence of the plaintiff in riding backwards. The granting of instruction A on behalf of the plaintiff is likewise assigned as error. This instruction is as follows:

"The court instructs the jury that it was the duty of the defendant to use ordinary care to furnish to the plaintiff a reasonably safe place for the performance by the plaintiff of the work of his employment; if the jury believe from the evidence that the defendant failed to use ordinary care to furnish the plaintiff a reasonably safe place for the performance of the work of his employment and as a direct consequence and result of said failure the plaintiff was injured without fault on his part and without knowledge of or opportunity of knowledge of any danger, then the jury must find for the plaintiff."

The objection urged to the instruction is that there is no evidence to justify the court in embodying in the instruction the idea that the plaintiff had no opportunity of knowledge of any danger; the view of the defendant being that the plaintiff not only had opportunity to know of the danger, but that his knowledge of general conditions were such as to impute to him actual knowledge thereof. If there was any error in this

respect, it was harmless, and the jury could not have been misled thereby, as this feature of the case was fully and completely covered by instructions 11 and 12 given at the instance of the defendant.

[9-11] Much has been said in the argument about "opportunity for knowledge," as though it were always the equivalent of imputed knowledge. But such is not the case. It is only when men of ordinary prudence and observation would have observed under like circumstances that it can be so construed. Mere failure to observe when there is no occasion for observation is not negligence. It is only negligent ignorance that can be chargeable as the equivalent of knowledge. Knowledge of general conditions will not comprehend a particular danger, where men of ordinary care and prudence, placed in the same circumstances, and using their faculties in the usual way, would not have apprehended such danger. If the failure to observe, however, amounts to negligence, then observation will be imputed. Such was the case of *Lindsay v. New York, etc., R. Co.*, 112 Fed. 384, 50 C. C. A. 298, where a brakeman, who has been continuously employed in a railroad yard for over nine months, was injured by falling into a drain which, with 118 other similar drains, had existed in the yard during the whole time of his employment, and *Ragon v. Toledo, etc., R. Co.*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336, where a brakeman who had been employed for a long while, and during all that time had walked over the railroad yard, was injured by stepping into an unfilled space between the ties of a railroad, plainly obvious, and with which the plaintiff was, or ought to have been, familiar, and *Green v. Cross*, 79 Tex. 130, 15 S. W. 220, where a section hand knew of just such defects in the railroad track, as the one which caused his injury, and continued his employment without notice to the master. Many other cases to the same effect might be cited. In all this class of cases, however, there was something to bring the defect to the attention of the party injured. Some occasion to observe, or the circumstances were such that a man of ordinary care and prudence would have observed. But in the case at bar, where we are required to draw all inferences favorable to the plaintiff which a jury might fairly draw, and to reject all inferences from the defendant's evidence favorable to it, except those which necessarily flow therefrom, we cannot infer that the plaintiff had knowledge of the height of the overhead pipe lines from the ground, in the absence of any evidence of the height of such pipe lines. He had never ridden on one of these trucks before. His previous employment had required him to walk about different parts of the plant, and, while he may have observed the fact that there were overhead

pipe lines at various points in the plant, there is no evidence that they interfered in any way with the discharge of his duties, or subjected him to any danger, or that there was any occasion for him to observe their height. If, as a matter of fact, the other overhead crossings were as low as the one which caused the injury complained of, it does not appear from the evidence, and we certainly cannot infer a knowledge of conditions which are not shown to have existed.

[12] While the plaintiff was being examined as a witness as to the instructions he had received immediately before the accident and by whom they were given, he was permitted to testify that Westcott was the foreman through whom he received his orders, that Westcott sent him to Bethel for instructions as to the particular job and the manner of doing it, and that, when he got to the place where the work was to be done, Bethel pointed out a foreman, whose name Taylor did not know, and said the foreman would tell him how to handle the cotton and what to do with it, and this foreman instructed him to load gun cotton on the trucks, and "to take my men and get on the trucks, and that the motorman knew the route; that he would carry me to the building." Objection was made to allowing the witness to give in evidence the statement above quoted, as it was not shown that the foreman was authorized to give any such instructions. The objection, if ever valid, was waived by the defendant proving the same fact by its principal witness. Westcott, who in his examination in chief by the defendant's counsel, and in response to a direct question from him, stated that "he was required to ride on the car at some place." That was the only issue. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472; *Va. & S. W. R. Co. v. Bailey*, 103 Va. 205, 49 S. E. 33; *Norfolk Ry. & L. Co. v. Spratley*, 103 Va. 379, 49 S. E. 502; *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719, 49 S. E. 988, 2 Ann. Cas. 997.

There was no error in the rulings of the trial court on other questions involving the admissibility of evidence. These objections have been considered, but they are of minor importance, involving no question of general interest, and need no discussion.

[13] It is assigned as error that the verdict for \$10,000 was excessive, and that the error was not cured by requiring the plaintiff to release \$2,000, of it, and accept a judgment for \$8,000; and the plaintiff assigns as cross-error the action of the trial court in requiring him to make the release. Acts 1906, p. 251. It must be admitted that the evidence would have warranted a verdict for a much smaller amount, and if the jury had so found we could not have disturbed their verdict; but if the statements contained in the testimony on behalf of the plain-

tiff be accepted as facts, as they must be, there is ample testimony to sustain the verdict. There is no measure of damages in cases of this kind, and there has not yet been discovered any standard by which to measure in dollars and cents the value of physical pain and suffering. It is a matter which must be left to the judgment and discretion of an impartial jury, and no mere difference of opinion of the trial judge, however, decided, will justify an interference with their verdict, unless it appears from the record that the jury has been influenced by partiality or prejudice, or has been misled by some mistaken view of the merits of the case. *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Hoffman v. Shartle*, 113 Va. 262, 74 S. E. 171. What was said by this court in *Southern R. Co. v. Smith*, 107 Va. 553-560, 59 S. E. 372, 375, is peculiarly applicable to this case. It was there said:

"It is true that \$15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is, not whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is therefore the established rule, settled by numerous decisions extending from *Farish & Co. v. Reigle*, 11 Grat. [52 Va.] 697, 62 Am. Dec. 686, to the recent case of *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. The record in the case at bar furnishes no suggestion that the jury were influenced by partiality or prejudice, or by any misconception of the merits of the case; nor is there anything to indicate that they were not moved to their conclusion from a sense of right and justice."

[14] There has been much difference of opinion among the courts, in the absence of a statute, as to the right of the court to put the plaintiff, in an action of tort, upon terms to accept a verdict for a reduced amount without the consent of the defendant. In England it has been held by the House of Lords that an appellate court had no power, without the consent of both parties, to put the plaintiff upon terms to accept a reduced amount, because it substituted the judgment of the court for the verdict of the jury, and was therefore an invasion of the defendant's right of a trial by jury. *Watt v. Watt*, L. R. App. Cas. (1906) 115, overruling *Belt v. Lawes* (1884) 12 Q. B. D. 356. There are sim-

liar holdings in a number of the states. See note 39 L. R. A. (N. S.) 1075. But the decided weight of authority is to the effect that if the verdict may be set aside as excessive, but it is not so excessive as to evince passion, prejudice, or corruption, the plaintiff may be put upon terms to accept a reduced amount, although there is no measure of the damages, and, if he accepts it, the defendant cannot complain. But it is only in such case that the reduction can be made. See cases cited in notes 39 L. R. A. (N. S.) 1067; Northern P. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854. The basis of this holding is that, so far as the plaintiff is concerned, he is not compelled to accept the reduced amount, but may decline it and accept the alternative of a new trial, and hence is not deprived of his trial by jury, but, if he accepts, he is bound by his acceptance and thus far waives a jury trial and cannot appeal; and, so far as the defendant is concerned, he has had his trial by jury whose adverse finding has been reduced in his favor, without impairing any other defenses he may have had. Such was the law in this state prior to the adoption of the act of 1906. Burks' Pl. & Pr. § 300, and cases cited.

[15-17] It is not necessary in this state that the losing party should consent to the remitter. James River Co. v. Adams, 17 Grat. (58 Va.) 435. But by the act of 1906 (Acts 1906, p. 251) the plaintiff is no longer deprived of his right of appeal. He does not surrender his right of appeal by accepting a judgment for the reduced amount, provided it is done under protest, but retains his right to insist on the verdict of the jury and to contest the correctness of the judgment of the trial court in reducing it. When the case reaches this court, it will affirm the judgment, upon the presumption of its correctness, in the absence of evidence to the contrary; but when the evidence is certified, and it appears that the verdict is not so excessive as to warrant the belief that the jury were influenced by partiality, prejudice, or corruption, or have been misled by some mistaken view of the merits of the case, and it also fails to disclose any standard by which the trial court could have measured the reduction, this court will uphold the verdict of the jury, because it is the tribunal appointed by law to ascertain the damages sustained. Neither the trial court nor this court can act arbitrarily in the matter. It is the peculiar province of the jury to decide such cases under proper instructions from court, and the court cannot substitute its judgment for the verdict of the jury. See cases cited in 2 Sutherland on Damages, § 459. The Legislature has evinced an intention to limit the discre-

tionary power of the trial court, not only by the act aforesaid, but also by the act forbidding directed verdict. Acts 1912, p. 52. If this conclusion is likely to lead to bad results, the appeal should be made to the Legislature, which has placed a limit on the amount of recovery in case of death resulting from the wrongful act or neglect of another, and has likewise fixed the amount of compensation to be paid by employers to their servants who are injured in the service.

In the case at bar, we can perceive no guide by which the trial court could have measured the reduction made, and, while reluctant to interfere with the wise practice of permitting trial courts to reduce verdicts to amounts deemed reasonable and proper, we feel constrained to do so when there is no standard by which such reduction can be measured and the verdict is not plainly without evidence to support it. The judgment of the trial court in favor of the plaintiff for \$8,000 will be affirmed, and this court will, in addition thereto, enter a judgment in favor of the plaintiff against the defendant for the further sum of \$2,000, with legal interest thereon from the 21st day of June, 1917, the date of the verdict, in accordance with the statute in relation to releases, in such case made and provided.

Affirmed, and additional judgment for amount remitted.

PRENTIS, J. (dissenting). I concur without hesitation in the affirmation of the judgment of the trial court for \$8,000. I am constrained, however, to dissent from the conclusion of the majority to enter an additional judgment for \$2,000 in favor of the plaintiff.

By the decided weight of authority, trial judges are vested with discretionary power to require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, in personal injury cases. 39 L. R. A. (N. S.) 1075, note. The statute (Acts 1906, p. 251), which authorizes a review of that discretion by this court, was not intended either to take away or to diminish that power. Indeed, its existence is thereby expressly recognized. A verdict then which has been disapproved, and which comes to this court without the sanction of the trial judge, has no such sanctity as that which properly attaches to a verdict which is approved by him. While it is true that there are no scales by which to measure human suffering, and the verdicts of juries in personal injury cases are generally approved, still there is a standard, based upon the common or average judgment of mankind, which sanctions and approves large verdicts for serious injuries and smaller verdicts for slight injuries. That standard is recognized by the act

limiting the recovery to \$10,000 where a negligent injury results in death, and by the amounts fixed in the Virginia Workmen's Compensation Act (Acts 1918, p. 637), under which the maximum recovery is \$4,000. It is also manifested in the verdicts which juries generally return, and which trial judges generally approve, for such injuries. In my opinion, all that the act of 1906 intended was to confer jurisdiction on this court to review the action of the trial courts where the verdict is reduced and the plaintiff accepts such reduction under protest. This court then should carefully weigh the evidence in such cases, bearing in mind the fact that the trial judge both saw and heard the plaintiff and his witnesses, and with the usual presumption in favor of the correctness of the judgment under review, and, unless it is clear that the trial judge has abused the discretion vested in him to prevent what seems to him to be an injustice, this court should approve his action.

"There is always a fair presumption that the verdict of the jury is correct, and when the judge who presides at the trial, who has heard all the evidence, witnessed all the proceedings, and the manner of conducting the cause before the jury, is satisfied with the verdict and refuses to set it aside, an appellate court which cannot have an equal opportunity for forming a just judgment ought not to interfere without the strongest reasons for doing so. 'On the other hand,' as was said by Judge Baldwin in *Patterson v. Ford*, 2 Gratt. 19, 25, 'when the judge' (who presided at the trial) 'is dissatisfied with the verdict and grants a new trial, some latitude must be allowed to his discretion; especially where the propriety of its exercise is affirmed by a verdict on such new trial for the party to whom it was granted.' In setting aside the verdict the trial court must to some extent pass upon the weight of the evidence before the jury; and a stronger case must be made in order to justify an appellate court in disturbing an order granting a new trial, than where it has been refused. The reason usually assigned for this rule is that the refusal to grant a new trial operates as a final adjudication of the rights of the parties, while the granting of the new trial simply invites further investigation, and affords an opportunity for showing the truth without concluding either party. *Barton's Law* Pr. 725, 726; *Ruffner v. Hill*, 31 West Va. 428, 431, 432 [7 S. E. 13]."
Chapman v. Va. Real Estate Co., 96 Va. 177, 188, 31 S. E. 74, 78.

"It would, indeed, be a futile and idle thing for the law to give to a court supervisory authority over the proceedings and the manner of conducting a cause before the jury, and the right to set aside the verdict of the jury therein because contrary to the evidence, unless the judge vested with such power could consider to some extent at least the evidence in the cause. * * *"
Cardwell v. Norfolk & Western Ry. Co., 114 Va. 500, 506, 77 S. E. 612, 614.

In this case, under the evidence, I think that the trial judge properly reduced the verdict, and that it should not be increased beyond the amount approved by him, \$8,000.

(33 W. Va. 689)

RUFFNER et al. v. BROWN et al.*
(No. 3695.)

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. POWERS ⇐34(2)—"WRITTEN INSTRUMENT SIGNED, SEALED AND ACKNOWLEDGED"—HOLOGRAPHIC WILL.

A power of appointment, to be exercised by "a written instrument signed, sealed and acknowledged," is well executed by a holographic will of the person in whom the power was vested, making disposition of the subject-matter thereof, by virtue of section 4 of chapter 77 of the Code of 1913 (sec. 3869).

2. POWERS ⇐34(2)—EXECUTION—"WRITTEN INSTRUMENT SIGNED, SEALED AND ACKNOWLEDGED."

It being doubtful whether such a power included in the general terms of said statute can be excepted from their operation, upon any ground recognized by the rules of construction, and the statute itself having been adopted by the Legislature of Virginia from the English Wills Act, 1 Vict. c. 26, § 10, before the organization of this state, and after it had been construed by an English court, as authorizing execution of a power of appointment so given by will, without compliance with prescribed formalities beyond those required by the statute, it is held to be within the statute, notwithstanding subsequent English decisions to the contrary.

(Additional Syllabus by Editorial Staff.)

3. POWERS ⇐34(2)—EXECUTION—DEED OR WILL—"WRITTEN INSTRUMENT SIGNED, SEALED, AND ACKNOWLEDGED."

A power of appointment to be exercised by "a written instrument signed, sealed and acknowledged" may be exercised either by deed or will, as a will need not always be acknowledged, though it may be, and sometimes must be, under Code 1913, c. 77, § 3 (sec. 3868).

Williams, J., dissenting.

Appeal from Circuit Court, Kanawha County.

Suit by Joseph Ruffner and others, executors, etc., against E. Fontaine Brown and others. From the decree defendants Maria Brown and others appeal. Affirmed.

Leo Loeb, of Charleston, for appellants.
W. G. Mathews, El. B. Dyer, and Morgan Owen, all of Charleston, for appellee E. Fontaine Brown.

Malcolm Jackson, of Charleston, for appellees Ann Conway Powers and others.

POFFENBARGER, J. If the trusts created by one of the deeds hereinafter described were impliedly revoked and annulled by the exercise of the power of appointment reserved in it to the grantor, there will be no occasion for consideration of the many assignments of error founded upon theories of construction of that deed. The legal basis of the decree giving effect to the will purporting revocation of the trusts, against which the appellants claim title, is not indicated. The learned judge of the trial court may have treated the execution thereof as having wrought such revocation, or he may have construed the deed as having vested complete beneficial ownership of the lands conveyed by it in the grantor, by reservation, and made it possible for him to devise them without having revoked the trusts. Both grounds are urged by counsel for the appellees, in resistance of the attack upon the decree appealed from.

By a deed dated January 14, 1903, Thomas L. Broun and Mary M. Broun, his wife, conveyed to Fontaine Broun and Angus W. McDonald, trustees, certain real estate situated in Boone and Kanawha counties, and consisting of a tract of 2,000 acres and undivided interests in several other tracts, equivalent in all to about 5,000 acres, upon the following terms: For the use and benefit of the wife for the joint lives of herself and her husband; the husband for his life, in case he should survive the wife; their three children in fee, subject to a provision for the wife, in case she should survive the husband; the children in fee without incumbrance, after the death of the husband, he having survived the wife, and McDonald, trustee, being required equally to convey the land to one of them and trustees for the others.

This deed, however, contained indisputable powers of revocation and appointment, which the husband, after the death of his wife, admittedly and effectively exercised by joining one of the trustees, Angus W. McDonald, in the execution of another deed, dated June 10, 1911, by which the lands granted by the deed of January 14, 1903, and other lands, making an aggregate of about 10,000 acres, were conveyed to four trustees, E. Fontaine Broun, Charles M. Broun, Philip S. Powers, and C. Beverly Broun. In this deed he was the party of the first part, Angus W. McDonald, trustee, party of the second part, and the four trustees just named, parties of the third part. It recited the powers of revocation and appointment reserved by the former deed, and conveyed the lands granted by it from Angus W. McDonald, trustee, to Thomas L. Broun, by direction of the latter, who then made the conveyance to the parties of the third part, in four equal parts, subject to reservations, for the use and benefit of his three children and numerous collateral

relatives, one undivided fourth going to each child and the other to the collateral relatives. He reserved an estate in the lands for his life, with power to sell timber on them and to lease them for coal, oil, gas, and other minerals, or for any purpose whatsoever, and to apply the proceeds to his own use or to such other uses as he might desire, or as by his will he might designate, and to subject the land, timber, and minerals to any and all charges he might see fit to make by his last will and testament. This deed also contained a reservation of power to revoke and appoint, reading as follows:

"But this conveyance and each and every trust, use, benefit, and estate hereinbefore declared, created or set forth, is upon and subject to the express condition and understanding that the said Thomas L. Broun, may, for his own benefit, and for the benefit of any person or object he may select, at any time, and as often as he shall see fit, and according to his will and pleasure, by a written instrument, signed, sealed and acknowledged by him, revoke, annul, alter, amend or make any substitution for the trusts, uses, benefits, and the estates hereinbefore declared or set forth, or any part thereof, either as to the whole of said real estate or any part thereof."

By an instrument signed, sealed, and acknowledged by him and dated May 8, 1912, Thomas L. Broun made some alterations of the deed of April 10, 1911, among which was one giving his collateral kindred only proceeds of the sale of the lands and timber and rentals and royalties arising from the lands. Charles M. Broun, Philip S. Powers, and E. Fontaine Broun, trustees, were given title to all of the land, but C. Beverly Broun, trustee, was authorized to receive one-fourth of the proceeds of sales of land and timber and the rents and royalties for distribution among the collateral kindred. This instrument repeated the reservation of power of revocation and appointment. It also provided that all donations, contributions, and bequests made by any will or any codicil of said Thomas L. Broun should be parts of the deed of April 10, 1911.

Under the reservations of power above mentioned, Thomas L. Broun either revoked the powers of the trustees and materially altered the dispositions of property made by the deed of April 10, 1911, and the instrument dated May 8, 1912, or modified them as to such dispositions, without abrogation of the powers of the trustees, by his will appointing Joseph Ruffner and Robert E. McCabe executors and giving all of the lands to Louise Fontaine Jackson, Edward Fontaine Broun, and Ann Conway Powers, his three children. The will was dated August 13, 1913, and admitted to probate March 30, 1914.

[3] That the power reserved could be exercised either by will or by deed is put beyond question by the authorities. The desig-

nated means of execution thereof is "a written instrument signed, sealed and acknowledged." That may be either a will or a deed, for both are written instruments. A will need not always be acknowledged, but it may be, and sometimes must be. Code, c. 77, § 3 (sec. 3868). There is language in the reservation clause that may import intent to require execution of the power by an instrument taking effect in the lifetime of Thomas L. Broun, which would exclude right to execute it by a will taking effect at the moment of his death; but such a limitation would arise only by implication, an unnecessary implication which the rules of construction do not permit. *Graham v. Graham*, 23 W. Va. 36, 38, 48 Am. Rep. 364; *Beard v. Beard*, 22 W. Va. 130, 136; *Earle v. Coberly*, 65 W. Va. 163, 64 S. E. 628, 17 Ann. Cas. 479; *Boisseau v. Aldridges*, 5 Leigh (Va.) 222, 27 Am. Dec. 590; *Sutherland v. Sydnor*, 84 Va. 880, 6 S. E. 480. "The mere question whether a will comes within the words instrument in writing has long ago been decided in the affirmative, and there is neither decision or dictum throwing any doubt on that." Sir R. T. Kindersley, Vice Chancellor, in *Orange v. Pickford*, 4 Drew. 363, 62 Eng. Reprint, 140. "If a power be created to be executed by a deed or instrument in writing, although the words seem to indicate instruments inter vivos only, yet it is settled that it may be well executed by will." Lord Chancellor Westbury in *Taylor v. Meads*, 4 De G. J. & S. 597, 46 Eng. Reprint, 1050. "It is quite well settled that a power to be executed by an instrument in writing may be executed by a will, that being an instrument in writing." Lord Romilly, M. P., in *Smith v. Adkins*, L. R. 14 Eq. Cas. 402. A power to revoke by any writing under hand and seal and to appoint new uses by the same or any other deed is well executed by a will. *Countess of Roscommon v. Fowke*, decided on appeal by the High Court of Parliament, 6 Bro. 158, 2 Eng. Reprint, 998. [1, 2] Whether a power to be executed by an instrument in writing could be well executed by a will, without compliance with requirements as to form and solemnity beyond those imposed by the statute of wills, has been decided both affirmatively and negatively in England. In *Buckell v. Blenkhorn*, 5 Hare, 131, 67 Eng. Reprint, 857, and *Collard v. Sampson*, 16 Beav. 543, it was held that the power could be so executed. Upon an appeal, the latter was reversed by a judgment delivered by Lord Justice Turner, 4 De G. M. & G. 224, 43 Eng. Reprint, 493. About a year later, 1854, the question arose again in *West v. Ray*, Kay, 385, 69 Eng. Reprint, 163, and was negatively disposed of. This was followed by a like decision in *Taylor v. Meads*, 4 De G. J. & S. 597, 46 Eng. Reprint, 1050. There can be no doubt, therefore, that the present English construction

of the statute excludes the operation of this will as an exercise of the power, if acknowledgment of the instrument is a substantial requirement and has not been complied with. The will is signed and sealed, but it bears no certificate of acknowledgment or other proof thereof.

Section 4 of chapter 77 of our Code (sec. 3869) is substantially the same as section 10 of the English Wills Act, 1 Vict. C. 26. Our statute was taken from the English Wills Act, after the decision in *Buckell v. Blenkhorn*, rendered in 1846, and before that rendered in *Collard v. Sampson* on appeal, in 1853. It was incorporated into the Virginia Code of 1849. Hence, strictly speaking, it was borrowed and adopted as construed in *Buckell v. Blenkhorn*, and falls within the rule that a statute borrowed from another jurisdiction is to be taken in the sense of the construction put upon it in the foreign jurisdiction, at the date of its adoption. The later English decisions giving it a different construction are merely persuasive. *N. & W. Ry. Co. v. Old Dom. Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *Danville v. Pace*, 25 Grat. (Va.) 1, 18 Am. Rep. 663; *Doswell v. Buchanan's Ex'rs*, 3 Leigh (Va.) 365, 379, 23 Am. Dec. 280.

The rule of construction just referred to rests upon presumption, of course, and may not be absolutely binding upon the courts of the adopting state. In the case of the adoption of a statute of a foreign jurisdiction before its construction has been fully determined by the courts of such jurisdiction, there might be good reason for adoption of the construction ultimately and finally put upon it by the courts of its origin.

There is some technical force in the later English decisions, repudiating the doctrine of *Buckell v. Blenkhorn*. Wills, not powers of appointment, constitute the subject-matter of the statute. The latter fall within the scope of the act in so far only as they are created by will or susceptible of execution by will. Powers not created by will nor susceptible of such execution do not fall within it at all, either wholly or partially. Being in derogation of the common law and in restraint of liberty, the statute falls under the rule of strict construction. Although these two propositions are not referred to in the opinions, the great jurists who rendered the decisions evidently had them in mind and founded their conclusions largely upon them. In *Collard v. Sampson*, Lord Justice Turner said:

"The question is, What is the meaning of the words 'power of appointment by will,' contained in that section—whether it embraces every case in which a power of appointment may be exercised by will, or applies only to cases in which the power is in terms given to be so exercised? The language of the act leaves this point in doubt."

After having shown that the interpretation clause of the act defined the word "will" as including a power of appointment by testament or codicil, or writing in the nature of a will, he said:

"But the act goes no further. Everything beyond this is left to judicial determination."

Then having determined that the terms creating the power were broad enough to permit execution thereof by will, but did not specifically authorize such execution, he proceeded as follows:

"The power mentioned in the statute is therefore included in the power given by the instrument before us, but it does not seem to me to follow that because the power mentioned in the statute is included in the power given by the instrument, the power given by the instrument is therefore a power to which the statute was intended to apply. It would be difficult, I think, to say that a power to appoint by will or other writing is the same thing as a power to appoint by a will or codicil, or writing in the nature of a will."

Vice Chancellor Sir W. Page Wood based the decision in *West v. Ray* upon the same ground, and concluded his opinion with these words:

"The donor might well say, 'I have not made any direction at all as to a will, and therefore my case is not within the statute. It may be that it was a matter of indifference to me whether the exercise of the power should be by will or not; but it was of the essence of my direction that it should be done with certain solemnities. Where the instrument is a matter of form and the required solemnities are the substantial requisites is not the same case as where the instrument is the substance of what is required by the power, and the solemnities are the accessories, which is the state of circumstances to which the statute applies.' I regret to come to this conclusion because, when persons fetter themselves with these forms, instead of saying simply that the appointment should be by deed or will, which would in most cases fulfill every purpose, they often disappoint themselves, or when they wish to give a power of appointment to third persons they frequently by these means disappoint the object of all parties. The Legislature has made a provision for the evil in cases of wills; but I think that it does not extend to the case where the power requires not a will, but an instrument with certain formalities different to those observed in the execution of a will. The distinction is no doubt narrow; for if the power had been to be executed by a 'writing testamentary or otherwise,' then the case would have fallen within the statute; but in that case the donor would have made a will of the substance of the case, and then the provisions of the statute would apply."

In *Taylor v. Meads*, Lord Westbury merely adopted the conclusion arrived at in *West v. Ray*. He submitted no argument to sus-

tain it, and invoked no rule or principle of construction in support of it.

On the other hand, Sir James Wigram, in *Buckell v. Blenkhorn*, expressed the opinion that execution of such a power by will was clearly within the statute. His cogent reasoning follows:

"Now, by the late statute of wills it is provided that in the execution of wills one given form shall be observed, and that such form shall be an equivalent for every arbitrary form of execution which the donor of a power may prescribe. It was not at the expense, but in favor and for the benefit, of such donors, and in order that their intentions might not be disappointed by the neglect of useless forms, that this legislative provision was made. I must presume, in this case, that Sarah McLaughlin made the deed of the 1st of September, 1843, with knowledge of the decisions upon the word 'writing,' and with knowledge also of the provisions of the Wills Act. Why, then, should I deprive her of the benefit of the act, for that is what I am asked to do? I am asked to deprive certain objects of her bounty of the gifts she intended for them only because a form has not been observed which the Legislature has declared to be useless. What reason then is there for saying that a will shall not, since as well as before the statute, be deemed a writing within the terms of the deed? If the testatrix had used the word 'will' instead of the word 'writing,' the statute would equally have applied."

The conclusion expressed in *Buckell v. Blenkhorn* is manifestly permissible under the rule of strict construction. Lord Justice Turner admits, in *Collard v. Sampson*, that the power mentioned in the statute is included in the power given by the instrument. Sir James Wigram, in the other case, says a decision against the validity of the execution by will would be "against the spirit and policy, as well as against the letter, of the act." What falls within both the spirit and letter of the statute is deemed, under that rule, to have been within the legislative intent. *Bank v. Thomas*, 75 W. Va. 321, 83 S. E. 985; *Harrison v. Leach*, 4 W. Va. 388, Davis v. Commonwealth, 17 Grat. (Va.) 617; *State v. Stephenson*, 2 Bailey (S. C.) 334, 335; *United States v. Hartwell*, 6 Wall. (U. S.) 885, 395, 18 L. Ed. 830. Nor does the rule of strict construction restrict the operation of terms actually used in a statute to their narrowest meaning, or to any particular meaning. *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16740; *United States v. Hartwell*, cited. As in other cases, the meaning of the words is to be determined in the light of the subject-matter and the context. The only absolute limitation upon the operation of a statute strictly construed is lack of terms expressing intent. This does not always obtain in the application of the rule of liberal construction. Under the former rule, what is authorized or forbidden must

be within both the spirit or purpose of the act and its terms, while under the latter, it sometimes suffices that it be within the spirit or purpose only. Execution by will, of a power exercisable by an instrument in writing, admittedly comes within the requirements of that rule.

Through wills and codicils, not deeds or other instruments, constitute the subject-matter of the statute, the execution of powers of appointment by will is expressly included. The uncertainty is limited to the extent of such inclusion. It is not expressly defined, and the context does not necessarily limit it. The first clause of the section is broad enough in its term to include any power that can be exercised by a will. It says no appointment made by will, "in the exercise of any power," shall be valid, unless, etc. The second clause is not definitive of the instrument or provision vesting the power. While it mentions "a power of appointment by will," its terms do not even suggest the necessity of the creation of such a power in specific, as contradistinguished from general, terms, and one created by the use of general terms is as valid and effective as one specifically conferred. Hence the statute seems grammatically, logically, and legally to include both cases. Of course, as suggested and held, there is a difference, but that difference is not made the ground of any express or necessary exception. Besides the uniform holding that a power so given as to be exercisable by an instrument in writing could be validly executed by will must have been known to the Parliament, and also to the Virginia General Assembly, when the statute was enacted.

To say the Legislature has not provided for the case in question necessarily narrows and restricts the meaning and operation of the terms of the act. The judicial observations of lack of provision, therefore, necessarily mean no more than that the act has made no specific provision for it. Such provision was wholly unnecessary, and would have been unusual, in the absence of some principle of public policy or rule of construction working an exception from the operation of the general terms of the act, by implication. No such principle or rule is invoked in any of the decisions overruling *Buckell v. Blenkhorn*. To give the statute effect commensurate with the extent of its general terms does not permit it perceptibly to innovate upon the law of deeds or other instruments. In case of the execution of such a power by deed, all of the prescribed formalities and solemnities must be complied with. Nothing is abrogated except in the case of execution by will, and that falls directly within the terms of the statute and constitutes part of its subject-matter. It places no restraint upon the liberty of the

creator of the power, for he may always limit the mode of execution to a deed or other instrument operating *inter vivos*, and, if he does not, he may well be presumed to have intended to place it under the operation of the statute. While the distinction between the form of the instrument of execution and the solemnities thereof, marked by Sir W. Page Wood, in *West v. Ray*, is a perfectly obvious one, it does not profess to stand upon any recognized ground of implied exception from the operation of the general terms of a statute. Some of these grounds, as defined by the English and American decisions, are briefly stated in *Conley and Avis v. Coal & Coke Ry. Co.*, 67 W. Va. 129, 67 S. E. 613, syl. pt. 27, in the following terms:

"In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the Legislature did not intend to innovate upon, unsettle, disregard, alter, or violate: (1) The common law; (2) a general statute or system of statutory provisions, the entire subject-matter of which is not directly or necessarily involved in the act; (3) a right or exception based upon settled public policy; (4) the Constitution of the state; nor (5) the Constitution of the United States."

An obvious and radical difference in the nature of the thing excepted from one named in the statute constitutes another ground.

The express terms of this act rebut the presumption against intent to alter the common law as to the execution of powers of appointment given to be exercised by will, whether so given in definite and specific terms or in general terms. The reasons of public policy impelling the enactment of the law apply with equal force to both classes of powers of appointment by will. The evil remedied by the act is the same in each class, as Sir W. Page Wood admitted in his opinion in *Collard v. Sampson*. Omission to relieve from compliance with useless and harmful formalities in the execution of powers of appointment otherwise than by will, signifies intent not to deal with the subject of execution of powers generally, but it does not import intention to restrain the general terms of the statute to one class of powers susceptible of execution by will. Nor is there any marked difference between the nature of a power given in general terms to be executed by will and one given in specific terms to be so executed. They differ only as to the forms of expression, the language, in which they are created. Each is a power susceptible of execution by will. When executed, each produces exactly the same legal result. If the power is given, in express terms to be executed by deed or by a will made with solemnities not required by the

statute, it can be executed by will without compliance with such solemnities. If it is conferred in general terms broad enough to permit both kinds of execution, the words used do not indicate any intention to require such compliance, nor do they point out any circumstance tending to give the instrument a different nature.

Although this question seems never to have been decided by the House of Lords, the court of last resort in England, the conclusion stated in the later decisions referred to may well be taken as settled law in that jurisdiction. There has been a general acquiescence in it for a great many years. The later construction adopted has not called forth any amendment of the act. Hence it may be justly inferred that the bench, bar, and Legislature are satisfied with it. If, in our opinion, it were clearly and firmly sustained by any definite rule or principle of construction and the Legislature of Virginia had not adopted it as formerly construed in England, we would be constrained to give it our assent, and hold the power not to have been well executed. But, in view of our doubt of its soundness when examined in the light of the rules of interpretation and construction, and the adoption of the statute as previously construed, we hold the will to have been a valid execution of the power, and affirm the decree complained of.

WILLIAMS, J. (dissenting). I do not think a power of revocation and reappointment, to be executed "by a written instrument, signed, sealed and acknowledged," is executed properly by a holograph will, not so signed, sealed and acknowledged. By the common law the mode prescribed for the execution of the power must be strictly pursued; if it is to be exercised by will only, a deed will not answer, and vice versa. 2 Min. 741, and *Williamson v. Beckham*, 8 Leigh (Va.) 20. If Mr. Broun's will had been sealed and acknowledged, it would have been a literal compliance with the condition, for even though it was testamentary in character, it would also have been the kind of a writing designated. But not being acknowledged, it is not such a writing as the donor had prescribed. The court has no right to imply that the acknowledgment is an immaterial requirement that can be dispensed with. There having been no express provision for a revocation and reappointment by will, I do not think section 4, c. 77, Code, has any application, for the reason stated by Lord Justice Turner in *Collard v. Sampson*, and quoted in the majority opinion. I think the later English decisions, and not the case of *Buckell v. Blenkhorn*, which the opinion has followed, furnish the correct interpretation of the statute.

(83 W. Va. 652)

PRICHARD v. PRICHARD et al.
(No. 3790.)

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. WILLS §523—"GIFT TO A CLASS."

A gift to a class exists when the instrument creating it directs the distribution of an aggregate sum to a body of persons, commonly designated by some general name, as "children," "grandchildren," "nephews," uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number of persons in the designated class.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Gift to a Class.]

2. WILLS §547—WORDS OF SURVIVORSHIP—CONSTRUCTION.

Words of survivorship contained in a will or trust instrument will be referred to the event plainly intended to accomplish the purposes of the testator or donor, whether that event be before, at the time of, or after his death.

3. WILLS §524(6)—GIFT TO A CLASS—SURVIVORSHIP.

Where, under the provisions of a will or trust instrument, a gift to a class, here described as "surviving grandchildren," is postponed to a particular time, or pending the termination of a preceding estate, generally survivorship is to be referred to the time when the property or fund is divisible, and those members of the class then living will take the whole, unless the particular language used confines the gift to those in existence at the date of the instrument or at the death of the testator or donor.

4. WILLS §524(2)—TESTAMENTARY TRUST—DISTRIBUTION.

So, where such an instrument creating a trust fund provides that the interest therefrom is to be divided among "surviving grandchildren equally," the distribution thereof is not limited to those in existence at the death of the donor, but is to be made to such grandchildren as are living at the time fixed for each period of distribution.

5. WILLS §695(2)—CONSTRUCTION—EQUITY JURISDICTION.

Generally jurisdiction in equity to construe wills arises only in cases where there is necessity for such construction in relation to actual litigation as to matters which are proper subjects of equity jurisdiction. Usually there must be something more in a suit than a mere construction of an instrument.

6. TRUSTS §178—CONSTRUCTION OF TRUST INSTRUMENT—GROUNDS.

Though a trustee or other fiduciary is sometimes permitted to come into a court of equity for a construction of an instrument under which

he is acting, he is permitted to do so only for the purpose of guidance in the administration thereof as immediate necessities may require, and the court properly may decline to extend its construction to cover contingencies which may never arise, or, if at all, at some remote date; such points being postponed for future consideration upon the application of the fiduciary or other persons interested when the occasion therefor is presented.

Appeal from Circuit Court, Kanawha County.

Suit by A. M. Prichard, trustee, etc., of S. B. Prichard, deceased, against Henry Lewis Prichard and others. From a decree adjudicating a question for the trustee's guidance in the administration of the trust fund, defendants appeal. Affirmed in part, and reversed in part.

A. M. Prichard, of Charleston, pro se.

LYNCH, J. The decree from which this appeal is taken adjudicates for the guidance of the trustee in the administration of the trust fund created by the donor, his mother, for the benefit of her grandchildren, three of whom are his own children, the question whether there is included among the beneficiaries a child born to him and his wife within slightly less than the gestation period of time after the death of his mother, the donor, and whether certain other provisions of the instrument are void by the rule against perpetuities. The instrument creating the trust follows:

"For value received, this 18th day of September, 1917, I, S. B. Prichard, hereby transfer, assign and set over unto my son, A. M. Prichard, as trustee, fifty-five thousand (\$55,000.00) dollars, United States 2% bonds due 1930, which I have loaned unto the Fifth-Third National Bank of Cincinnati, Ohio, for an additional 2%, as evidenced by its certificate therefor dated February 14, 1917, standing in my name, but to be forthwith transferred to the name of my said trustee, who is to have and to hold said bonds in trust to keep the principal thereof invested in safe interest-bearing securities, and to collect the income therefrom, and divide the same, less taxes and expenses, among my surviving grandchildren, equally, until the 1st day of January, 1950, when he shall distribute the principal of said bonds equally among such of my grandchildren as shall be then alive; and in case any be then dead leaving issue surviving, then such issue shall be entitled to so much as the parent, if living, would have received; but, provided, however, that the income from ten thousand (\$10,000.00) dollars of said bonds shall be paid to Annie Mary Imboden for so long as she shall live unmarried, and this trust shall continue as to said ten thousand (\$10,000.00) dollars of said bonds for so long after the 1st day of January, 1950, as the said Annie Mary Imboden shall continue to live unmarried, but this provision for her benefit shall cease and determine immediately upon her death or marriage, whichever shall first occur."

[1-3] Though not, and apparently not intended to be, a formal will, the instrument, it appears, is nevertheless a testamentary adjustment of the whole or a part of the personal property of the donor. It purports an immediate devolution of the title and vests it in trust for grandchildren, of whom four then were, and now are, living, and another born July 26, 1918, since the donor's death, which occurred October 30, 1917, and also now living. The trust so created is an active and continuing trust, and, if lawful, cannot terminate within the time fixed for its continuation, either by the joint and voluntary act of the beneficiaries or by the coercion of a court of equity. *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; *Olsen v. Youngerman*, 136 Iowa, 404, 113 N. W. 938. Though, as we have said, it is not strictly a will, it has the elementary characteristics of a bequest of personal property, and doubtless the donor had in mind the purpose to part with the title she held in anticipation of her early demise.

The particular language involved in the first question is:

"To collect the income therefrom, and divide the same, less taxes and expenses, among my surviving grandchildren, equally, until the 1st day of January, 1950."

The intent manifested by the trust apparently was to provide for the division of the income among members of a class described as surviving grandchildren. No one is named individually; the number of beneficiaries is uncertain; but the reference is to a group which can be determined at each income period fixed for its distribution. In *Jarman on Wills* (6th Ed.) p. 336, it is said:

"A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews'; but in legal language the question whether a gift is one to a class depends, not upon these considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number of persons."

See, also, 40 Cyc. 1473; *Saunders v. Saunders*, 109 Va. 191, 63 S. E. 410.

It seems clear, therefore, that this clause of the trust is for the benefit of a class.

The determination of the question who are members of the class entitled to share in the distribution of the income is more important at this time. A grandchild was born after the death of the creator of the trust, and others still may be born, and if the term "surviving grandchildren" is limited to those in being at the creation of the trust, or at the death of the donor, they will be excluded

from participation in the distribution. In *Schaeffer v. Schaeffer*, 54 W. Va. 681, 48 S. E. 150, the question was mooted, but not decided, whether survivorship in a will related to the death of the testator, or to some other point of time. But *Dent v. Pickens*, 61 W. Va. 488, 58 S. E. 1029, pt. 4, syl., states the rule thus:

"Words of survivorship contained in a will will be construed according to their usual and common acceptation, unless a different meaning plainly appears to have been intended thereby; and will be referred to the event plainly intended to accomplish the purposes of the testator, whether that event be before, at the time of, or after the death of the testator."

See, also, *Neal v. Hamilton Co.*, 70 W. Va. 250, 260, 73 S. E. 971; 40 Cyc. 1511.

In accordance with that rule the intent of the testator is to govern in construing the meaning of words of survivorship in a will; and it is highly proper that such should be the rule of construction, for the purpose of the court in construing a will is to give effect to the wishes of the testator with respect to the disposition of his property after death, subject only to restrictions imposed by established rules of law. Though, as we have said, the instrument here involved is a trust instead of a will, the same rule of construction applies; for the intent of the creator of the trust clearly was to make such disposition of part at least of her estate as is usually made by will.

[4-6] When the term "surviving grandchildren" is read in connection with the second part of the instrument, that providing for the distribution of the "principal of said bonds equally among such of my grandchildren as shall be then alive," it clearly appears that she did not limit the distribution of the income to those only who were living at the date of the instrument or at her death. The principal is to be divided among those of her grandchildren who shall be alive on January 1, 1950, apparently without regard to the date of their birth, provided it occurred prior to 1950. Is it not fair to assume that she intended the distribution of the income from the bonds to be as broad in scope as the division of the principal? Her own intention as deduced from a reasonable and fair interpretation of the entire instrument leads irresistibly to this conclusion.

Further, where under the provisions of a will or trust instrument a gift to a class is postponed to a particular time, or pending the termination of a preceding estate, generally those members of the class take, and those alone, who are in being at the arrival of the time for distribution, unless the particular language used confines the gift to those in existence at the date of the instrument or at the death of the testator or donor. 40 Cyc. 1477; *Schouler on Wills, Executors, and Administrators* (5th Ed.) § 530; *Dole v.*

Keyes, 143 Mass. 237, 9 N. E. 625; *Byrnes v. Stilwell*, 103 N. Y. 453, 90 N. E. 241, 57 Am. Rep. 760; *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146; *Brewick v. Anderson*, 267 Ill. 169, 107 N. E. 878; *Theobald on Wills* (7th Ed.) p. 681. In the last-named work it is said:

"In simple cases, where the gift is to several or the survivors, or to several and the survivors or the survivors of them, or to a class described as surviving, such as surviving children, or to several of a class with benefit of survivorship between them, the rule is now well settled that survivorship is to be referred to the time when the property or fund is divisible, and those then living will take the whole."

See, also, 2 *Jarman on Wills* (6th Ed.) pp. 2127-2130.

For these reasons we are of opinion that the distribution of the income from the trust property must be made to such grandchildren as are in being at the time fixed for each period of distribution.

The second question raised on this appeal, namely, the determination of the method for distribution of the principal of the trust property on January 1, 1950, presents a matter of construction which we must decline to consider at this time. There must be something more in a suit than a demand for a mere construction of an instrument. Many contingencies may occur before January 1, 1950, which will render unnecessary, indeed futile, anything we might say at this time. There is no actual litigation in respect of the matter now sought to be determined upon this phase of the subject.

"Jurisdiction in equity to construe wills arises only in cases where there is necessity for such construction in relation to actual litigation as to matters which are proper subjects of equity jurisdiction, such as relief on behalf of an executor, trustee, cestui que trust, or legatee." *Buskirk v. Ragland*, 65 W. Va. 749, 65 S. E. 101; *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198.

It is true that a trustee or other fiduciary is sometimes permitted to come into a court of equity for a construction of an instrument under which he is acting (*McDonald v. Jarvis*, 64 W. Va. 62, 60 S. E. 990, 131 Am. St. Rep. 889); but this is only for the purpose of guiding him in the administration thereof when the occasion confronts him. The decision which we have announced on the question of the distribution of the income from the trust property is sufficient to guide the trustee as to his duties with respect thereto until the time arrives for the distribution of the principal of the fund. It is unnecessary to decide in advance all of the many possible contingencies which may occur while the trust remains active and continuing. 3 *Pomeroy's Equity Jurisprudence* (4th Ed.) § 1157, note 2b; *Strawn v. Jacksonville Academy*, 240 Ill. 111, 88 N. E. 460; *Fuller v. McKim*,

187 Mich. 667, 154 N. W. 55; Gebhard v. Lenox Library, 74 N. H. 416, 68 Atl. 540. What we have said, taken in connection with the directions of the instrument itself, answers all the purposes deemed essential for the guidance of the trustee until the time arrives for the termination of the trust estate, at least so far as we can now perceive. If then or sooner any question of administrative right or power under the trust may arise demanding the aid of a court of equity, or involving the right of distribution at the termination of the trust period, nothing herein said will operate to bar the right to resort to the proper tribunal for further directions in the premises.

For these reasons assigned, our order will affirm the decree to the extent that it admits the grandchild born after the creation of the trust to receive a share of the income from the trust estate, and reverse the decree to the extent it attempts to adjudicate other provisions of the trust to be void because violative of the rule against perpetuities, because, and only because, such adjudication is premature as not now being within the power of the court to determine, and probably may not be necessary until the arrival of the date fixed by the donor for the final distribution of the trust property; the costs of the litigation to be taxed as part of the expenses of the administration.

(83 W. Va. 659)

KELLER v. WASHINGTON et al.
(No. 3509.)

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ⇐49½(5)—GIFT TO HUSBAND—CONVEYANCE.

Delivery by a wife of her money or other property to her husband, who uses it in his business without an agreement, oral or written, entered into by them at the time, binding him to account therefor to her, gives rise to the presumption of an intention on her part to bestow it upon him as a gift.

2. HUSBAND AND WIFE ⇐49½(5)—HUSBAND AS DEBTOR OR TRUSTEE—PROOF.

In order to create the relation of debtor and creditor, or cestui que trust and trustee, between husband and wife, as to such transaction, to the prejudice of his creditors, the proof must be ample, clear, and satisfactory; and where the facts and circumstances tend to establish an intention on her part to give him her property without limitation or restraint, the mere parol testimony of both to show a private understanding between them of a different character, or that they regarded the transaction as a loan or trust, ordinarily will not suffice, as against creditors of an insolvent husband, to rebut the presumption of a gift.

3. HUSBAND AND WIFE ⇐49½(5) — GIFT TO HUSBAND—PRESUMPTION.

But where there is other evidence sufficient of itself to show, and corroborative of the statements of the wife coupled with the admissions of the husband tending to show, an intention to create a trust to invest for her benefit the property intrusted to him, and there is no conduct inconsistent with such an intention, and no circumstance warranting the suspicion that, in acknowledging the obligation to repay his wife, the husband was trying to favor or prefer her to the prejudice of his other creditors, the presumption of a gift is deemed to be rebutted.

4. TRUSTS ⇐33—ACCEPTANCE OF MONEY FOR SPECIFIC PURPOSES.

Where a person, not acting merely as agent, has or accepts possession and control of money or other personal property, not to deal with it as his own, but to hold and apply it for certain specific purposes, or for the benefit of certain specified persons, a valid and enforceable trust is created.

5. TRUSTS ⇐1, 62, 91—"EXPRESS TRUST"—"RESULTING TRUST"—"CONSTRUCTIVE TRUST."

An express trust springs from the agreement of the parties; a constructive or resulting trust from the construction of equity, in order to satisfy the demands of justice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust; Express Trust; Resulting Trust.]

6. LIMITATION OF ACTIONS ⇐103(4)—TRUSTS—REPUDIATION.

The statute of limitations never applies to express trusts until and from the time the trustee repudiates the trust by unequivocal words or acts, and such repudiation is brought to the notice of the beneficiary in such a manner as to require him promptly to assert his rights.

7. TRUSTS ⇐365(2) — EXPRESS TRUSTS — LACHES.

Though there may be instances in which laches will run against express trusts, courts of equity apply the rule in such cases less readily than in cases of constructive or resulting trusts, and rarely ever do so unless the lapse of time is of such duration, and the circumstances of such character, as to indicate clearly a relinquishment or abandonment thereof, or unless a situation has arisen in the nature of an estoppel which will make it clearly inequitable and unjust to enforce it.

8. CREDITORS' SUIT ⇐57 — LIFE CLAIM AGAINST HUSBAND—DISTRIBUTION.

When a wife places her personal property in the hands of her husband in trust to invest for her, and he later becomes insolvent, she may, upon declining to assert any possible lien rights she may have to the detriment of other creditors, present her claim as a general creditor, and is entitled to participate proportionately with other general creditors in the distribution of any fund derived from the sale of the insolvent's real or personal property, after all specific and general liens chargeable thereto are satisfied.

9. HUSBAND AND WIFE ~~§~~144—INDEBTEDNESS OF WIFE—ACKNOWLEDGMENT.

When the husband in such a case, years after he received his wife's money or property, acknowledges by written statement the validity of her claim against him, but seeks to defer payment or restitution until all his other debts are satisfied, her acceptance of such statement, when not based upon a valuable consideration, generally does not operate as a waiver of her right to participate with general creditors of the common debtor.

10. CONTRACTS ~~§~~47—WAIVER—CONSIDERATION.

No agreement to waive an existing legal right is valid unless it rests upon a consideration deemed legally sufficient.

Williams, J., dissenting.

Appeal from Circuit Court, Hampshire County.

Suit by Louise E. Keller against R. M. Washington, Mary Cavitt Washington, his wife, and others. From a decree overruling her exceptions to the report of the commissioner appointed to ascertain for court's information the realty of R. M. Washington, the liens against his estate, and the priorities thereof, and confirming the report, Mary Cavitt Washington appeals. Reversed and remanded, with directions.

G. K. Kump, of Romney, and Walter C. Capper, of Cumberland, Md., for appellant.
J. S. Zimmerman, of Romney, for appellees.

LYNCH, J. The appellant, Mary Cavitt Washington, acquired through the estate of her deceased father, Josephus Cavitt, valuable real and personal property owned by him in the state of Texas. The land devised or allotted to her she caused to be sold at the instance of her husband, R. M. Washington, to whom she was married in 1886. The proceeds of the sale she likewise at his instance delivered to him, together with all or most of the personal property derived from her father's estate; and such of it as was not converted into money when so received he sold or assigned, and apparently devoted the proceeds to his individual personal use. In this manner her patrimony came into his possession or under his control at various times after the marriage, though the dates of the receipt of all of it are not disclosed. She did not demand any notes or memoranda evidencing the receipt thereof or the purpose of its delivery to him, or if she did make such demand, he did not comply therewith until February 28, 1914, when, by way of recognition of an indebtedness to her for the various sums, aggregating \$35,770.81, he executed a paper filed in the record to which we shall have occasion to refer at a later stage of this review.

The decree from which she has appealed

overruled her exceptions to the report of the commissioner to whom the cause was referred to ascertain for the information of the court the real estate of R. M. Washington, and the liens chargeable against his estate, and the priorities thereof, and confirmed the report. The report and decree denied the right claimed by her to participate in the distribution of the proceeds of the sale of the lands and personal property of her husband, who, it seems, is hopelessly insolvent. His investments, though large and valuable, are grossly inadequate to meet his liabilities.

The refusal of such right is sought to be sustained by appellees, who are common and lien creditors of the insolvent, upon the grounds: (1) That the delivery of the money or property to the husband did not create the relation of debtor and creditor, but presumably was a gift to him by her; (2) that, if it was a debt, it is barred by the statute of limitations, or, if not by the statute, by her laches. She seeks to reverse the decree, and supplant it by another allowing the claim, on the ground that the money was delivered and received in trust for investment for her at interest, pursuant to an oral agreement entered into between them on the several dates of the delivery. She does not, however, attempt to trace it to any specific property in which it was invested by him, or ask to have it declared to be a lien or charge against any particular part of her husband's lands or personal property, but she does ask to be permitted to join ratably with other creditors of her husband in the distribution of the surplus proceeds remaining after the payment, in whole or in part, of the specific liens on certain parcels of his real estate, not as a trust fund in his hands, but by way of enrichment of his estate to that extent, and merely as a debt entitled to such participation notwithstanding its character as a trust fund. In other words, as she cannot point out with certainty any property, real or personal, not subject to liens created by him with her consent evidenced by her joining with him in creating them, if such there be, she expresses a willingness to accept a share of such surplus ratably with other creditors of her husband.

[1] Delivery by a wife of her money or property to her husband, who uses it in his business without an agreement, oral or written, entered into by them at the time, binding him to account therefor to her, gives rise to the presumption of an intention on her part to bestow it upon him as a gift, and, in order to create the relation between them of debtor and creditor as to such a transaction to the prejudice of his creditors, the proof must be ample, clear and satisfactory. *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175; *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; *Crumrine v. Crumrine*, 50

W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859; *Horner v. Huffman*, 52 W. Va. 40, 43 S. E. 132; *Morris v. Westerman*, 79 W. Va. 502, 508, 92 S. E. 587. Likewise where the facts and circumstances tend to establish an intention on her part to give him her property without limitation or restraint, with the right to appropriate it to any purpose he may desire without regard to any obligation to restore the possession or account therefor to her, and he uses and deals with it as if he were the real and sole owner, the mere parol testimony of both to show a private understanding between them of a different character, or that they considered the transaction as a loan or trust, ordinarily will not suffice, as against creditors of an insolvent husband, to rebut the presumption that a gift was intended. *Zinn v. Law*, supra; *Horner v. Huffman*, supra; *Cheuvront v. Horner*, 62 W. Va. 476; *Morris v. Westerman*, supra.

[2, 3] The basis for the presumption of a gift as between husband and wife, and the difficulty of overcoming it by proof when the rights of creditors are involved are well stated in *Morris v. Westerman*, supra, 79 W. Va. page 508, 92 S. E. 570:

"If she had had the property in her possession or the title in her name and within her control, and delivered or conveyed it to him, or permitted him to take possession of it, without any understanding or agreement for return thereof, there would have been a presumption of a gift. * * * But if, under such circumstances, he had contemporaneously given her his note or other obligation, * * * or even verbally promised to pay or return it, no such presumption would have arisen. The transaction would have created the relation of debtor and creditor. In most instances, however, if not all of them, the verbal agreement is rejected for want of sufficient proof or inconsistency with conduct."

Here there is neither such inconsistency of conduct nor want of sufficient proof to rebut the presumption of gift. True there was no written agreement to invest for the wife's benefit; no notes or other documentary evidence of the real character of the transaction given. All the negotiations were oral. The money or property passed directly to Mrs. Washington or to her husband through the hands of her brother, J. B. Cavitt, who acted on behalf of his and Mrs. Washington's mother, the executrix of their father's estate, and as such agent he made all the settlements with the heirs of their father and distributees of the estate, as he also did subsequently with respect to their mother's estate. Mrs. Washington's share of the property inherited from both sources he paid to her personally, or to her husband at her direction, but not without protest in her behalf, manifested by correspondence conducted by him with her and her husband regarding the application of the money, the result of which was as he says that "finally he [the husband] stated to me that he had all of

Mrs. Washington's money invested for her in such a way that she would get it back with good earnings."

He also says:

"From many statements made to me by R. M. Washington at the times he received these different sums of money and on many other occasions he induced me to believe that he was getting all this money from my sister to be invested for her, and that he was in duty and honor bound to handle it for her in such a way that it would make her good interest."

The reasonable deduction from this testimony given by a witness having peculiar knowledge of these frequent transactions, and being an active agent participating in them during a period of several years, is that he meant what his language clearly imports, namely, that R. M. Washington received the property upon the agreement to reinvest it for his wife, and not that she had loaned it to him. It is not susceptible of any other reasonable interpretation. The trend of what the witness says, the force of the language he uses, and the implications embodied in it, warrant but one conclusion when finally construed as a whole. So that without accrediting any probative force or value to the oral testimony of Mrs. Washington relative to the purpose for which she delivered the money or its equivalent to her husband, or his recognition in the paper signed by him of the liability and amount thereof, there remains in the record enough to permit us to discern the true character of the negotiations between them in respect to her property. The only effect of the combined testimony is to render more obvious that which is sufficiently apparent for the purpose of reaching a just conclusion as to the merits of her claim.

[9, 10] Certainly in view of the separation before, and the apparent hostility existing between them at the time the paper was executed, and in view of the harsh terms of the paper itself, we perceive no circumstance to excite or warrant the suspicion that, in acknowledging the obligation to repay his wife, Washington was trying to favor or prefer her to the prejudice of his other creditors. Indeed, the terms so prescribed deferred payment to her until after his other debts were satisfied. Clearly this he could not lawfully do without her consent or promise to forebear to urge immediate payment or to sue to enforce payment, and if she had so promised, of which there is not a word of proof, it would not avail because there was no consideration on which the promise could stand. No agreement to waive a legal right is valid unless it rests upon a consideration deemed legally sufficient. *Charleston Lumber Co. v. Friedman*, 64 W. Va. 151, 61 S. E. 815; *Bays v. Johnson*, 80 W. Va. 559, 562, 92 S. E. 792. This postponement, he attempted to justify or excuse upon the assumption that an unqualified agreement to pay her would tend to the further embarrassment and com-

plexity of his business relation to other creditors with whom he had contracted the indebtedness, to which he desired to subordinate payment to her, instead of according to her the benefit of a co-ordination justly due her. The mere acceptance of the paper, we think, did not operate as a waiver of the right to press her claim, the justness of which he so acknowledged. Evidently she did not acquiesce in the voluntary restrictions so placed upon her rights, and his stipulation to that effect was inoperative, for he was already in duty bound to return to her the money which he held. Beyond the mere acceptance of the paper, no witness testifies that she agreed to postpone the assertion of her claim. She cannot be prejudiced by the failure to call R. M. Washington to testify in her behalf. She was not bound to do so, though he was within reach of the court's process.

[4-6] The presumption of a gift being overcome or rebutted, we are of opinion that the husband, in accepting the money, assumed to act as trustee for his wife with regard to its investment. The difference between an express and a constructive or resulting trust is clearly set forth in *Currence v. Ward*, 43 W. Va. 387, 27 S. E. 329, and *Newman v. Newman*, 60 W. Va. 371, 378, 55 S. E. 377, 7 L. R. A. (N. S.) 370. The former springs from the agreement of the parties, the latter from the construction of equity in order to satisfy the demands of justice. Clearly the understanding and agreement of the parties here was that the husband should undertake for the wife the investment of her property, and return to her the principal thereof unimpaired, but augmented by the interest it should earn under his management. The elements of a loan are wanting. The agreement was not to pay her interest for the use of her money, but the interest earned by it. Where a person, not acting merely as agent, has or accepts possession and control of money, promissory notes, or other personal property, with the express or implied understanding that he is not to hold it as his own absolute property, but is to hold and apply it for certain specific purposes, or for the benefit of certain specified persons, a valid and enforceable trust exists. 39 Cyc. 70, 71; *Stanley v. Pence*, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; *Graham's Adm'r. v. English*, 160 Ky. 375, 169 S. W. 836; *First Natl. Bank v. Hinkle* (Okla.) 162 Pac. 1062. It is true that the relation of principal and agent is very similar to that involved in a trust between the cestui and trustee, and it is frequently difficult to mark the dividing line between them. Yet in this case there was more than an agency involved. An agent usually acts in a representative capacity in the name of the principal, and binds the latter by acts done within the scope of the agency. A trustee does not act in such a representative capacity, but not infrequently deals with others, as one having full control and right of disposition of the

property intrusted to him, though vested in him for the benefit of another. The nature of the husband's control over the property in this case, and the judgment and discretion required, were such as to constitute an active and continuing administrative trust. *First Natl. Bank v. Hinkle*, supra.

[7] As a further argument to support the decree, appellees assert that the claim of Mrs. Washington is barred either by the statute of limitations or by laches. It is well settled, however, that the former never applies to express trusts until and from the time the trustee repudiates the trust by unequivocal words or acts, and such repudiation is brought to the notice of the beneficiary in such a manner as to require him promptly to assert his rights. *Ruckman v. Cox*, 63 W. Va. 74, 59 S. E. 760. And, though there may be instances in which laches will run against express trusts, courts of equity apply the rule in such cases less readily than in cases of constructive or resulting trusts, and rarely ever do so unless the lapse of time has been so long, and the circumstances of such character, as to establish clearly a relinquishment or abandonment thereof, or unless a situation has arisen in the nature of an estoppel which will make it clearly inequitable and unjust to enforce it. *Newman v. Newman*, 60 W. Va. 371, 55 S. E. 377, 7 L. R. A. (N. S.) 370; *Roush v. Griffith*, 65 W. Va. 752, 762, 65 S. E. 168; *Ash v. Wells*, 76 W. Va. 711, 86 S. E. 750.

Wherein the doctrine of laches applies to exclude the participation demanded by appellant counsel do not point out, except by its mere invocation to their relief from the burden of her claim, or as revealed by the circumstances appearing in the cause. There is nothing to show relinquishment or abandonment of the claim against her husband. The delicate relation subsisting between the parties may have constituted the reason for her long acquiescence in his use of the property unaccompanied by the slightest intention to relinquish or abandon her claim to the property. *Morris v. Westerman*, supra. Her silence is not a decisive or a clear index to her intention. In going to the inception of this transaction, we find an agreement by the husband to take and invest his wife's property in her behalf, a trust agreement not deprived of its character as such because of the long acquiescence of the wife. With respect to the trust deeds in which she joined her husband, it may well be that she would have been estopped to assert her claim as against those whose claims are secured by such instruments. But no question arises concerning them, for they seem to have been foreclosed, and the liens satisfied to the extent of the sums realized from the property sold. And as against unsecured creditors, she is not attempting to secure preferential treatment to their detriment, as we understand, but expresses willingness to stand equally

with them as a general creditor. It cannot be said, therefore, that her claim is barred merely because of delay in the assertion of her right.

[8] Looking into the situation without prejudice against her or any creditor of her husband, or predilection for either or any of them, so far as their legal or equitable rights and interests are involved, and with no object other than to discover the real merits of the controversy, we observe no substantial reason founded upon the circumstances revealed for denying the claim of the wife to have set apart to her what she asks. The theory of a gift being unsupported except by the legal presumption, sufficiently rebutted, as we have seen, these facts stand out prominently as unquestioned by any pretense of a contrary purport. The vast real estate of her husband, most of which he perhaps acquired by disloyalty to the trust reposed in him, she has willingly permitted to be exhausted and applied to the liquidation of his lien liabilities, whereby her heritage has in large measure already gone to reimburse his creditors. Had she required the execution of formal obligations binding him to repay her the money so advanced on trust and expended, she knows not how or where, could the creditors equitably or legally deny or question her right to participate as distributee of his estate, though they may not have known of the documents? This question this court answered in *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357, and in point 3 of the syllabus said:

"Where is it clearly shown that a married woman holds a bona fide debt against her husband, she is entitled to the same legal rights as any other creditor, except as to remedy."

Likewise in *Bolyard v. Bolyard*, 79 W. Va. 554, 91 S. E. 529, L. R. A. 1917D, 440, the discussion preliminary to a decision of the case notes the difference between the right of husband and wife to enter into contracts as between themselves and the enforceability of such contracts in actions at law and suits in equity. And with peculiar aptness and perspicuity the opinion says:

"In the broad sense of the law, including the equity jurisprudence as well as the legal, they are valid. The partial condemnation does not rest upon anything vicious in the sense of immorality. It goes no farther than exclusion from legal cognizance, and this exclusion is effected merely to place them within the exclusive cognizance of that class of courts whose procedure and remedies are sufficiently flexible and varied to enable them to do justice under all circumstances."

Bolyard v. Bolyard and *Righter v. Riley* are in accord as to the views expressed in both respecting the enforcement of the contracts of husband and wife made with each other during coverture, if just and reasonable, and the forum to which recourse must

be had for that purpose. Hence, since such contracts are enforceable only in equity, they are not totally invalid, but only partially so, and their validity, or rather their enforceability, depends to some extent upon the forum in which suit on them is brought, as sometimes is the case with other contracts. This being a suit in a court of equity, there can be no question of the right of Mrs. Washington to enforce the claim asserted by her, at least so far as the forum is concerned, and for the further reason that equity is the proper tribunal in which to enforce trusts.

Though her claim originated as a trust, she is not attempting to assert lien rights paramount to those of other lien creditors, and we do not say that she could have done so to their prejudice. As to any balance remaining unpaid after the foreclosure of all specific liens, her claim stands upon an equality with respect to those of other general creditors, thus making it a contest between general creditors. Other creditors of the insolvent cannot be heard to say that she is estopped to assert her claim because they were ignorant of its existence, when we have already seen that it is not barred by the statute of limitations or by laches. They are not injured by the fact of their ignorance of her rights any more than one of them is injured because of his ignorance of the claim of any other creditor unrelated to the insolvent by blood or marriage. Such defense would be eminently proper in the circumstances presented if the wife was trying to assert a preferred claim.

For these several reasons assigned we are of opinion to reverse the decree and remand the cause, with direction to allow the claim contested to participate proportionally with other general claims in the distribution of any fund derived from the sale of the R. M. Washington property not applied to the discharge of specific liens on each tract subject thereto, and to judgment or other lien incumbrances thereon, and to grant to Mrs. Washington the right to participate pro rata with other creditors as to such excess.

WILLIAMS, J. (dissenting). I do not think the evidence offered by Mrs. Washington to establish the alleged trust between herself and husband is sufficiently certain and definite to overcome the legal presumption that the funds belonging to her, which she permitted him to receive and handle as if they were his own, were mutually understood as a gift. She does not attempt to state any agreement between them, and no note or memorandum was made at the time he received any part of her funds, although he received many thousands of dollars at different times, extending over a period of 30 years. She kept no memoranda of the amounts, and, apparently, had to depend on her brother for the information as to the sums her husband had received. Her brother, the only other

witness to any such trust agreement, simply says:

"From many statements made to me by R. M. Washington at the times he received these different sums of money, and on many other occasions he induced me to believe that he was getting all this money from my sister to be invested for her, and that he was in duty and honor bound to handle it for her in such a way that it would make her good interest."

What did his brother-in-law say that induced his belief? Witness does not say. Perhaps his belief was ill-founded. This testimony, I think, falls far short of the rule as to clear and certain evidence required to overcome the presumption of a gift by the wife to the husband, after the lapse of years and the intervention of rights of his creditors. *R. D. Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726; *Miller v. Cox*, 38 W. Va. 747, 18 S. E. 960; *Bennett v. Bennett*, 37 W. Va. 596, 16 S. E. 638, 38 Am. St. Rep. 47; and *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175.

(83 W. Va. 640)

BELL v. KANAWHA TRACTION & ELECTRIC CO. (No. 3738).*

(Supreme Court of Appeals of West Virginia. March 25, 1919.)

(Syllabus by the Court.)

1. CONTRACTS ⚡303(2)—**EXCUSE FOR NON-PERFORMANCE—STATUTE.**

Where a contract is lawful at the time it is entered into, but before it has been fully executed its further performance is rendered impossible by a valid legislative act, or by some other supervening cause over which the parties have no control, they will be excused from its further performance.

2. CONTRACTS ⚡319(2) — **EXCUSE FOR NON-PERFORMANCE—DAMAGES.**

In such case neither party may recover the consequential damages which result to him by reason of the failure of performance upon the part of the other.

3. CONTRACTS ⚡319(2)—**EXCUSED PERFORMANCE—RECOVERY OF CONSIDERATION.**

But in such case, where one party has paid the full consideration for the contract, in accordance with its terms, and the other party has not performed, or has only partially performed, the party so performing will be entitled to recover back the consideration paid by him, or its value, in toto or pro tanto, as the failure to perform by the other party is total or only partial.

(Additional Syllabus by Editorial Staff.)

4. RAILROADS ⚡64(2) — **RIGHT OF WAY—CANCELLATION OF DEED—EFFECT.**

Where performance of a railroad's contract, in consideration of a right of way, to transport owner and his family without charge, has been

made illegal by Hepburn Act June 29, 1906 (U. S. Comp. St. §§ 8563-8604aa), and Laws W. Va. 1913, c. 9, §§ 6, 7 (Code 1913, c. 150, §§ 6, 7 [secs. 641, 642]), cannot be rescinded, as the right of way has been dedicated to the public use, and cannot be withdrawn therefrom in the interest of a private individual.

5. RAILROADS ⚡64(1) — **RIGHT OF WAY—PAYMENT OF CONSIDERATION.**

A railroad, contracting in 1901, in consideration of a right of way, to furnish to the owner free transportation thereover for himself and family, was excused from further performance outside the state by Hepburn Act June 29, 1906, and within the state by Laws W. Va. 1913, c. 9, §§ 6, 7, both making performance illegal and impossible.

Error to Circuit Court, Wood County.

Suit by William Bell against the Kanawha Traction & Electric Company. Demurrer to plaintiff's declaration sustained, and he brings error. Reversed, demurrer overruled, and case remanded.

C. M. Hanna, R. E. Bills, and Reese Blizard, all of Parkersburg, for plaintiff in error.

Van Winkle & Ambler, of Parkersburg, for defendant in error.

RITZ, J. This writ of error is prosecuted to review a judgment of the circuit court of Wood county sustaining a demurrer to the plaintiff's declaration.

In the year 1901 the defendant secured from the plaintiff a right of way for its car track through a certain tract of land owned by him in the county of Wood; the sole consideration therefor being that the defendant, when its road was constructed, would furnish to the plaintiff free transportation thereover for himself and his family. In accordance with the agreement, such free transportation was furnished until the year 1906, when the Congress of the United States, by the passage of the Hepburn Act (Act Cong. June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. §§ 8563-8604aa]), made it impossible for the defendant to comply with its contract. The agreement was, however, modified at that time so as to provide for the furnishing of such transportation only within the state of West Virginia, and as modified was performed by the defendant until the year 1913, when the Legislature of West Virginia, by an act (Laws 1913, c. 9, §§ 6, 7 [Code 1913, c. 150, §§ 6, 7, (secs. 641, 642)], made it unlawful for the defendant to further perform the contract even to that extent. This suit was thereafter brought to recover the value of the consideration given by the plaintiff for such free transportation to the extent that the same had not already been furnished.

The substantial question involved is whether the declaration presents a cause of ac-

tion. It is not contended that the contract in its inception was not entirely legal and proper, such a contract as the parties had a right to make, and enforceable as the law then stood.

[1, 2, 4] It is very well settled that, where the further performance of a contract, legal at the time it was made, is rendered unlawful by a subsequent act of Congress or of the Legislature of the state, the parties will be excused from further performance. Elliott on Contracts, §§ 685, 1901; 13 Cor. Jur. 646; 6 R. C. L. 366; Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; American Mercantile Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022; Dorr v. Railway Co., 78 W. Va. 150, 88 S. E. 666, L. R. A. 1916E, 622; Baily v. De Crespigny, L. R. 4 Q. B. 180; Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350. Nor can it be doubted that the inhibitions of the Hepburn Act are such as to prevent the legal performance by the railway company of this contract. A common carrier by that act is prohibited from receiving such compensation for transportation furnished by it. Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Dorr v. Railway Co., 78 W. Va. 150, 88 S. E. 666, L. R. A. 1916E, 622. For this reason specific performance of the contract cannot be compelled, and, as was held in the case of Dorr v. Railway Co., supra, rescission cannot be had, for the very obvious reasons that the railway company has partially performed the same, and, further, the right of way thus secured has been dedicated to the public use, and cannot be withdrawn therefrom in the interest of a private individual.

[3, 5] It is also very well settled that no action will lie to recover any consequential damages which may result from the failure to perform a contract the performance of which is forbidden by law, or prevented by some uncontrollable supervening cause. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, and many authorities there cited. But these conclusions do not answer the question involved here. The plaintiff does not seek specific performance, but, on the contrary, admits that he cannot have it. He does not seek the cancellation or rescission of the contract, nor does he seek to recover any consequential damages for its nonperformance. The whole theory upon which the case proceeds is the recovery of that part of the consideration received by the defendant for which it has not made compensation. It is quite true that the defendant is excused from the further performance of the contract, and that no action can be maintained thereon for its breach, for its rescission, or for its specific execution, but does

this mean that one of the parties who has received full performance from the other can retain that full performance? Many authorities are cited in argument, but few of them answer the specific inquiry. Most of them simply hold that specific execution will not be decreed, or that no action can be maintained for consequential damages for the breach of the contract, or that the party who has not performed is excused therefrom.

The exact question presented here seems not to have been passed upon by the courts of last resort of many of the American states. It was before the Supreme Court of the state of Kentucky in the case of Louisville & Nashville Railroad Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848. Crowe had granted to the railroad company a strip of land for a right of way in consideration that the railroad company would issue to him free transportation over its lines during his life. The railroad company refused to issue the transportation for the reason that it was forbidden to do so by the provisions of the Hepburn Act. It was then sued to recover compensation for the consideration given it, just as was done in this case, and it was contended by the railroad company that not only was it excused from the further performance of its contract, but that it had a right to keep the consideration without making any compensation therefor. This contention, however, was denied by the court, and the railroad company held liable for the value of the consideration received by it to the extent that it had not already made compensation therefor. In the case of Cowley v. Northern Pacific Railroad Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, exactly the same question was involved, and the Supreme Court of the state of Washington reached a contrary conclusion, holding that the railroad company was entitled to keep the land conveyed to it for a right of way without paying for it; that it was not only excused from performing its contract, but might keep the full consideration received by it without making compensation.

Questions involving the rights of parties to contracts, where performance has been rendered impossible, either by an act of law or some other uncontrollable supervening cause, have been considered by many of the American courts, and while the authorities may not be entirely uniform, we think the doctrine to be deduced therefrom is that, where a contract, lawful when made, is rendered impossible of performance from some cause beyond the control of the parties, neither party can be required to further perform, but where one party has paid the full consideration, and in many of the cases where he has furnished only part of the consideration agreed upon, the other party will be compelled to return so much thereof as he has not rendered compensation for.

In 3 Elliott on Contracts, § 1902, it is held that:

"Although by the terms of a contract for work and labor the full price is not to be paid until the work is completed, if a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full price agreed on."

Now, if the doctrine of the Washington court in the case above referred to is correct, there could be no such recovery as is indicated by this authority. The doctrine of that case is that, whenever by an act of the law the performance of the contract is rendered impossible, each party keeps whatever he was fortunate enough to get. The doctrine of the text above quoted is approved in 6 R. C. L. p. 981, § 350, under the title "Contracts," and seems to be well supported by the authorities there cited. In 13 Corp. Jur. at page 644, it is said:

"One who has contracted to do a particular thing and has received payment therefor cannot retain the payment made to him in advance for his work, when by reason of an unavoidable accident he is excused from the performance of his contract."

What difference is there in principle whether the excuse for nonperformance is an unavoidable accident or an act of Congress making further performance unlawful? So in the case of Jones-Gray Construction Co. v. Stephens, 167 Ky. 765, 181 S. W. 659, it is held that a party who has received in advance payment for work to be performed by him upon the barn of another, which is destroyed before performance of the contract by an accident for which neither is responsible, is liable to the party having made the payment for the repayment of the unearned consideration. In Jones & Jones v. Judd, 4 N. Y. 411, it was held that, where by the terms of a contract for work and labor the full price is not to be paid until the work is completed, and complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full price agreed on. It is a little difficult for us to understand why a party who has furnished only part of the consideration would be allowed to recover to the extent that he has furnished it when further performance is prevented by the law, but would not be allowed to recover when he has furnished the whole consideration for the contract to the extent that he has not received compensation. In the case of Helne v. Meyer, 61 N. Y. 171, it was held that, where the prosecution of work in the alteration of a building is forbidden by an officer having authority to do so, and a contractor is thus prevented from performing his contract, he is discharged therefrom, but is entitled to recover for the work done. A very instructive case dealing

with this question is that of Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654. In that case both the English and American authorities are cited and reviewed by the court, and the conclusion is reached that, where the full performance of a contract is rendered impossible by an act of God, neither party can recover damages for nonperformance of the contract, but either might recover from the other; in that case the landowner for what he had paid in excess of the value of the work done, or the builder for what he had done in excess of the amount he had been paid. Another case which is quite instructive is that of Thomas v. Hartshorne, 45 N. J. Eq. 215, 16 Atl. 916, 3 L. R. A. 381. In that case Thomas entered into an agreement with the Secretary of the Treasury by which he was given permission to make explorations in New York Harbor with a view to recovering certain sunken treasure. Hartshorne, under an agreement with Thomas, furnished certain money to be used for the purpose of prosecuting the work of recovering the treasure. Before the purpose was accomplished, and before all of the money so furnished was spent in the work, the license under which Thomas was acting was revoked by the Secretary of the Treasury; and it was held that Hartshorne was entitled to recover back from Thomas so much of the money as had not been spent in the prosecution of the work; that Thomas was relieved from further prosecuting his contract; that he would not be liable in damages for failure in that regard, but that he could not keep the money furnished to him which he had not used. Other authorities might be cited to support this view, but we think these are quite sufficient to establish the proposition that, where a contract is entered into, perfectly lawful at the time, and performance thereof is subsequently prevented, either by a change in the law or by any other uncontrollable supervening cause, the parties will be excused from performance, but if one of the parties has received full consideration from the other who has not fully executed the contract on his part, he will not be allowed to keep the same. This would be unconscionable and inequitable. To allow the defendant in this case to retain the plaintiff's property would be admittedly unjust and inequitable. It would be receiving what the declaration alleges is a very valuable strip of land without paying therefor what it agreed to pay. We are of the opinion that the declaration states a cause of action, and that the plaintiff in this case is entitled to recover the value of the consideration delivered by him to the defendant to the extent that he has not received compensation by the performance of this contract on the part of the defendant.

Some criticism is made of the declaration because the pleader styles the action one of trespass on the case, when, if he has any right to recover, it must be an implied assumption. The declaration fully sets out all of the facts as we have stated them, and it is made very clear therefrom the theory upon which the plaintiff seeks to recover. Language is used which ordinarily is used in a declaration filed in an action of trespass on the case, but this matter may be treated as surplusage; it is nonessential. The defendant is fully informed of the cause of action against him, and because the pleader improperly styles it an action of trespass on the case we will not hold it bad. Though inartistically drawn, it is sufficient in form to fully advise the defendant of the ground upon which recovery is sought. *Kennaird v. Jones*, 9 Grat. (Va.) 183; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225; *Grass v. Development Co.*, 75 W. Va. 719, 84 S. E. 750, L. R. A. 1915E, 1057.

Our order will reverse the judgment of the circuit court of Wood county, overrule the demurrer to the declaration, and remand the cause.

(83 W. Va. 873)

In re ADKINS et al.

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT ⇐ 1, 2—ADMISSION TO PRACTICE—JOINT LEGISLATIVE RESOLUTION.

The Legislature cannot, by the passage of a joint resolution requiring the court to grant licenses to certain named individuals to practice law, avoid the requirements of a general statute, and rules of the court made and promulgated pursuant thereto, regulating the granting of such licenses and prescribing the length of study and degree of preparation required of the applicant in order to entitle him thereto.

(Additional Syllabus by Editorial Staff.)

2. ATTORNEY AND CLIENT ⇐ 7 — ADMISSION TO PRACTICE—POLICE POWER — JUDICIAL ACT.

The right to practice law is not one of a citizen's inherent rights, but is a privilege which may be granted within prescribed regulations under the exercise of the state's police power, and the granting of a license is a judicial and not a mere ministerial act.

Application by Boyd Adkins and others for licenses to practice law. Licenses refused.

J. H. Meek, of Huntington, and J. M. Rigg, of Wayne, for applicants.

R. S. Spilman, of Charleston, for protestants.

WILLIAMS, J. Boyd Adkins of Wayne county, W. R. Meservie of Ritchie county, and W. M. Hefner of Braxton county, have applied for license to practice law. They present no certificates from the state board of law examiners to show that they have passed the required examination entitling them to a license, according to section 1, c. 119, of the Code, and an order of this court made pursuant thereto on the 6th of May, 1915, prescribing a certain standard of preliminary education to be attained by all candidates, and also prescribing the length of time they should devote to the study of law, either in a law office under the direction of some member of the bar, or as a student in some approved law school. Instead of such certificates, they have presented joint resolutions of the House and Senate of the Legislature, reciting facts which show they possess all the requisite qualifications now required of candidates for license, except those relating to their educational preparation and length of time they have studied law. Respecting such preparation, the resolutions say, it is impracticable, because of their age, for them now to prepare to take the state bar examination, but that they possess the qualifications of good lawyers, in consideration whereof the Supreme Court of Appeals of West Virginia is "requested" to issue license to M. W. Hefner and "required" to issue licenses to said Boyd Adkins and W. R. Meservie.

[1] It is not contended that these joint resolutions have the force or effect of a statute, or that they amount to more than an ascertainment by the Legislature of the qualifications of the applicants to practice law, and their recommendation to the court for licenses. Even if the resolutions had the form required by section 1, art. 6, of the Constitution, for an act of the Legislature, it would nevertheless be unconstitutional for three reasons: (1) It was not read on three separate days in each House as required by section 29, art. 6, of the Constitution; (2) it was not presented to the Governor for his approval or disapproval as required by section 14, art. 7, of the Constitution; and (3) it contravenes section 39, art. 6, of the Constitution. After forbidding the passage of special laws covering a large number of enumerated subjects, the section last cited concludes with this general provision:

"And in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for."

There is now and for several years has been, a general statute intended to cover every case of application for license to practice law in this state. It is not necessary in this opinion to enter upon a discussion of the question

to what extent the Legislature may, in the exercise of its police power, regulate the granting of licenses to practice law. It is enough to say that, whatever may be the extent of its power in this respect, it must exercise it by general, and not by special, laws. Section 1, c. 119, of the Code (sec. 4699), amended and re-enacted by chapter 50, Acts 1897, authorizing this court to prescribe the degree of preparation and the period of study required of applicants and to provide for their examinations, either by the court or otherwise, is such a general regulatory statute; and pursuant thereto this court, by an order entered of record on the 6th of May, 1915, prescribed certain general rules which have been widely published throughout the state and are pretty generally understood. So far as we know, this is the first attempt on the part of an applicant for license to evade or avoid those requirements. They are now the general law on the subject and must be observed, so long as they are continued as such.

[2] The right to practice the law is not one of the citizen's inherent rights, but is a privilege which may be granted him within prescribed regulations, under the exercise of the state's police power (6 O. J. 571); and the granting of the license is a judicial, and not a mere ministerial, act (In re Application to Practice Law, 67 W. Va. 213, and cases cited at page 218, 67 S. E. 597).

For a number of years, the State Bar Association has been diligently striving to elevate the educational standard of the legal profession; in fact, this movement has been general over the country, both in the American Bar Association and in the various state bar associations. The most approved law schools also have been gradually increasing the degree of preparation required of students before their graduation. Nearly all of the first-class colleges of law now require at least three years' study in law before a student is entitled to receive his diploma, and, in addition thereto, some of them require the student to be an academic graduate of some reputable college. To comply with the request of the Legislature in the present instances would seem to be a step backward, which the court is not inclined to take. It is no hardship upon the applicants to require them to comply with the present regulations. If a man has sufficient ability to make a good lawyer, with a limited amount of literary preparation, as the Legislature has said respecting these gentlemen, he can surely make a much better lawyer if he contents himself for a while, in order to pursue the required preliminary studies, until he is able to comply with the present reasonable requirements for admission to the practice. He will be a little longer in obtaining his license, but he will be all the better qualified when he begins, and consequently will make more

rapid and successful progress, and in the end will have no regrets.

We are constrained to refuse the licenses.

POFFENBARGER, J. (concurring in the conclusion). I agree that the joint resolutions relied upon by the applicants do not have the force of legislative acts, and therefore that they constitute no legal basis for these applications.

As mere memorials to the court in behalf of the applicants, they do not justify any departure on the part of the court, from the requirements of the statute regulating the licensing of attorneys. Like all other statutory regulations of professions, this one binds the officers and tribunals charged with its administration, to apply it without discrimination, to the end that all may know what their rights are and may stand equal before the law. To grant licenses upon mere petitions in the form of legislative resolutions would be tantamount to the setting aside of a law providing a different method designed to systematize the granting of such licenses, procure a reasonable degree of proficiency in persons practicing law in the courts, and prevent discrimination in the granting thereof by the court or anybody else.

If these applicants are able lawyers, and, by reason of their ages, find it impracticable to comply with the requirements as to preliminary education, they must have been able to pass bar examinations on purely legal questions, before these very recent regulations were put into effect. When they were prescribed, they contained a saving clause in favor of applicants deficient in point of standard literary and legal preparation. A reasonable period of time was allowed them for examination before the regulations became effective, and published notice thereof given. Their neglect to avail themselves of it constitutes a very large obstacle to their appeal for a special rule or exception in their favor, if the court had discretionary power to grant it.

Nothing in these applications or the resolutions upon which they are predicated calls for any declaration, on the part of the court, as to any real or supposed limitations upon the powers of the Legislature over the subjects of licenses of attorneys and admissions to practice the legal profession. The Legislature has passed no law purporting to innovate upon the judicial claim of exclusive authority over these subjects. I decline either to sound a warning to a co-ordinate branch of the government against an act it has not performed nor threatened to perform, or to enter upon a discussion of a question not submitted to us upon any pleadings or other procedure raising it. Therefore I do not concur in what has been said on this subject, in the opinion prepared by Judge

WILLIAMS and adopted by a majority of the court; but I concur in the refusal of the licenses applied for.

(83 W. Va. 647)

WETTERWALD et al. v. WOODALL
(No. 3640.)

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. CONTRACTS ⇐147(1)—CONSTRUCTION.

In the construction of contracts the purpose is to arrive at the real intention of the parties.

2. CONTRACTS ⇐152—MEANING OF WORDS—CONSTRUCTION.

In determining the meaning of words not of certain and definite import used in a contract, consideration will be given to the situation of the parties, the subject-matter of the contract, the acts of the parties thereunder, and the purpose sought to be accomplished thereby.

3. PATENTS ⇐216 — SALE OF LICENSE — BREACH—DAMAGES.

Where a building contractor agrees to purchase a license for the use of a patented process for the construction of a floor, such license to be paid for upon the construction of a satisfactory sample floor, and such sample floor is constructed and is satisfactory, except that the proposed purchaser of the license finds that the cost is greatly in excess of the representations made to him in that regard, and refuses to further execute the contract because of such dissatisfaction, there can be no recovery against him because of such refusal, where it appears that he could not inform himself in advance of the cost of construction of such a floor, because of the secret process used therein.

Error to Circuit Court, Kanawha County.

Suit by Walter A. Wetterwald and others against R. J. Woodall. Verdict for plaintiffs, and from judgment setting aside the verdict, they bring error. Affirmed.

Morton & Mohler, of Charleston, for plaintiffs in error.

C. W. Good, of Charleston, for defendant in error.

RITZ, J. Plaintiffs are the owners of a patent process for constructing floors, and the defendant is a building contractor doing business at Charleston, W. Va. On the 9th of July, 1914, they entered into a contract in writing by which the plaintiffs agreed to sell to the defendant, and the defendant agreed to buy from the plaintiffs, a license to manufacture this floor within the county of Kanawha, for which the defendant was to pay the sum of \$300, \$100 to be deposited in the bank to be paid over and delivered,

together with defendant's two notes for \$100 each, due at three and six months, upon the completion of a satisfactory sample floor, according to the patented process. The contract further provided that the defendant should order the material for the construction of this sample floor and pay the plaintiffs' workman for doing the work. It also provided that upon the payment of the \$100 in cash, and the delivery of the two notes referred to, the secret process would be disclosed to the defendant, and a license to manufacture the same under plaintiffs' patent delivered to him. The defendant, of course, did not know, as is shown by the contract, what materials were necessary in order to construct the sample floor called for in the contract, and the plaintiffs for this reason ordered on his behalf the materials required for the purpose. These materials were shipped to the defendant, and the plaintiffs sent their workman to Charleston to construct the sample floor in accordance with the patent process. The floor was constructed, and after it was completed was inspected by the defendant. He found that, so far as its serviceability was concerned, it was entirely satisfactory, but it was unsatisfactory from the standpoint of cost, and for this reason he refused to deliver the \$100 to the plaintiffs, or to execute to them his two notes in accordance with the terms of the contract. Plaintiffs thereupon sued him for the sum of \$300, being the amount he was to pay for the license to manufacture this floor. The case was tried in the circuit court of Kanawha county, and a verdict returned in favor of the plaintiffs for the full sum of \$300, which, on motion, was set aside, and from the judgment of the circuit court in setting aside the verdict this writ of error is prosecuted.

[1, 2] The defendant paid all of the expense entailed in constructing the sample floor, as he had agreed to do under the contract, and the only question involved here is whether or not he can be made to respond to the plaintiffs in damages for failure to take the license and pay therefor. It was shown upon the trial of the case that, when the plaintiffs' agent procured the contract from the defendant, the question of the cost of the floor was discussed, and it was represented to the defendant that it would cost from 14 to 16 cents per square foot. While this representation is not a part of the contract, there is no doubt that it was influential in procuring the defendant to sign it. That this representation was made is proved not only by the defendant, but by another witness who was present, and there is no substantial denial thereof. It is further shown without material contradiction that the plaintiffs had a free hand in constructing the sample floor, they procuring the materi-

al for the defendant at his expense, and furnishing their own workman for the purpose, and that the cost of this sample floor, instead of being 14 to 16 cents per square foot, was more than 25 cents a square foot, and it was because of the excessive cost that the same was unsatisfactory to the defendant. There is a great deal of evidence introduced concerning the increased cost of the materials from which the floor was made subsequent to the breaking out of the European war. It does not occur to us, however, that this evidence is very material in view of the fact that the materials which were furnished, as is shown by the testimony of the people who furnished them, were sold at prewar prices, and the cost of the sample floor actually made was not rendered unsatisfactory because of increase in the price of materials brought about by the existence of the war. It is contended that the provision in the contract for the construction of a satisfactory sample floor does not include the element of the cost of such floor, but that the qualification only extends to the serviceability or character of the floor, as such. In determining what significance should be given to language when used in a contract, the situation of the parties, the nature of the subject-matter with which they are dealing, and the purpose to be accomplished are all matters to be considered by the court. *Lumber Co. v. Wilson*, 69 W. Va. 598, 72 S. E. 651; *White v. White*, 64 W. Va. 30-35, 60 S. E. 885; *Snider v. Robinett*, 78 W. Va. 88, 88 S. E. 599. It cannot be said that the word "satisfactory" has an inflexible meaning attributable to it in every connection in which it may be used. The purpose of all construction is to arrive at the real intention of the parties. Of course, where the language is plain and the words are of certain and definite import, there is no room for construction, but where, as in this case, the language used may be capable of different meanings in different connections, and when used under varying circumstances, the situation of the parties, the subject-matter with which they are dealing, as well as the purpose sought to be accomplished, are all material inquiries.

[3] In this case the defendant was a building contractor, and admittedly desired to procure the license to make this patent floor in order that he might use the same in his business. The contract shows on its face that he did not know the materials from which the floor was made, nor the process of manufacturing the same. This was to be divulged to him when he paid the money, so that it is quite clear that he could not know in advance what the cost of the floor would be. It was quite as important to him that the floor should be one which could be constructed at a price that would enable him to use it in his business of building, as it was that it should be a serviceable floor, and

we are quite well satisfied that, when this language is construed in the light of the situation of the parties at the time, they meant that the floor would satisfy the defendant from the standpoint of cost of construction, as well as in every other regard. This was the view taken of the contract by the court below, and he instructed the jury to that effect. The instructions are, however, a little indefinite, and were, no doubt, misunderstood by the jury, else they could not have rendered the verdict which they did. There is no question here of any capricious dissatisfaction of the defendant because of the cost of this floor. The evidence is clear that he was dissatisfied therewith immediately upon discovering the cost thereof. There was nothing equivocal in his conduct. Just as soon as the floor was laid and the cost determined, he at once notified the plaintiffs that it was not satisfactory in this regard. His failure to accept the license under these terms is based upon a substantial reason. It is shown without contradiction that the actual cost of the floor was more than 50 per cent. in excess of what the defendant believed it would cost from the representation made to him by the plaintiffs' agent. It must be assumed that the plaintiffs were fully advised as to the cost of constructing floors under this patent process. They, or rather their agent, knew the purpose for which the defendant desired the license, and with full knowledge on their part of all these things, of which the defendant had no knowledge, they undertook to satisfy him that this floor would meet his requirements, not only as to its serviceability and durability as a floor, but as to the cost of its construction. It is suggested that, even though the floor cost as much as the defendant claims, still the process can be used advantageously. This is not material. The plaintiffs did not put any limit of cost thereon in the contract. This was to be determined by the defendant when the floor was laid and the actual cost determined. His conclusion in that regard honestly and reasonably arrived at binds the parties.

It is argued that the defendant cannot refuse to accept the license for which he contracted because of the increased cost of materials due to the conditions existing on account of the breaking out of the European war. As before stated, this element does not enter into this case. The sample floor actually constructed was constructed of materials purchased at prewar prices, and the defendant's dissatisfaction therewith on account of the price was not based on any increase in the element of cost because of war prices.

Whether the defendant could arbitrarily and without any reason refuse to comply with his contract we need not inquire. We think in this case his evidence comes clearly

within what seems to be the rule supported by the great weight of authority on this question, and that is that, where one seeks to furnish an article or to do work to the satisfaction of another, and such article or such work is rejected because the same is not satisfactory upon reasonable grounds for such dissatisfaction, there is no basis for recovery. 3 Page on Contracts, § 1390; 3 Elliott on Contracts, § 1881.

It follows from what we have said that there is no error in the judgment of the circuit court setting aside the verdict of the jury, and the same will be affirmed.

(88 W. Va. 710)

GATES et al. v. FRIEDMAN et al.
(No. 3578.)

(Supreme Court of Appeals of West Virginia.
March 25, 1919.)

(Syllabus by the Court.)

1. PARTY WALLS ⇨7—AGREEMENT.

Party walls are as a general rule the subject of agreement, express or implied, between adjoining owners.

2. PARTY WALLS ⇨4(1) — CROSS-EASEMENTS — USE.

Where adjoining owners are grantees of a common grantor, and the deed to the first conveys to him to the center line an equal moiety in the wall of the building on the adjoining lot divided longitudinally, with the right and authority to use said wall as a part of the building to be constructed by him, and the deed to the other grantee conveys to him the said adjoining lot and the building thereon to the center line of said dividing wall, subject only to the rights of the first grantee, cross easements in the whole of said wall are thereby reserved and vested in each grantee, and said wall is thereby constituted a party wall, and each is entitled to make use thereof as a party wall.

3. PARTY WALLS ⇨8(3)—USE—REPAIRS.

Where a party wall so exists, either of the owners has the right to enter upon it for the purpose of building up, extending or repairing said wall for his building, if it can be done without injury to the adjoining building and said wall is clearly of sufficient strength to bear the additional burden, unless he is restrained by the provisions of his contract or deed.

4. PARTY WALLS ⇨10—USE—EJECTMENT.

Where such party wall exists between adjoining owners, ejectment will not lie by the one against the other to recover any part of the wall so entered upon and occupied by the other for the upbuilding and extension thereof for his building.

Error from Circuit Court, Kanawha County.

Ejectment by A. P. Gates and others against Jacob Friedman and others. De-

murrer to plaintiffs' evidence overruled by the court of common pleas, and judgment for plaintiffs, and from a judgment of the circuit court, rejecting the writ of error prayed for by Jacob Friedman, he brings error. Reversed, and judgment rendered, that the demurrer be sustained and the action dismissed.

Linn & Byrne, of Charleston, for plaintiff in error.

L. D. Vickers and W. G. Mathews, both of Charleston, for defendants in error.

MILLER, P. In ejectment, the defendants demurred to plaintiffs' evidence, and upon the conditional verdict found by the jury the court found the law to be for the plaintiffs and pronounced the judgment to which, upon the petition of the defendant Jacob Friedman, the present writ of error was awarded.

The declaration averred that plaintiffs on February 1, 1883, and continuously since then were owners in fee of a certain lot in the city of Charleston, bounded as follows:

Beginning on Capitol Street in the center of the side wall nearest to Virginia Street, of what on the date of said deed was known as the Courier Building; thence with Capitol Street towards Virginia Street, fifty-nine feet and one inch to the center of the side wall nearest to Kanawha Street, of what on the same date was known as the Rust Building; thence with the center of said wall to the side line of the lot formerly owned by Dulce Rowena Laidley; thence with a line of said Laidley's lot to a point opposite the beginning corner; thence a straight line passing through the center of the side wall of the said Courier Building to the place of beginning.

And it is further averred that being the owner and in possession of said lot and of every part thereof as aforesaid from the date of their said deed, defendants on August 13, 1904, unlawfully entered and took possession of a portion thereof described as follows:

Being a strip of land and building wall nine inches wide adjoining the lot then owned by the defendant Jacob Friedman, and extending from Capitol Street aforesaid back along said Friedman's lot a distance of sixty-two feet, the entire length of plaintiffs' said lot.

So that what plaintiffs seek to recover is not the whole of their said lot but only the portion thereof upon which it is alleged defendants had so unlawfully entered and were then unlawfully withholding from them.

The evidence of plaintiffs showed that they and Jacob Friedman derived title to their respective lots from a common source, namely, the Kanawha Valley Bank, the plaintiffs by deed dated February 5, 1883, the defendant Friedman by deed dated

March 26, 1904, the difference in the time of the two deeds being over twenty-one years. The deed to Friedman covered what is known as the Courier Building, the side wall of which nearest Virginia Street was one of the monuments called for in plaintiffs' deed, and the lot on which the same was situated is described therein as follows:

Beginning on Capitol Street at the corner of said Courier Building; thence with a line of said building on Capitol Street about twenty-eight feet and one inch to the center of the side wall of said Courier Building; thence leaving Capitol Street and running from same towards Summers Street, with the center of said wall two feet ten inches to the line of the Gates Building; thence continuing said line back from Capitol Street following the center of said north-east wall of said Courier Building to the rear thereof, and further continuing said line nine feet to a ten-foot alley-way in the rear of the "Wood" property; thence with the said alley towards the Kanawha River about ten feet to the corner of the old foundation wall of the Arnold Building; thence with the outside of said foundation wall towards Summers Street twenty-six feet to the corner thereof; thence with the outside of said foundation walls towards the Kanawha River to a point where the south side line so extended reversed to the place of beginning on Capitol Street.

The deed to plaintiffs contains in the granting clause this very important provision:

"Together with the right and authority on the part of the grantees to use the side wall of the Courier Building and the Rust Building adjacent to the lot herein conveyed as parts of the building to be constructed by said grantees on the lot herein conveyed."

And the deed to Friedman contains in the granting clause thereof the following provision, which we think must be given special consideration in determining the rights of the parties to the present controversy, namely:

"Subject to the conveyance by the party of the first part to A. P. and C. A. Gates, by deed dated February 1, 1883, of record in the office of the clerk of the county court of Kanawha County, West Virginia, in Deed Book 39, page 144, in regard to the east wall of said building and the rights therein granted."

The present suit was not brought, as the record shows, until April 3, 1914, nearly ten years after the alleged trespass by defendants upon that portion of plaintiffs' lot sued for. The act of trespass by defendants, according to the evidence on both sides, or proven by that of the plaintiffs and not controverted by the evidence of defendants, consisted in the entry by defendants upon the top of said north-east wall of the Courier Building, an interest in which was conveyed to them as aforesaid, then a three-story building, taking off the top of the wall down

to solid courses, and then building upon the original wall, which was about eighteen inches, a twelve inch wall, on plaintiffs' side, for a fourth story of his building, leaving a clear space of six inches on his side of the wall, to the injury may it be said of plaintiffs in point of inside space and strength of the wall, if they should ever wish to build higher on their lot; also in digging down and extending said side wall from the rear end thereof to the back line of defendant's lot a distance of ten to twelve feet and carrying the same upon the plaintiffs' side corresponding in width and height to the original wall as built for the fourth story; also in occupying the whole of the wall of the original Courier Building fronting on Capitol Street by facing the same with the same kind of brick used by him in rebuilding or repairing the same.

There is no evidence that plaintiffs were not fully advised at the time of the use defendant was making of said original walls and the way they were being extended and built up on their side of the center line. Nor was there any effort on the part of plaintiffs to explain their silence for so many years after the alleged trespass by defendant.

On the demurrer to the evidence several points are presented. But the turning point, we think, is whether the wall in question is or is not a party wall; if a party wall, one set of rules and principles control; if not, other rules and principles govern the rights of the parties. The plaintiffs contend that the wall is not a party wall; that by their respective deeds each owns to the center line thereof, with no rights in the other to any cross easements or rights in that part of the wall beyond the center line thereof, and with respect to which they are entitled to be protected the one against the other.

[1, 2] We have no statute defining or governing the subject of party walls, local or general as in England by act of Parliament, and in some of the states. Rudall on Party Walls (2d Ed.) 36, Ch. II.; Jones on Easements, secs. 635-640. Usually party walls are the subject of agreement, express or implied, between adjoining owners. Jones on Easements, sec. 641 et seq. For definition we find that the text writers and the adjudicated cases generally refer to the decision of Mr. Justice Fry in *Watson v. Gray*, 14 Ch. Div. 194, as follows:

"The words appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, (1 Man. & Ry. 404,) and *Corbitt v. Porter*, (8 B. & C. 257, 265.) I think that the judgments in those cases show that that is the most common and primary meaning of the term. In the next place the term may be used to signify a wall divided longi-

tudinally into two strips, one belonging to each of the neighboring owners, as in *Matts v. Hawkins*, (5 Taunt. 20.) Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the building acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety. This last is the sense in which the term is more frequently used in the United States." Jones on Easements, sec. 632.

See also Rudall on Party Walls, 1; Carson's Gale on Easements (9th Ed.) 406.

According to Rudall the primary meaning of the term "party wall" is one of which two adjoiners are tenants in common; but a wall in common use by two adjoining land owners *prima facie* makes them tenants in common thereof. Rudall on Party Walls, supra, p. 2. Generally the rights of the parties are by contract. The case of *Matts v. Hawkins*, 5 Taunt. 20, is cited and relied on by plaintiffs' counsel as opposed to this proposition and as sustaining the contention that the wall here involved is not a party wall. But as pointed out by Mr. Rudall, the wall in that case was not within the county, but within the party wall act then in force.

Our conclusion is that the rights of the parties in the case at bar are governed by the provisions in their respective deeds, above emphasized, and that the wall in question falls plainly within the last or fourth class defined by the text writers and judicial decisions cited, that is where the wall is divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety. This, say the authorities cited, is the sense in which the term is more frequently used in the United States.

As we have observed, the deed to plaintiffs not only conveyed to them the fee in the land to the center line of the easterly wall of the Courier Building, but also the right and authority to use said wall and also the side wall of the Rust Building "as parts of the building to be constructed by them." It may be said, however, that no such cross easements were reserved to the plaintiffs and that the defendant Friedman by his subsequent deed acquired no right or rights to any use of said wall beyond the center line of said wall to which his grant extended. But did he not get by his deed everything and every right remaining vested in the bank, the common grantor? It seems to be well settled, at least in England, that where one grants a divided moiety of an outside wall of his own house with the intention of making such wall a party wall between his house and an adjoining one to

be built by the grantee, the law implies the grant and reservation in favor of the grantor and grantee respectively of such easements as may be necessary to carry out what was the original intention of the parties with regard to the use of the wall, the nature of those easements varying with the particular circumstances of each case. Carson's Gale on Easements, supra, pp. 407, 408; Washburn on Easements (4th Ed.) pp. 606 et seq. The Supreme Court of Appeals of Virginia says:

"A party wall is a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by the respective owners of both houses." *Bellenot v. Laube's Ex'r*, 104 Va. 842, 52 S. E. 698.

While the right may not exist as a common law or statutory right, it exists in this State as the result of contract, express or implied. *List v. Hornbrook*, 2 W. Va. 340, 345. So that whatever rights were reserved by the grantor, were granted to Friedman in the deed to him, and were those which in this country have been held to appertain to the owners of a party wall.

[3, 4] The wall in controversy then being a party wall, with the usual rights of each owner appertaining thereto, the question remains: Did Friedman have the right to enter upon it in the way and manner alleged and proven, to build up and extend it in the repair and extension of his building? The authorities on this question seem to be uniform in holding that either of the adjacent owners may increase the height or extend the length of such wall if it can be done without injury to the adjoining building and the wall is clearly of sufficient strength to bear the addition. This seems to be the general rule unless limited by the provisions of the contract or deed. Jones on Easements, secs. 696-699, and cases cited in notes. *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, and elaborate note; *Calmelet v. Sichel*, 48 Neb. 505, 67 N. W. 467, 58 Am. St. Rep. 700, and note; *Bright v. Bacon*, 131 Ky. 848, 116 S. W. 268, 20 L. R. A. (N. S.) 386, and note. In this note a long line of decisions is cited for the proposition that in this country, in the absence of agreement, express or implied, regulating the respective rights of the owners of a party wall, either one may increase the height if the wall is of sufficient strength and can be raised without injury to the adjoining building and without impairing the cross easement to which the other owner is entitled, and it is there said that no American authority can be found, and we find none, which disputes the proposition. And upon the same principle and for like reasons the rule permitting the raising of a party wall permits the extension thereof unless restrained by the contract. *Matthews v. Dixey*, 149 Mass. 595,

22 N. E. 61, 5 L. R. A. 102; Everett v. Edwards, 149 Mass. 588, 22 N. E. 52, 5 L. R. A. 110, 14 Am. St. Rep. 462.

So that it now seems clear that plaintiffs have no right by ejectment to recover from defendants the nine inches of the party wall situated on their side of the division line thereof. If under the law of party walls Friedman had the right to extend the wall upwards and longitudinally, as we hold he had, he had the right to go upon the wall and occupy it as far as necessary and reasonably convenient to accomplish the work and he cannot be ejected therefrom. In justice and equity when defendant elected to build only a twelve inch wall he should have built the same on his side of the original wall so as to leave plaintiffs free when they

came to use the wall on their side to build up and strengthen it for their purposes. But we do not think ejectment is the proper remedy, if any they have, to right their wrongs in the premises.

Our conclusion is to reverse the judgment of the circuit court rejecting the writ of error prayed for, and also the judgment of the court of common pleas overruling the defendants' demurrer to the evidence, and to enter such judgment thereon as we think the trial court and the circuit court should have entered, namely, that the demurrer be sustained and that the action be dismissed for want of jurisdiction in ejectment, and that defendants recover their costs in the trial court as well as in this court herein sustained.

END OF CASES IN VOL. 98

